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Proclamation 10660 of October 31, 2023

The President

Critical Infrastructure Security and Resilience Month, 2023**By the President of the United States of America****A Proclamation**

Throughout our history, America has been a can-do country full of possibilities. Our people are models of grit, drive, and determination, and when we properly prepare ourselves, we can meet any challenge that comes our way and ensure future generations thrive. This Critical Infrastructure Security and Resilience Month, let us recommit to reinforcing our critical infrastructure and remaining vigilant to threats that undermine our collective security and economic prosperity.

That means protecting our investments from all hazards and ensuring the infrastructure that American people rely on every day is secure and resilient. Climate change is making natural disasters more frequent, ferocious, and costly, straining our highways, railways, waterways, and energy systems. These disruptions—whether a natural disaster, a pandemic, or a cyberattack—exploit vulnerabilities in our supply chains and make it more difficult to access critical products when people need them. State and non-state actors, such as criminals and violent extremists, continue to target our power grids, pipelines, health care systems, and water systems—threatening the infrastructure that underpins our economy, public health and safety, and national security. As President, I am committed to building a better future for our country by making America’s critical infrastructure more secure and addressing the threats and hazards that place them at risk.

Bolstering the Nation’s infrastructure is a cornerstone of my Investing in America agenda. With a combination of funding from the American Rescue Plan, Bipartisan Infrastructure Law, the Inflation Reduction Act, and the CHIPS and Science Act, we are investing billions of dollars to enhance the security of our infrastructure by elevating roads and bridges above projected flood zones, supporting community resilience programs, reducing the strain put on our power grids, and so much more. These investments will save lives, protect our families, render a strong and innovative economy, enhance our resilience to disasters, and provide peace of mind to millions of Americans.

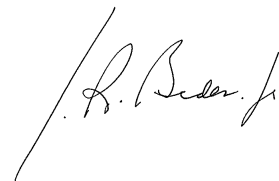
We know that to protect our critical infrastructure we must improve our cybersecurity. From the very beginning of my Administration, we have worked tirelessly to strengthen our Nation’s cyber defenses. During my first year in office, I issued an Executive Order on Improving the Nation’s Cybersecurity, a crucial step toward defending against the increasingly malicious cyber campaigns targeting our infrastructure. My Bipartisan Infrastructure Law builds on this progress by investing \$1 billion to bolster cybersecurity for State, local, Tribal, and territorial governments. I am proud to have appointed senior cybersecurity officials who are laser-focused on anticipating and responding to cyber threats and ensuring that the Federal Government leverages all of its resources to improve the cybersecurity of the Nation’s critical infrastructure. These priorities have been catalyzed by my National Cybersecurity Strategy released earlier this year, which lays out our strategy to enhance the cybersecurity and resilience of our Nation’s critical infrastructure and the American people.

While my Administration is investing to protect America's critical infrastructure, we are also working with our international partners to build sustainable, resilient infrastructure around the globe. At the G20 Summit earlier this year, through the Partnership for Global Infrastructure and Investment, I was proud to unveil the launch of the landmark United States partnership with the European Union to develop the Trans-African Corridor. We are working with partners to connect the Democratic Republic of the Congo and Zambia to regional and global trade markets through the Port of Lobito in Angola, including by launching feasibility studies for a new greenfield rail line expansion between Zambia and Angola. This reliable and cost-effective corridor will increase efficiencies, secure regional supply chains, enhance economic unity, generate jobs, and decrease the carbon footprint in both countries. We hope to pursue opportunities to connect our initial investments across the continent to Tanzania and, ultimately, the Indian Ocean. Through quality infrastructure investments in key economic corridors like these, we are creating a better future filled with opportunity, dignity, and prosperity for everyone.

The United States is the only country in the world that becomes stronger after every challenge we face. Time and again, we have seen that when we work together, nothing is beyond our capacity. This Critical Infrastructure Security and Resilience Month, let us come together in common cause to bolster our Nation's critical infrastructure and create a more resilient nation and economy for generations to come.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 2023 as Critical Infrastructure Security and Resilience Month. I call upon the people of the United States to recognize the importance of protecting our Nation's infrastructure and to observe this month with appropriate measures to enhance our national security and resilience.

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

A handwritten signature in black ink, appearing to read "Joe Biden", with a long, sweeping horizontal line extending to the left.

Presidential Documents

Proclamation 10661 of October 31, 2023

National Adoption Month, 2023

By the President of the United States of America

A Proclamation

Children are the kite strings that hold our Nation's ambitions aloft, and every one of them deserves to grow up in a safe and loving home. This National Adoption Month, we celebrate all the families made whole through adoption and recommit to ensuring that every child can build a life of happiness and well-being.

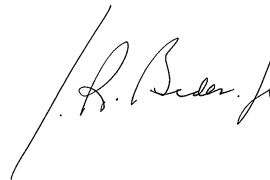
Today, more than a hundred thousand children are awaiting adoption in our Nation's foster care system, hoping for the love, connection, and a lasting foundation that a permanent family can provide. To help more families cover the cost of adoption, I have urged the Congress to make the adoption tax credit fully refundable so that every adoptive family benefit, regardless of income, and can focus on building supportive lives together. I have proposed making legal guardians eligible as well so that loving grandparents, aunts, uncles, and others can care for children and keep extended families together. I have also expanded the Military Parental Leave Program, allowing service members to spend more time with their families after a child is born, adopted, or placed with them through long-term foster care. At the same time, my Administration is working to remove barriers that make it harder for LGBTQI+ families to adopt, including by providing State child welfare agencies with training and funds to better support and place LGBTQI+ youth in safe and compassionate environments.

Still, thousands of young people unfortunately will not be adopted before they age out of foster care. To help ease that transition, my latest budget called for \$9 billion to provide housing vouchers to all 20,000 adolescents exiting foster care annually; and I sought another \$1 billion to support job placement, health care, access to higher education, and other programs. My Administration is also working closely with States to help foster youth stay in school, train for jobs, pay their bills, and begin promising adult lives.

During National Adoption Month, we recognize the bonds of love shared by adoptive families across America. We celebrate the millions of adoptive and kinship families who have opened their hearts to provide safe and caring homes. We thank the foster families and dedicated professionals who help so much along the way. We stand with foster youth and adoptees of all ages and want you to know that you are never alone. This month especially, we encourage anyone who is considering adoption to take that brave and loving step forward, growing their families and adding profound meaning to their lives.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 2023 as National Adoption Month. I encourage all Americans to honor this month by helping the children and youth in your communities secure their forever homes and find the love and connection that they need to thrive.

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

A handwritten signature in black ink, appearing to read "Joe Biden", with a long, sweeping horizontal line extending to the left.

[FR Doc. 2023-24483

Filed 11-2-23; 8:45 am]

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Presidential Documents

Proclamation 10662 of October 31, 2023

National Alzheimer's Disease Awareness Month, 2023

By the President of the United States of America

A Proclamation

Over six million Americans live with Alzheimer's disease, a form of dementia that deprives people of their precious memories, thoughts, and identity. During National Alzheimer's Disease Awareness Month, we honor the extraordinary courage, strength, and resilience of people facing this devastating disease. We recognize the support of families and caregivers who stand by their loved one's side and help them age with dignity. We resolve to continue advancing scientific research and treatment options to ensure a brighter future for all Americans facing Alzheimer's.

Today, Alzheimer's remains a leading cause of death in older adults. It exacts an emotional, physical, and financial toll on the entire family of those who are diagnosed—especially for African Americans and Latinos, who are more likely to develop dementias than any other races or ethnicities, and for individuals with Down syndrome, who are at higher risk for Alzheimer's. My Administration has taken numerous actions to help treat and prevent this terrible disease. We worked with the Congress to secure \$2.5 billion in bipartisan funding for the Advanced Research Projects Agency for Health (ARPA-H). This agency is developing critical breakthroughs in preventing, diagnosing, and treating Alzheimer's and other deadly diseases and pioneering partnerships to get those breakthroughs out to clinics and patients.

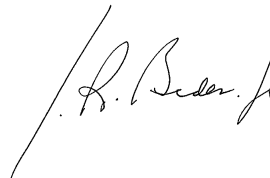
Earlier this year, the Food and Drug Administration granted the first-ever approval for a prescription drug that can alter the course of Alzheimer's in some people, rather than simply treat symptoms—a sign of hope to so many patients and families affected by this disease. In addition, I was proud to sign an Executive Order on Increasing Access to High-Quality Care and Supporting Caregivers. As a result, the Centers for Medicare and Medicaid Services (CMS) announced a groundbreaking model that will offer a comprehensive package for care management and coordination for people living with Alzheimer's and related dementias, caregiver support and education, and respite services. Meanwhile, CMS continues to offer services that help people access cognitive care assessments, ensuring that those with Alzheimer's receive the care they need. In addition, the Centers for Disease Control and Prevention is creating a uniform national public health infrastructure focused on increasing early detection and diagnosis of Alzheimer's disease and related dementias, reducing dementia risk, preventing avoidable hospitalizations, and supporting caregivers of those living with dementia.

This November, let us honor the memory of those we have tragically lost to Alzheimer's. Let us recognize the millions of Americans who are living with the impact of this condition every day and all the incredible caregivers, doctors, researchers, and advocates supporting them. Let us come together as a Nation; carry forward a spirit of hope; and recommit to doing everything we can to prevent, treat, and eliminate this disease.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 2023 as National Alzheimer's Disease Awareness Month. I call on the people

of the United States of America to honor and support those living with Alzheimer's and the many people who continue extraordinary and tireless efforts to combat this disorder. I encourage all Americans to visit www.Alzheimers.gov for evidence-based resources and information.

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

A handwritten signature in black ink, appearing to read "Joe Biden", with a long, sweeping horizontal line extending to the left.

Presidential Documents

Proclamation 10663 of October 31, 2023

National Diabetes Month, 2023

By the President of the United States of America

A Proclamation

One in ten Americans has diabetes, and of that group, one in five of them do not know that they do. While this chronic condition is becoming more common, there is so much that we can do to help prevent and manage it. During National Diabetes Month, we recommit as a Nation to making treatment more affordable, improving care, and finally finding a cure.

Every day, millions of Americans with diabetes struggle to afford life-saving insulin. It costs drug companies just \$10 a vial to produce, but some charge more than 30 times that amount. Americans across the country have told me how those high prices sometimes force them to ration their medication, too often resulting in dangerous health complications that could have been avoided. Too many of them know what it is like to lay awake at night, staring at the ceiling, wondering how to choose between putting food on the table and buying the insulin they need to stay alive. It is wrong.

I ran for President to rebuild the middle class—and that includes working to make health care a right in this country, not a privilege. For decades, big pharmaceutical companies have blocked efforts to lower prescription drug costs, but together, we took them on and won. Last year, I signed the Inflation Reduction Act, one of the most significant laws ever passed to reduce prescription drug prices, capping insulin at \$35 per month for seniors on Medicare, down from as much as \$400 per month. The Inflation Reduction Act finally gave Medicare the ability to negotiate for lower drug prices, starting this year with ten drugs—including treatments for diabetes—benefiting more than nine million Americans. The law also requires drug companies that raise prices faster than inflation to pay the difference back to the Government, saving seniors up to \$618 per dose of medication. Seniors and other Part D enrollees with high drug spending will have their out-of-pocket drug costs capped at about \$3,500 next year. In 2025, the Inflation Reduction Act will cap total out-of-pocket drug costs for all seniors on Medicare at \$2,000 per year, period. There is more to do, but these steps will put money back in the pockets of millions of families, easing fears and giving them just a little more breathing room.

While we keep working to make diabetes medications more affordable, my Administration is also focused on prevention, early interventions, improving treatments, and finding a cure. Today, one in three American adults has prediabetes, with a risk of developing Type 2 diabetes within 5 years. Diabetes has serious consequences. It is a leading cause of death in the United States, and once diagnosed, increases one's risk of heart attack, stroke, blindness, kidney failure, and loss of toes, feet, or legs. It is important to be aware of diabetes risk factors, many of which relate to nutrition and physical activity deficits. To learn more about risk factors and how to combat prediabetes, visit the Centers for Disease Control and Prevention National Diabetes Prevention Program: <https://www.cdc.gov/diabetes/prevention/index.html>.

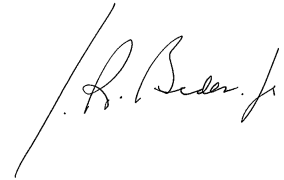
Last year, we launched the Advanced Research Project Agency for Health (ARPA-H) to drive breakthroughs in preventing, detecting, and treating deadly diseases, including diabetes. Research advances have already helped develop several new diabetes drugs, including the first that can delay the onset of Type 1 diabetes, giving recently diagnosed people more time before starting insulin. This year, the Food and Drug Administration also approved the first cell therapy for adults with Type 1 diabetes who cannot safely manage their glucose levels with insulin as well as the first new oral medication for children with Type 2 diabetes in over two decades. We remain committed to robust research investment and to providing pathways to drive the development and delivery of additional, effective treatments and much-needed cures.

At the same time, we have expanded health coverage nationwide and lowered health care costs for millions of Americans, including the nearly 15 million Americans who buy their coverage under the Affordable Care Act and are saving \$800 per year on their premiums. We are also cracking down on surprise medical bills and junk health insurance plans that look affordable but then stick consumers with big hidden costs. Last year, we held the first White House Conference on Hunger, Nutrition, and Health in over 50 years where we convened advocates, health care providers, food companies, and officials from every level of government. We have laid out a vision to prevent and reduce the pervasiveness of diet-related disease, like diabetes, across the United States by 2030, outlining a comprehensive strategy to end hunger and put healthy food on the table. Our plan incorporates steps to better prevent and manage diabetes, including by expanding access to nutrition counseling and working with the Congress to make the Medicare Diabetes Prevention Program permanent.

We want all 37 million Americans with diabetes to know that we have their backs and that the historic progress we have made to lower insulin prices is just the first step. This month, we celebrate the courage and resilience of this community; and we honor the medical professionals, loved ones, and advocates who do so much to help support it and keep driving us toward a cure.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim the month of November 2023 as National Diabetes Month. I call upon all Americans, school systems, government agencies, nonprofit organizations, health care providers, research institutions, and other interested groups to join in activities that raise diabetes awareness and help prevent, treat, and manage this disease.

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

A handwritten signature in black ink, appearing to read "Joe Biden", with a long, sweeping horizontal line extending to the left.

Presidential Documents

Proclamation 10664 of October 31, 2023

National Entrepreneurship Month, 2023

By the President of the United States of America

A Proclamation

Whether they are running family restaurants or opening new factories, American entrepreneurs create businesses that are the heart and soul of our communities. This National Entrepreneurship Month, we honor the job creators, business owners, and daring innovators who remind us of the promise of the American Dream.

When I first took office, the American economy was reeling. Small businesses across the Nation were being crushed. Hundreds of thousands of storefronts were closed for good, and millions more were hanging on by a thread. But over the past few years, our economic plan has unlocked extraordinary opportunities for entrepreneurs. In my first 2 years in office, we saw a record 10.5 million new business applications—the most ever recorded in a 2-year period in American history. Asian American-, Black-, and Latino-owned businesses are seeing faster creation rates today than they have in years. The economy has created nearly 14 million new jobs. Our entrepreneurs form the backbone of our Nation's economy, and I remain committed to making sure they have the resources they need to succeed.

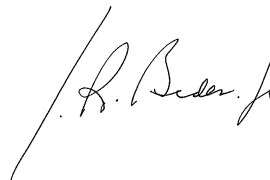
As my Administration implements historic legislation that is transforming our economy, we are working to ensure entrepreneurs reap the benefits. My Administration is leveraging American Rescue Plan funds to provide billions of dollars of capital and technical support to small businesses across the country so they can start and scale their businesses in high-growth, high-wage industries. We are also investing in small disadvantaged businesses to provide fair opportunities to entrepreneurs from underserved and underrepresented communities who have historically been left behind, including through the Minority Business Development Agency, which was made permanent through the Bipartisan Infrastructure Law. Last year, the Federal Government awarded a record \$162.9 billion in contracts to small businesses, and \$69.9 billion of that investment went to small disadvantaged businesses. In addition, the Small Business Administration has supported over \$4 billion in loans to Black-owned and Latino-owned small businesses, marking significant increases from 2020. Through the CHIPS and Science Act, we are making strategic, localized investments to drive technology- and innovation-centric growth and create good jobs for American workers from all backgrounds. The Inflation Reduction Act is cutting health insurance and energy costs for entrepreneurs, doubling research-and-development tax credits for small businesses, and incentivizing manufacturers to use American suppliers.

Our entrepreneurs are models of drive, resilience, and determination—the very virtues that built America. From small towns to big cities, these dreamers and doers are the glue that holds our communities together and the fuel that propels our Nation forward. As President, I recognize the critical contributions that our Nation's entrepreneurs make, and I remain committed to giving them the support they need to thrive.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 2023

as National Entrepreneurship Month. I call upon all Americans to commemorate this month with appropriate programs and activities and to celebrate November 21, 2023, as National Entrepreneurs' Day.

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

A handwritten signature in black ink, appearing to read "Joe Biden", is written over a horizontal line.

Presidential Documents

Proclamation 10665 of October 31, 2023

National Family Caregivers Month, 2023

By the President of the United States of America

A Proclamation

How we treat our children, parents, and loved ones and how we value those who care for them are fundamental to who we are as a Nation. Early care and education give young children a strong start in life while long-term care helps older Americans, veterans, and people with disabilities live and work with dignity. During National Family Caregivers Month, we honor the Americans who lift up our communities and our Nation by providing dignified, professional, and invaluable care to the people we cherish the most.

The cost of care in this country is too high, and the pay for care workers is too low. A majority of Americans struggle to find affordable, high-quality care for themselves and their loved ones. At the same time, care workers remain among the lowest-paid workers in the country, though their jobs are some of the most demanding. More than half of long-term care employees and nearly 20 percent of child care workers leave their jobs every year. As a result, many Americans are forced to leave their own jobs behind to care for their loved ones.

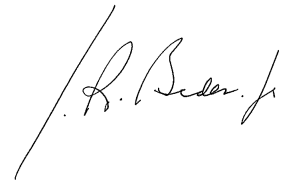
No one should have to choose between the parents who raised them, the loved ones who depend on them, or the paycheck they rely on to care for their families. That is why as soon as I got into office, I signed the American Rescue Plan to help millions of families afford child care. Through that law, we provided \$145 million to help the National Family Caregiver Support Program deliver counseling, training, and short-term relief to family caregivers and other informal care providers. We also helped States expand and strengthen Medicaid home care programs, increased Child Care and Development Block Grants that help low-income families afford child care, and provided crucial support to stabilize the child care sector more broadly. Consequently, we were able to keep the doors of 220,000 child care providers open during the pandemic, ensuring nearly 10 million children received care.

Last year, we also issued the first-ever national Strategy to Support Family Caregivers, outlining hundreds of actions that the Federal Government can take to support family caregivers' health, well-being, and financial security. We required companies seeking significant Federal funding from our CHIPS and Science Act to submit a plan on how they will help employees access affordable child care. Further, my Administration proposed a rule that would set a Federal floor for staffing levels in nursing homes. This spring, joined by people with disabilities, family caregivers, long-term care workers, early educators, veterans, and aging advocates, I signed a historic Executive Order that calls for the most comprehensive set of actions of any administration to date to increase access to high-quality child care and long-term care and support for caregivers. The order improves access to home-based care for people with disabilities and veterans, expands access to mental health benefits to care workers and veteran family caregivers, lowers child care costs for hard-working families, builds the supply of high-quality care to provide more options to individuals and families, helps protect workers from exploitation, and much more.

This week, we recognize the love and sacrifice of millions of American caregivers. They are the backbone of our country, caring for young children, aging parents, disabled veterans, injured service members, and others who need support and medical assistance. Let us celebrate and honor our caregivers and renew our efforts to protect their dignity, health, and security. Because when we care for our caregivers, we honor our American ideals and move closer to a future where no one in this Nation is left behind.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 2023 as National Family Caregivers Month. I encourage all Americans to reach out to those who provide care for our Nation's family members, friends, and neighbors in need to honor and thank them.

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

A handwritten signature in black ink, appearing to read "Joe Biden", with a long, sweeping horizontal line extending to the left.

Presidential Documents

Proclamation 10666 of October 31, 2023

National Lung Cancer Awareness Month, 2023

By the President of the United States of America

A Proclamation

This year, nearly 250,000 Americans will be diagnosed with lung cancer, the leading cause of cancer death in the United States. During National Lung Cancer Awareness Month, we honor the resilient people who have faced this diagnosis, the loved ones who rally to their side, and the medical professionals who do all they can to help patients survive and heal. We recommit to ending cancer as we know it by investing in new, affordable ways to prevent, detect, and treat this deadly disease.

In recent years, improved treatments, as well as enhanced early detection, have brought us closer toward turning cancer diagnoses from death sentences into treatable diseases. However, challenges persist for patients and their families. It can be challenging to determine the best course of treatment. The treatment itself can be grueling. Medical bills can pile up. For some, progress is still too slow. This includes Black men, who are disproportionately likely to develop and die from lung cancer; people living in rural communities, where mortality rates remain stubbornly high; and women under 50 years old, who are diagnosed with lung cancer at higher rates than men of the same age.

As a Nation, we must come together to change that. That is why the First Lady and I reignited the Cancer Moonshot, setting ambitious goals to cut the cancer death rate by at least half in the next 25 years and improve the experience of patients and families. As a first step, my Administration secured \$2.5 billion in funding for the Advanced Research Projects Agency for Health (ARPA-H). The scientists, innovators, and public health professionals funded by ARPA-H are driving breakthroughs in preventing, detecting, and treating cancer and other deadly diseases. Throughout our history, the United States has led the world in scientific innovation and discovery. We will continue to do so on our way to ending cancer as we know it.

My Administration is also investing in screening and early detection—services that are critical to diagnosing lung cancer in its beginning stages and saving lives. The Centers for Disease Control and Prevention—along with other agencies, community health centers, and partners in the private sector—is providing early detection knowledge and support services to underserved communities. We remain committed to increasing lung cancer screening rates for those most at risk and encourage everyone to talk to their doctor about symptoms.

There are additional steps each of us can take to reduce the impact of lung cancer in our own lives. For many, that starts with quitting smoking, the number one cause of lung cancer and the single-largest driver of cancer deaths in America. This year, our White House Smoking Cessation Forum brought together public health workers, health care providers, people living with cancer and their caregivers, and others to expand access to programs that help people who want to quit and ensure that these programs are accessible to everyone. Last year, the Food and Drug Administration proposed rules to prohibit menthol cigarettes and flavored cigars to help adults who are trying to quit smoking and to prevent children from becoming the

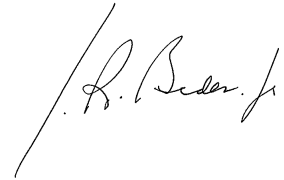
next generation of smokers. Help is available to those who want to quit smoking at www.BeTobaccoFree.gov or www.smokefree.gov or by calling 877-44U-QUIT.

Additionally, my Administration has taken significant steps to make cancer treatments affordable for everyone. Through the Inflation Reduction Act, out-of-pocket drug costs for seniors on Medicare will soon be capped at \$2,000 per year—including expensive cancer drugs that sometimes cost several times that. We strengthened Medicaid and the Affordable Care Act (ACA), expanding health care coverage for millions of Americans and helping nearly 15 million people save an average of \$800 per year on health insurance premiums. I remain committed to maintaining the accessibility of cancer care secured in the ACA, including requiring insurers to pay for cancer screenings and primary care visits and covering cancer survivors and others who have preexisting conditions. I signed the PACT Act into law—one of the most significant laws ever to help veterans exposed to toxic materials, some of whom develop lung cancer and other diseases. This law expands access to benefits and services to veterans, ensuring they have access to health care, free screenings, and benefits through the Department of Veterans Affairs. The law also provides access to survivor benefits for families of veterans who died due to a toxic-related illness. I was also proud to sign the Federal Firefighters Fairness Act, giving more than 10,000 firefighters and their families critical workers' compensation and other benefits by making sure certain kinds of heart problems, lung disease, and cancers are presumed to be caused by the job.

Cancer has touched nearly every family in America—including mine. During National Lung Cancer Awareness Month, the First Lady and I have one message to the Nation: There is hope. We see it in the extraordinary courage and strength of all who are facing this deadly disease and in the families and loved ones who support them. We see it in the researchers who are chasing new breakthroughs and the health care workers who care for their patients with compassion and skill. This month and every month, we must seize the urgency of this moment to find better solutions, treatments, and cures and to unite as one Nation to end cancer as we know it.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 2023 as National Lung Cancer Awareness Month. I call upon the people of the United States to speak with their doctors and health care providers to learn more about lung cancer. I encourage citizens, government agencies, private businesses, nonprofit organizations, the media, and other interested groups to increase awareness about what Americans can do to prevent, detect, and treat lung cancer.

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

A handwritten signature in black ink, appearing to read "Joe Biden", is written over a diagonal line that extends from the bottom left towards the top right.

Presidential Documents

Proclamation 10667 of October 31, 2023

National Native American Heritage Month, 2023

By the President of the United States of America

A Proclamation

During National Native American Heritage Month, we recognize the invaluable contributions of Native peoples that have shaped our country and honor the hundreds of Tribal Nations who continue exercising their inherent sovereignty as vital members of the overlapping system of governments in the United States. We also recommit to supporting Tribal sovereignty; upholding the Federal Government's solemn trust and treaty responsibilities; and working in partnership with Tribal Nations to advance prosperity, dignity, and safety for all Native peoples.

Since time immemorial, Native communities have passed down rich cultures, knowledge, traditions, and ways of life. But throughout our history, Native peoples' cultures, identities, and governments were not always seen as a part of this Nation but as a threat to it. Native people were pressured to assimilate, banned from practicing their traditions and sacred ceremonies, and forced from their homes and ancestral homelands. This violence and devastation cost countless lives, tore families apart, and caused lasting damage to Tribal communities and institutions.

Despite centuries of violence and oppression, Native peoples remain resilient and proud. Today, Native Americans are essential to the fabric of the United States. They serve in the United States Armed Forces at higher rates than any other ethnic group. They continue to steward so many of our great lands. Their contributions to science, humanities, arts, public service, and more have brought prosperity for all of us. Their diverse cultures and communities continue to thrive and lead us forward.

Since the beginning of my Administration, I have been determined to help champion a new and better chapter in the story of our Nation-to-Nation relationships. I started by appointing Native Americans to lead in my Administration—including the first Native American Secretary of the Interior Deb Haaland, dozens of Senate-confirmed Native American officials, and over 80 Native American appointees serving across my Administration and in the Federal courts. I restored the annual White House Tribal Nations Summit to advance communication between key members of my Administration and the leaders of hundreds of Tribal Nations. My Administration formally recognized Indigenous Knowledge as one of the many important bodies of knowledge that contributes to the scientific, technical, social, and economic advancements of the United States and our collective understanding of the natural world.

Together with leadership from Tribal Nations, we are making historic investments in Indian Country. Our American Rescue Plan invested \$32 billion in Tribal Nations—the largest one-time direct investment in Indian Country in American history. Our Bipartisan Infrastructure Law invested more than \$13 billion to rebuild infrastructure, the single largest investment in Indian Country infrastructure in history. Our Inflation Reduction Act also made the largest investment ever to combat the existential threat of climate change, including \$700 million dedicated to climate change response in Native communities. Last year, I signed a Presidential Memorandum that improves consultation between the Federal Government and Tribal Nations.

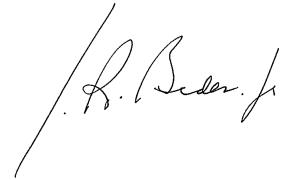
My Administration is also working to address the impacts of harmful Federal policies of the past while ensuring Native communities are safe and healthy. Through the Department of the Interior's Road to Healing initiative, Native language preservation, public safety initiatives, and bold new investments, we are supporting Native American families and their communities as they heal. We are also working to improve public health and safety for Native Americans. I signed an Executive Order that helps us respond more effectively to the epidemic of missing and murdered Indigenous peoples. Last year, when we reauthorized the Violence Against Women Act, I was proud to include historic provisions that reaffirm Tribal sovereignty and restore Tribal jurisdiction. My budget for Fiscal Year 2024 also requested a \$9.1 billion infusion for the Indian Health Service, and I have asked the Congress to make that funding a mandatory part of the Federal budget for the first time in our history.

We are also committed to partnering with Tribal Nations to protect and steward their sacred and ancestral lands and waters. Through Tribal co-stewardship agreements, we work directly with Tribal Nations to make decisions about how to manage those lands that are most precious to them—recognizing and utilizing the invaluable knowledge they have from countless generations. I established new national monuments protecting lands sacred to Tribal Nations at Baaj Nwaavjo I'tah Kukveni in Arizona, the Camp Hale-Continental Divide in Colorado, and Avi Kwa Ame in Nevada. I also restored protections for the Northeast Canyons and Seamounts Marine National Monument in New England and Bears Ears and Grand Staircase-Escalante in Utah.

This month, we celebrate Native American history and culture. We are reminded that with hard work and a commitment to our founding ideals, we can address the wrongs of our past and become a more perfect Union—one that ensures liberty, justice, dignity, and equality for all.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 2023 as National Native American Heritage Month. I urge all Americans, as well as their elected representatives at the Federal, State, and local levels, to observe this month with appropriate programs, ceremonies, and activities. Also, I urge all Americans to celebrate November 24, 2023, as Native American Heritage Day.

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

A handwritten signature in black ink, appearing to read "Joe Biden", is written over a diagonal line that extends from the bottom left towards the top right.

Presidential Documents

Proclamation 10668 of October 31, 2023

National Veterans and Military Families Month, 2023

By the President of the United States of America

A Proclamation

The poet John Milton once wrote, “They also serve who only stand and wait.” During National Veterans and Military Families Month, we recognize that our military and veteran families answer our Nation’s call to duty, and we recommit to doing right by their service and sacrifice.

For me, the First Lady, and the entire Biden family: It is personal. When our son Beau was deployed to Iraq, we learned what it meant to pray every day for the safe return of someone you love. Our grandkids learned what it meant to have their dad overseas in a warzone instead of at home, tucking them into bed and reading them a story every night. Millions of Americans have had that experience. To all the mothers and fathers, sisters and brothers, sons and daughters, spouses and partners, and loved ones who stand alongside our veterans and service members: You are the solid steel spine that bears up under every burden and the courageous heart that rises to every challenge.

Our Nation has only one truly sacred obligation—to prepare those we send into harm’s way and care for them and their families while they are deployed and when they return home. Since the beginning of my Administration, fulfilling that obligation has been my top priority. In June, I signed an Executive Order that establishes the most comprehensive set of administrative actions in our Nation’s history to support the economic security of military and veteran spouses, caregivers, and survivors. It encourages all Federal agencies to do more to retain military spouses through flexible policies, improves the ability for spouses to maintain their employment when moving overseas, allows spouses to seek advice on overseas employment issues through military legal assistance offices for the first time, and improves spouses’ access to quality, dependable, and affordable child care.

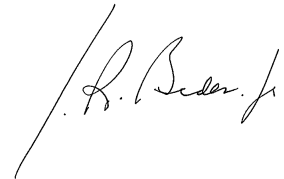
Since the beginning of my Administration, I have signed more than 30 bipartisan bills to expand the services and benefits that support our veterans and their families, caregivers, and survivors—including the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act, the most significant expansion of benefits and services for toxin exposed veterans and survivors in over 30 years. We released a national strategy to reduce military and veteran suicide by tackling some of the root causes of this crisis—like addressing financial insecurity by expanding job training opportunities for transitioning service members and veterans and their spouses and increasing funding to prevent and eliminate homelessness. Further, I signed an Executive Order that implemented historic, bipartisan military justice reforms to transform how the military handles sexual assault and domestic violence cases in order to make our military safer and more just. Earlier this year, I directed the Department of Defense to review pay and benefits for our military members, because our Armed Forces and their families deserve a 21st century compensation system that reflects their service and sacrifice. Additionally, the First Lady’s Joining

Forces initiative is providing support to military and veteran families, caregivers, and survivors by improving economic opportunity for military families, making school transitions easier for military children, and expanding resources to promote health and well-being for this community.

Our fighting force is the greatest in the world—in no small part because, year after year and decade after decade, military and veteran families have had their loved ones' backs. As a country, we owe it to these families to have their backs. This year—as we celebrate 50 years of an all-volunteer force—may we also recognize the bravery and dedication of our military and veteran families and work to repay the debt of gratitude we owe each one of them.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 2023 as National Veterans and Military Families Month. I call upon the people of the United States to honor veterans and military families with appropriate ceremonies and activities.

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

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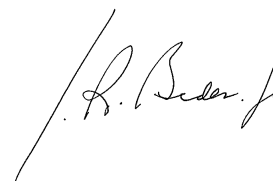
Presidential Documents

Notice of November 1, 2023

Continuation of the National Emergency With Respect to the Proliferation of Weapons of Mass Destruction

On November 14, 1994, by Executive Order 12938, the President declared a national emergency with respect to the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States posed by the proliferation of nuclear, biological, and chemical weapons (weapons of mass destruction) and the means of delivering such weapons. On July 28, 1998, by Executive Order 13094, the President amended Executive Order 12938 to respond more effectively to the worldwide threat of weapons of mass destruction proliferation activities. On June 28, 2005, by Executive Order 13382, the President, among other things, further amended Executive Order 12938 to improve our ability to combat proliferation. The proliferation of weapons of mass destruction and the means of delivering them continues to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. For this reason, the national emergency declared in Executive Order 12938 of November 14, 1994, with respect to the proliferation of weapons of mass destruction and the means of delivering such weapons must continue beyond November 14, 2023. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 12938, as amended.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
November 1, 2023.

Rules and Regulations

Federal Register

Vol. 88, No. 212

Friday, November 3, 2023

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

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2142; Project Identifier MCAI–2023–01056–T; Amendment 39–22592; AD 2023–22–08]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2023–04–12, which applied to all Airbus SAS Model A350–941 and –1041 airplanes. AD 2023–04–12 required repetitive detailed inspections of affected cargo sealing tapes and applicable corrective actions. Since the FAA issued AD 2023–04–12, additional locations have been identified that are subject to the unsafe condition. This AD retains the requirements of AD 2023–04–12 and expands the inspection area, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 20, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 20, 2023.

The FAA must receive comments on this AD by December 18, 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](https://www.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](https://www.regulations.gov) under Docket No. FAA–2023–2142; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For EASA material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; website easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–2142.

FOR FURTHER INFORMATION CONTACT: Dat Le, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7317; email Dat.V.Le@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–2023–2142; Project Identifier MCAI–2023–01056–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](https://www.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 Dat Le, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; 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

The FAA issued AD 2023–04–12, Amendment 39–22359 (88 FR 12143, February 27, 2023) (AD 2023–04–12), for all Airbus SAS Model A350–941 and –1041 airplanes. AD 2023–04–12 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2023–0011, dated January 17, 2023 (EASA AD 2023–0011), to correct an unsafe condition.

EASA AD 2023–0011 stated that longitudinal sealing tape in the forward and aft cargo compartments had migrated from its original position, possibly due to relative movement between the cargo floor panels and the cargo loading system, combined with compression of the tape.

AD 2023–04–12 required repetitive detailed inspection of the affected parts (*i.e.*, cargo sealing tapes installed between the cargo floor panels and the cargo loading system in longitudinal direction, in the forward and aft cargo compartment area), and, depending on findings, accomplishment of applicable corrective action. The FAA issued AD 2023–04–12 to address migration of the tape, which can affect the tightness of the cargo compartment floor panels that provide an enclosed area to maintain halon concentration in the event of a fire. This condition, if not addressed, could affect the fire extinguishing system efficiency in the cargo compartments, possibly resulting in failure of the system to contain a cargo compartment fire or permanently extinguish a fire.

Actions Since AD 2023–04–12 Was Issued

Since the FAA issued AD 2023–04–12, EASA issued AD 2023–0011R1, dated February 23, 2023 (EASA AD 2023–0011R1) to provide dispatch instructions under the Master Minimum Equipment List. EASA subsequently superseded EASA AD 2023–0011R1 and issued EASA AD 2023–0176, dated October 6, 2023 (EASA AD 2023–0176) (also referred to as the MCAI), to correct an unsafe condition for all Airbus SAS Model A350–941 and –1041 airplanes. The MCAI states that additional parts (cargo sealing tapes installed between the cargo floor panels and the floor structure in transversal direction in the bulk cargo compartment area at frame 82) have been identified as affected by the same potential unsafe condition.

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](https://www.regulations.gov) under Docket No. FAA–2023–2142.

Explanation of Retained Requirements

Although this AD does not explicitly restate the requirements of AD 2023–04–12, this AD retains all of the requirements of AD 2023–04–12. Those requirements are referenced in EASA AD 2023–0176, which, in turn, is referenced in paragraph (g) of this AD.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0176 specifies procedures for the following actions:

- Repetitive detailed inspections to detect complete or partial migration of the cargo sealing tapes (including high speed tape and glass cloth tape) and existing repairs of affected parts (*i.e.*, cargo sealing tapes installed between the cargo floor panels and the cargo

loading system in longitudinal direction, in the forward and aft cargo compartment area; and cargo sealing tapes installed between the cargo floor panels and the floor structure in transversal direction, in the bulk cargo compartment area at frame 82).

- Measurement of the maximum migration of partially migrated tape.
- Inspection for incorrect seating or sealant of repaired tape.
- Repair of discrepancies, including cargo sealing tape that has migrated more than 11 millimeters, complete migration of the tape, incorrect seating/condition of the tape in repaired areas, and incorrect sealant condition in repaired areas.

EASA AD 2023–0176 allows deferral of corrective actions through dispatch of the airplane under specified Airbus A350 Master Minimum Equipment List items.

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.

FAA’s Determination

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

Requirements of This AD

This AD requires accomplishing the actions specified in EASA AD 2023–0176 described previously, except for any differences identified as exceptions in the regulatory text of this 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, EASA AD 2023–0176 is incorporated by reference in this AD. This AD requires compliance with EASA AD 2023–0176 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using

common terms that are the same as the heading of a particular section in EASA AD 2023–0176 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 2023–0176. Service information required by EASA AD 2023–0176 for compliance will be available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–2142 after this AD is published.

Interim Action

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

FAA’s Justification 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 migration of the sealing tape can affect the tightness of the cargo compartment floor panels, which provide an enclosed area to maintain halon concentration in the event of a fire. Migration of the sealing tape in the forward and aft cargo compartments could affect the fire extinguishing system efficiency in the cargo compartments and possibly result in failure of the system to contain a cargo compartment fire or permanently extinguish the fire. The additional affected locations in the bulk cargo compartment further increase the effect on the fire extinguishing system efficiency by widening the area in which a halon concentration could perpetuate due to migration of the sealing tape and increasing the likelihood of a failure to contain a cargo

compartment fire or permanently extinguish the fire. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest 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 (RFA)

The requirements of the 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 32 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Retained actions from AD 2023-04-12	Up to 1 work-hour × \$85 per hour = \$85	\$0	Up to \$85	Up to \$2,720.
New actions	2 work-hours × \$85 per hour = \$170	0	\$170	\$5,440.

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on

the results of any required actions. The FAA has no way of determining the

number of aircraft that might need these on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 3 work-hours × \$85 per hour = \$255	Up to \$10	Up to \$265.

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) 2023–04–12, Amendment 39–22359 (88 FR 12143, February 27, 2023); and

■ b. Adding the following new AD:

2023–22–08 Airbus SAS: Amendment 39–22592; Docket No. FAA–2023–2142; Project Identifier MCAI–2023–01056–T.

(a) Effective Date

This airworthiness directive (AD) is effective November 20, 2023.

(b) Affected ADs

This AD replaces AD 2023–04–12, Amendment 39–22359 (88 FR 12143, February 27, 2023) (AD 2023–04–12).

(c) Applicability

This AD applies to all Airbus SAS Model A350–941 and –1041 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by the migration of cargo sealing tape from its original position between the cargo floor panels and the cargo loading system in the longitudinal direction in the forward and aft cargo compartment area, and between the cargo floor panels and the floor structure in the transversal direction in the bulk cargo compartment area at frame 82. The FAA is issuing this AD to address this tape migration, which can affect the tightness of the cargo compartment floor panels that provide an enclosed area to maintain halon concentration in the event of a fire. This condition, if not addressed, could affect the fire extinguishing system efficiency in the cargo compartments, possibly resulting in failure of the system to contain a cargo compartment fire or permanently extinguish a fire.

(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 2023–0176, dated October 6, 2023 (EASA AD 2023–0176).

(h) Exceptions to EASA AD 2023–0176

(1) Where EASA AD 2023–0176 refers to “31 January 2023 [the effective date of EASA AD 2023–0011],” this AD requires replacing those words with “March 14, 2023 (the effective date of AD 2023–04–12).”

(2) Where EASA AD 2023–0176 refers to its effective date, this AD requires using the effective date of this AD.

(3) Where paragraph (2) of EASA AD 2023–0176 specifies accomplishing corrective actions if “discrepancies, as identified in the AOT” are found, for this AD, discrepancies are defined as cargo sealing tape that has migrated more than 11 millimeters, complete migration of the tape as shown in Condition B of the service information reference in EASA AD 2023–0176, incorrect seating/condition of the tape in repaired areas, and incorrect sealant condition in repaired areas.

(4) Where paragraph (2) of EASA AD 2023–0176 specifies accomplishing corrective actions “in accordance with the instructions of the AOT,” for this AD, replace those words with “in accordance with the instructions of the AOT for the FWD and AFT cargo compartment areas and in accordance with the instructions of Airbus AOT A53P016–22, Revision 03, dated September 13, 2023, or later approved revisions for the BULK cargo compartment areas.”

(5) Where the service information referenced in EASA AD 2023–0176 specifies use of cargo sealing tape 398FR, this AD also allows use of cargo sealing tape 398FRP.

(6) This AD does not adopt the “Remarks” section of EASA AD 2023–0176.

(i) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(ii) AMOCs approved previously for AD 2023–04–12 are approved as AMOCs for the corresponding provisions of EASA AD 2023–0176 that are required by paragraph (g) of this AD.

(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.

(3) *Required for Compliance (RC)*: Except as required by paragraph (i)(2) of this AD, if any service information referenced in EASA AD 2023–0176 that contains paragraphs that are labeled as RC, the instructions in RC paragraphs, including subparagraphs under an RC paragraph, must be done to comply with this AD; any paragraphs, including subparagraphs under those paragraphs, that are not identified as RC are recommended. The instructions in paragraphs, including subparagraphs under those paragraphs, not identified as RC may be deviated from using accepted methods in accordance with the operator’s maintenance or inspection program without obtaining approval of an AMOC, provided the instructions identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to instructions identified as RC require approval of an AMOC.

(j) Additional Information

For more information about this AD, contact Dat Le, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7317; email Dat.V.Le@faa.gov.

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0176, dated October 6, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0176, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; website easa.europa.eu. You may find this EASA AD on the EASA website at ad.easa.europa.eu.

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket at regulations.gov under Docket No. FAA–2023–2142.

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

Ross Landes,

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

[FR Doc. 2023–24405 Filed 11–1–23; 11:15 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA–2023–1339; Airspace Docket No. 22–ANM–84]

RIN 2120–AA66

Establishment of Class E Airspace; Grand Coulee Dam Airport, Electric City, WA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace extending upward from 700 feet above the surface at Grand Coulee Dam Airport, Electric City, WA, in support of the airport’s transition from visual flight rules (VFR) to instrument flight rules (IFR) operations.

DATES: Effective date 0901 UTC, May 16, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

FAA Order JO 7400.11H, 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 Drasin, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S. 216th Street, Des Moines, WA 98198; telephone (206) 231–2248.

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 the 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 establishes Class E airspace to support IFR operations at Grand Coulee Dam Airport, Electric City, WA.

History

The FAA published an NPRM for Docket No. FAA–2023–1339 in the **Federal Register** (88 FR 39384; June 16, 2023), proposing to establish Class E airspace at Grand Coulee Dam Airport, Electric City, WA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

The Class E5 airspace designation 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 amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

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

The Rule

This action amends 14 CFR part 71 to establish Class E airspace Grand Coulee Dam Airport, Electric City, WA, in support of the airport's transition from VFR to IFR operations.

The airspace design—which extends from the airport reference point (ARP) 10.2 miles east and 9.7 miles southwest—would fully contain departing and missed approach IFR operations until reaching 1,200 feet above the surface on the Area Navigation (RNAV) (Global Positioning System [GPS]) Z Runway (RWY) 22 missed approach and the SINGG (RNAV) obstacle departure procedure (ODP), and arriving IFR operations below 1,500 feet above the surface on the RNAV (GPS) Y RWY 22 and RNAV (GPS) Z RWY 22 approaches.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

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

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

* * * * *

ANM WA E5 Electric City, WA [New]
Grand Coulee Dam Airport, WA
(Lat. 47°55'19" N, long. 119°4'59" W)

That airspace extending upward from 700 feet above the surface within an area bounded by a line beginning at the airport's 063° bearing at 10.2 miles, then clockwise along the airport's 10.2-mile radius to the 99° bearing at 10.2 miles, to the 172° bearing at 4.7 miles, to the 216° bearing at 9.7 miles, then clockwise along the airport's 9.7-mile radius to the 237° bearing at 9.7 miles to the 329° bearing at 3.6 miles, thence to the point of beginning.

* * * * *

Issued in Washington, DC, on October 18, 2023.

B.G. Chew,

*Group Manager, Operations Support Group,
Western Service Center.*

[FR Doc. 2023–23731 Filed 11–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–0866; Airspace
Docket No. 22–AAL–51]

RIN 2120–AA66

Amendment to United States Area Navigation Route Q–46; Point Hope, AK

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends United States Area Navigation (RNAV) Route Q–46 in the vicinity of Point Hope, AK. The FAA is taking this action due to the pending decommissioning of the Point Hope, AK (PHO), Non-Directional Beacon (NDB) navigational aid (NAVAID).

DATES: Effective date 0901 UTC, January 25, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

FAA Order JO 7400.11H, 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: Steven Roff, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

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 the 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 modify the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System (NAS).

History

The FAA published a notice of proposed rulemaking for Docket No. FAA 2023-0866 in the **Federal Register** (88 FR 21139; April 10, 2023), proposing to amend RNAV route Q-46. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Differences From the NPRM

The NPRM published in the **Federal Register** (88 FR 21139, April 10, 2023) contained a typographical error in the proposed legal description. In the proposed legal description, the longitudinal geographical coordinate listed for Barrow, AK, Very High Frequency Omnidirectional Range/Distance Measuring Equipment (VOR/DME) was incorrect. The NPRM listed the longitudinal coordinate for Barrow, AK, VOR/DME as 156°47'18.90" W. The final rule corrects this error by listing the longitudinal coordinate for Barrow, AK, VOR/DME as 156°47'17.22" W.

Incorporation by Reference

United States Area Navigation Routes are published in paragraph 2006 of FAA

Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

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

The Rule

This action amends 14 CFR part 71 by amending RNAV route Q-46 in the vicinity of Point Hope, AK due to the pending decommissioning of the Point Hope NDB. The RNAV route amendment action is described below.

Q-46: As amended, Q-46 extends between the VANTY, AK, waypoint (WP) and the Barrow, AK, VOR/DME.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that 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

This action of amending RNAV Route Q-46 in the vicinity of Point Hope, AK due to the pending decommissioning of the Point Hope NDB qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5-6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas,

airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points); and paragraph 5-6.5.i., which categorically excludes from further environmental impact review the establishment of new or revised air traffic control procedures conducted at 3,000 feet or more above ground level (AGL); procedures conducted below 3,000 feet AGL that do not cause traffic to be routinely routed over noise sensitive areas; modifications to currently approved procedures conducted below 3,000 feet AGL that do not significantly increase noise over noise sensitive areas; and increases in minimum altitudes and landing minima. As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5-2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. Accordingly, the FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

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 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

* * * * *

Paragraph 2006 United States Area Navigation Routes.

Q-46 VANTY, AK to Barrow, AK (BRW) [Amended]

VANTY, AK	WP	(lat. 68°20'40.64" N, long. 166°48'09.96" W)
Barrow, AK (BRW)	VOR/DME	(lat. 71°16'24.34" N, long. 156°47'17.22" W)

* * * * *

Issued in Washington, DC, on October 24, 2023.

Karen Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–23812 Filed 11–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA–2023–1119; Airspace Docket No. 22–AAL–76]

RIN 2120–AA66

Establishment of Class E Airspace; Tununak Airport, Tununak, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace extending upward from 700 feet above the surface at Tununak Airport, Tununak, AK, in support of the airport's transition from visual flight rules (VFR) to instrument flight rules (IFR) operations.

DATES: Effective date 0901 UTC, July 11, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11, Airspace Designations and Reporting Points, and publication of conforming amendments.

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

FAA Order JO 7400.11H, 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 Drasin, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S

216th Street, Des Moines, WA 98198; telephone (206) 231–2248.

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 (U.S.C.). 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 the 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 establishes Class E airspace to support IFR operations at Tununak Airport, Tununak, AK.

History

The FAA published an NPRM for Docket No. FAA–2023–1119 in the **Federal Register** (88 FR 37484; June 8, 2023), proposing to establish Class E airspace at Tununak Airport, AK. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

The Class E5 airspace designation is published in paragraph 6005 of FAA Order JO 7400.11, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

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

The Rule

This action amends 14 CFR part 71 to establish Class E airspace at Tununak Airport, Tununak, AK, in support of the airport's transition from VFR to IFR operations.

The Class E airspace will extend upward from 700 feet above the surface

and extends 7.4 miles from the airport reference point to both the north and south with a 3.4-mile western extension. This configuration is designed to fully contain arriving IFR operations below 1,500 feet above the surface on the Area Navigation (RNAV) Global Positioning System (GPS) RWY 34 approach, RNAV (GPS) Y RWY 16 approach, and the RNAV (GPS) Z RWY 16 approach, as well as departing IFR operations until they reach 1,200 feet above the surface on the EZEPU ONE (OBSTACLE) (RNAV) departure.

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

In consideration of the foregoing, the FAA 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 part 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

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

* * * * *

AAL AK E5 Tununak, AK [New]

Tununak Airport, AK

(Lat. 60°34'10" N, long. 165°14'47" W)

That airspace extending upward from 700 feet above the surface within a 3.4-mile radius of the airport between the 258° bearing clockwise to the 306° bearing, and within 2.5 miles east and 2.8 miles west of the 168° bearing extending from the airport to 7.4 miles south, and within 1.9 miles east and 2.3 miles west of the 348° bearing extending from the airport to 7.4 miles north.

* * * * *

Issued in Washington, DC, on October, 25, 2023.

B.G. Chew,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2023–24024 Filed 11–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1026; Airspace Docket No. 23–AGL–7]

RIN 2120–AA66

Amendment of Multiple Air Traffic Service (ATS) Routes and Establishment of Area Navigation (RNAV) Route T–478 in the Vicinity of Danville, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Jet Route J–84, United States Area Navigation (RNAV) route Q–42, and Very High Frequency Omnidirectional Range (VOR) Federal airways V–171 and V–

251, and establishes United States RNAV route T–478. The FAA is taking this action due to the planned decommissioning of the VOR portion of the Danville, IL (DNV), VOR/Tactical Air Navigation (VORTAC) navigational aid (NAVAID). The Danville VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Effective date 0901 UTC, January 25, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

FAA Order JO 7400.11H, 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:

Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

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 the 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 modifies the Air Traffic Service (ATS) route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA–2023–1026 in the **Federal Register** (88 FR 29573; May 8, 2023), proposing to amend Jet Route J–84, United States RNAV route Q–42, and VOR Federal airways V–171 and V–251, and establish United States RNAV route T–478 due to the planned decommissioning of the VOR portion of the Danville, IL, VORTAC NAVAID. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

Differences From the NPRM

Concurrent with the NPRM, the FAA published a final rule for Docket No. FAA–2022–1586 in the **Federal Register** (88 FR 31607; May 18, 2023), amending VOR Federal airway V–171 by removing the airway segment between the Grand Forks, ND, VOR/Distance Measuring Equipment (VOR/DME) and the Roseau, MN, VOR/DME. That airway amendment, effective August 10, 2023, is included in this rule.

Additionally, subsequent to the NPRM, the FAA determined the STRUK, IL, waypoint (WP) listed in the Q–42 description is not required to be included in the part 71 description of Q–42. The WP is not a beginning or end point of Q–42, is not a point where the route changes one degree or more, is not used as a holding fix, and is not required as the maximum distance allowed between NAVAIDs, fixes, or WPs is not exceeded. As such, this rule removes the STRUK, IL, WP from the Q–42 part 71 description. This is an editorial change only and does not alter the alignment of the Q–42 route.

Finally, in the NPRM, the RIVRS, IL, route point listed in the T–478 description was incorrectly referenced and listed as a Fix. The RIVRS, IL, Fix was updated in the National Airspace System Resource (NASR) database prior to publication of the NPRM and is now described as a WP. This rule corrects that error and lists the RIVRS route point as a WP. This is an editorial change only to match the FAA's NASR database information and does not alter the alignment of the T–478 route.

Incorporation by Reference

Jet Routes are published in paragraph 2004, United States RNAV Routes (Q-routes) are published in paragraph 2006, VOR Federal airways are published in paragraph 6010(a), and United States RNAV Routes (T-routes) are published in paragraph 6011 of FAA Order JO 7400.11, Airspace Designations and

Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. This amendment action will be published in the next update to FAA Order JO 7400.11.

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

The Rule

This action amends 14 CFR part 71 by amending Jet Route J-84, United States RNAV route Q-42, and VOR Federal airways V-171 and V-251, and establishing United States RNAV route T-478. This action is due to the planned decommissioning of the VOR portion of the Danville, IL, VORTAC. The ATS route actions are described below.

J-84: Prior to this final rule, J-84 extended between the Oakland, CA, VOR/DME and the Sidney, NE, VOR/DME; and between the Dubuque, IA, VORTAC and the Danville, IL, VORTAC. The route segment between the Northbrook, IL, VOR/DME and the Danville, IL, VORTAC is removed. As amended, the route now extends between the Oakland VOR/DME and the Sidney VOR/DME and between the Dubuque VORTAC and the Northbrook VOR/DME.

Q-42: Prior to this final rule, Q-42 extended between the Kirksville, MO, VORTAC and the ZIMMZ, PA, Fix. The Kirksville VORTAC route point is replaced with the LEWRP, MO, WP; the Danville, IL, VORTAC route point is replaced with the LCOLN, IL, WP; and the Muncie, IN, VOR/DME route point is replaced with the SNKPT, IN, WP. Editorial corrections are made to the state abbreviation and the type of route point for the ZIMMZ Fix to match the NASR database information. As amended, the route now extends between the LEWRP WP and the ZIMMZ Fix.

V-171: Prior to this final rule, V-171 extended between the Lexington, KY, VOR/DME and the Joliet, IL, VOR/DME; and between the Nodine, MN, VORTAC and the Grand Forks, ND, VOR/DME. The airway segment between the Terre Haute, IN, VORTAC and the Peotone, IL, VORTAC is removed. As amended, the airway now extends between the Lexington VOR/DME and the Terre Haute VORTAC, between the Peotone VORTAC and the Joliet VOR/DME, and between the Nodine VORTAC and the Grand Forks VOR/DME.

V-251: Prior to this final rule, V-251 extended between the Adders, IL, VORTAC and the Boiler, IN, VORTAC. The airway segment between the Champaign, IL, VORTAC and the Boiler, IN, VORTAC is removed. As amended, the airway now extends between the Adders VORTAC and the Champaign VORTAC.

T-478: T-478 is a new RNAV route established between the RIVRS, MO, WP located northeast of Bolling Green, MO, and the BOLRR, IN, WP located near the Boiler, IN, VORTAC. This new T-route mitigates the removal of the V-251 airway segment addressed above between the Champaign, IL, VORTAC and the Lafayette, IN, area to mitigate the removal of the V-251 airway segment addressed above and provides non-radar routing between the RIVRS WP and the Champaign VORTAC, when needed.

All NAVAID radials listed in the VOR Federal airway V-171 description below are unchanged and stated in degrees True north.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that 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 of amending Jet Route J-84, United States RNAV route Q-42, and VOR Federal airways V-171 and V-251, and establishes United States RNAV route T-478, due to the planned decommissioning of the VOR portion of the Danville, IL, VOR/DME NAVAID, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5-6.5a, which categorically excludes from further environmental impact review

rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points); and paragraph 5-6.5i, which categorically excludes from further environmental impact review the establishment of new or revised air traffic control procedures conducted at 3,000 feet or more above ground level (AGL); procedures conducted below 3,000 feet AGL that do not cause traffic to be routinely routed over noise sensitive areas; modifications to currently approved procedures conducted below 3,000 feet AGL that do not significantly increase noise over noise sensitive areas; and increases in minimum altitudes and landing minima. As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5-2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List 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 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 2004 Jet Routes.

* * * * *

J-84 [Amended]

From Oakland, CA; Linden, CA; Mina, NV; Delta, UT; Meeker, CO; to Sidney, NE. From Dubuque, IA; to Northbrook, IL.

* * * * *

*Paragraph 2006 United States Area
Navigation Routes.*

* * * * *

Q-42 LEWRP, MO to ZIMMZ, PA [Amended]

LEWRP, MO	WP	(Lat. 40°08'06.06" N, long. 092°35'30.15" W)
LCOLN, IL	WP	(Lat. 40°17'37.55" N, long. 087°33'25.36" W)
SNKPT, IN	WP	(Lat. 40°14'13.96" N, long. 085°23'39.21" W)
HIDON, OH	WP	(Lat. 40°10'00.00" N, long. 081°37'27.00" W)
BUBAA, OH	WP	(Lat. 40°10'27.00" N, long. 080°58'17.00" W)
PSYKO, PA	WP	(Lat. 40°08'37.00" N, long. 079°09'13.00" W)
BRNAN, PA	WP	(Lat. 40°08'07.00" N, long. 077°50'06.70" W)
HOTEE, PA	WP	(Lat. 40°20'36.00" N, long. 076°29'37.00" W)
SPOTZ, PA	WP	(Lat. 40°45'55.00" N, long. 075°22'59.00" W)
ZIMMZ, PA	FIX	(Lat. 40°48'11.00" N, long. 075°07'25.00" W)

* * * * *

*Paragraph 6010(a) Domestic VOR Federal
Airways.*

* * * * *

V-171 [Amended]

From Lexington, KY; INT Lexington 251° and Louisville, KY, 114° radials; Louisville;

to Terre Haute, IN. From Peotone, IL; INT Peotone 281° and Joliet, IL, 173° radials; to Joliet. From Nodine, MN; INT Nodine 298° and Farmington, MN, 124° radials; Farmington; Darwin, MN; Alexandria, MN; INT Alexandria 321° and Grand Forks, ND, 152° radials; to Grand Forks.

* * * * *

V-251 [Amended]

From Adders, IL; to Champaign, IL.

* * * * *

*Paragraph 6011 United States Area
Navigation Routes.*

* * * * *

T-478 RIVRS, IL to BOLRR, IN [New]

RIVRS, IL	WP	(Lat. 39°25'21.41" N, long. 090°55'56.70" W)
Spinner, IL (SPI)	VORTAC	(Lat. 39°50'23.04" N, long. 089°40'39.85" W)
Champaign, IL (CMI)	VORTAC	(Lat. 40°02'04.31" N, long. 088°16'33.87" W)
SLONI, IL	WP	(Lat. 40°11'06.39" N, long. 087°55'15.88" W)
LCOLN, IL	WP	(Lat. 40°17'37.55" N, long. 087°33'25.36" W)
BOLRR, IN	WP	(Lat. 40°33'22.03" N, long. 087°04'09.55" W)

* * * * *

Issued in Washington, DC, on October 27, 2023.

Karen L. Chiodini,

*Acting Manager, Rules and Regulations
Group.*

[FR Doc. 2023-24076 Filed 11-2-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA-2023-1014; **Airspace**
Docket No. 23-ACE-2]

RIN 2120-AA66

**Amendment of VOR Federal Airways
V-14 and V-67, and Area Navigation
Route T-272; Vandalia, IL**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Very High Frequency Omnidirectional Range (VOR) Federal airways V-14 and V-67, and United States Area Navigation (RNAV) route T-272. The FAA is taking this action due to the planned decommissioning of the VOR portion of the Vandalia, IL (VLA), VOR/Distance

Measuring Equipment (VOR/DME) navigational aid (NAVAID). The Vandalia VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Effective date 0901 UTC, January 25, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

FAA Order JO 7400.11H, 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: Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800

Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

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 the 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 modifies the Air Traffic Service (ATS) route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA-2023-1014 in the **Federal Register** (88 FR 29580; May 8, 2023), proposing to amend VOR Federal airways V-14 and V-67, and United States RNAV route T-272 due to the planned

decommissioning of the VOR portion of the Vandalia, IL, VOR/DME NAVAID. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

Incorporation by Reference

VOR Federal airways are published in paragraph 6010(a) and United States Area Navigation Routes (T-routes) are published in paragraph 6011 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. This amendment action will be published in the next update to FAA Order JO 7400.11.

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

The Rule

This action amends 14 CFR part 71 by amending VOR Federal airways V-14 and V-67, and United States RNAV route T-272 due to the planned decommissioning of the VOR portion of the Vandalia, IL, VOR/DME. The Air Traffic Service (ATS) route actions are described below.

V-14: Prior to this final rule, V-14 extended between the Chisum, NM, VOR/Tactical Air Navigation (VORTAC) and the Tulsa, OK, VORTAC; and between the Springfield, MO, VORTAC and the Flag City, OH, VORTAC. The airway segment between the St. Louis, MO, VORTAC and the Terre Haute, IN, VORTAC is removed. As amended, the airway now extends between the Chisum VORTAC and the Tulsa VORTAC, between the Springfield VORTAC and the St. Louis VORTAC, and between the Terre Haute VORTAC and the Flag City VORTAC.

V-67: Prior to this final rule, V-67 extended between the intersection of the Centralia, IL, VORTAC 010° and Vandalia, IL, VOR/DME 162° radials (CORKI Fix) and the Rochester, MN, VOR/DME. The airway segment between the intersection of the Centralia VORTAC 010° and Vandalia VOR/DME 162° radials (CORKI Fix) and the Spinner, IL, VORTAC is removed. As amended, the airway now extends between the Spinner VORTAC and the Rochester VOR/DME.

T-272: Prior to this final rule, T-272 extended between the Hallsville, MO, VORTAC and the Vandalia, IL, VOR/

DME. The Vandalia, IL, VOR/DME route point is changed to the TYMME, IL, waypoint (WP) which is located approximately 60 feet northeast of the Vandalia VOR/DME. As amended, the route now extends between the Hallsville VORTAC and the TYMME WP. Additionally, the Hallsville, MO, identifier is added to the first line of the route description and the geographic coordinates of each route point are updated to be expressed in degrees, minutes, seconds, and hundredths of a second.

The NAVAID radials contained in the V-14 description listed below in The Amendment section are unchanged and stated in degrees True north.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that 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 of amending VOR Federal airways V-14 and V-67, and United States RNAV route T-272, due to the planned decommissioning of the VOR portion of the Vandalia, IL, VOR/DME NAVAID, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5-6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points); and paragraph 5-6.5k, which categorically excludes from further environmental impact review publication of existing air traffic control

procedures that do not essentially change existing tracks, create new tracks, change altitude, or change concentration of aircraft on these tracks. As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5-2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List 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 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V-14 [Amended]

From Chisum, NM; Lubbock, TX; Childress, TX; Hobart, OK; Will Rogers, OK; INT Will Rogers 052° and Tulsa, OK, 246° radials; to Tulsa. From Springfield, MO; Vichy, MO; INT Vichy 067° and St. Louis, MO, 225° radials; to St. Louis. From Terre Haute, IN; Brickyard, IN; Muncie, IN; to Flag City, OH.

* * * * *

V-67 [Amended]

From Spinner, IL; Burlington, IA; Iowa City, IA; Cedar Rapids, IA; Waterloo, IA; to Rochester, MN.

* * * * *

Paragraph 6011 United States Area
Navigation Routes.

* * * * *

T-272 Hallsville, MO (HLV) to TYMME, IL [Amended]

Hallsville, MO (HLV)	VORTAC	(lat. 39°06'48.75" N, long. 092°07'41.64" W)
TYMME, IL	WP	(lat. 39°05'38.35" N, long. 089°09'43.71" W)

* * * * *

Issued in Washington, DC, on October 27, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023-24077 Filed 11-2-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2023-0965; Airspace
Docket No. 23-AGL-8]

RIN 2120-AA66

**Amendment of VOR Federal Airways
V-158 and V-172; Polo, IL**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Very High Frequency Omnidirectional Range (VOR) Federal airways V-158 and V-172 in the vicinity of Polo, IL. The amendments are due to the planned decommissioning of the VOR portion of the Polo, IL (PLL), VOR/Distance Measuring Equipment (VOR/DME) navigational aid (NAVAID). The Polo VOR is being decommissioned as part of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Effective date 0901 UTC, January 25, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

FAA Order JO 7400.11H, 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:

Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

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 the 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 modifies the Air Traffic Service (ATS) route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System (NAS).

History

The FAA published a notice of proposed rulemaking for Docket No. FAA-2023-0965 in the **Federal Register** (88 FR 23595; April 18, 2023), proposing to amend VOR Federal airways V-158 and V-172 due to the planned decommissioning of the VOR portion of the Polo, IL, VOR/DME NAVAID. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. One comment was received.

The commenter stated the FAA should keep the Polo VOR and associated VOR Federal airways, V-158 and V-172, because decommissioning them represented an aeronautical navigation challenge to instrument flight rules (IFR) aircraft not yet equipped with an IFR suitable global positioning system (GPS) and as a backup to GPS navigation, since there is

a lack of other suitable VOR navigational aids in the area.

The VOR MON is designed to enable aircraft, having lost Global Navigation Satellite System (GNSS) service, to revert to conventional navigation procedures and enable aircraft to proceed to a MON airport where an Instrument Landing System (ILS) or VOR approach procedure can be flown without the necessity of GPS.

In December 2011, the FAA published a notice of proposed policy and request for comments in the **Federal Register** (76 FR 77939). The notice addressed the FAA's proposed strategy for reducing the current VOR network to a Minimum Operational Network (MON) in support of transitioning the NAS to performance-based navigation (PBN) as part of the Next Generation Air Transportation System (NextGen). The FAA announced that, as part of a NAS Efficient Streamlined Services Initiative, the number of VORs would be reduced while more efficient Area Navigation (RNAV) routes and procedures would be implemented throughout the NAS. The notice stated that the FAA, with assistance of a work group, would develop a candidate list of VORs for discontinuance using relevant operational, safety, cost, and economic criteria.

In response to comments received to the notice of proposed policy, the FAA published a disposition of comments notice in the **Federal Register** (77 FR 50420; August 21, 2012), stating it would develop an initial VOR MON discontinuance plan which would be made publicly available. As a result, the FAA convened a working group for developing the objective criteria to be used to help identify those VORs that would remain operational. Stakeholders, aviation industry, and military services provided further input to the FAA for consideration in developing the criteria to select VORs that needed to be retained as a part of the MON. With this collective input, the FAA developed the criteria to determine which VORs would be retained. The VORs not meeting these criteria were considered discontinuance candidates.

As referenced in the NPRM, the FAA published its VOR MON final policy statement in the **Federal Register** (81 FR 48694; July 26, 2016). In that notice, the

candidate list of VORs to be discontinued was announced. The Polo, MI, VOR was announced as a candidate VOR for discontinuance. The FAA remains committed to its final policy statement and plan to retain an optimized VOR MON that enables pilots to revert from PBN to conventional navigation for approach, terminal, and enroute operations in the event of a GPS outage. This action supports the NAS transition from ground-based to satellite-based navigation consistent with the FAA's NextGen goals and the NAS Efficient Streamlined Services Initiative.

The commenter also stated that if the Polo VOR is decommissioned, there will not be any usable NAVAID between the Moline, IL, VOR and the DuPage, IL, VOR (a distance of 108 nautical miles (NM)) which is outside of the current VOR service volume, nor would there be any usable VOR connecting the Dubuque, IA, VOR/Tactical Air Navigation (VORTAC) with the Chicago area DuPage, IL, and Joliet, IL, VORs. The commenter continued that flying between the Dubuque, IA, VORTAC and the Joliet, IL, VOR/DME would put pilots outside current VOR service volumes due to significant limitations imposed on the Dubuque VOR and the limited ranges of the Davenport and Moline VORs.

In response, the FAA offers that although the route between the Moline VOR/DME and the DuPage, IL, VOR/DME is approximately 108 NM, pilots flying direct between those two VORs today are required to have their aircraft RNAV equipped since the distance, as stated, is beyond the service volume of the two NAVAIDS. However, there are other VOR Federal airway alternatives in the area that allow pilots to navigate between the Moline and DuPage VORs. A pilot could choose to navigate between the Moline and DuPage VORs via V-63 between the Moline VOR/DME and the Davenport, IA, VORTAC, then via V-6 between the Davenport VORTAC and the DuPage VOR/DME.

Likewise, there will continue to be VOR Federal airway alternatives available for navigating between the Dubuque, IA, area and the Chicago area DuPage, IL, and Joliet, IL, VORs. To navigate between the Dubuque VORTAC and DuPage VOR/DME, pilots may navigate via V-129 between the Dubuque and Davenport VORTACs, then via V-6 between the Davenport VORTAC and the DuPage VOR/DME. Alternatively, a pilot could choose to navigate between the Dubuque VORTAC and the Joliet VOR/DME via V-129 between the Dubuque VORTAC and the

GENSO Fix, then via V-8 between the GENSO Fix and the Joliet VOR/DME.

Additionally, pilots may continue to navigate between the Dubuque, IA, area and the Chicago area Northbrook, IL, VOR/DME via V-246 between the Dubuque VORTAC and the Janesville, IL, VOR/DME, then via V-24 between the Janesville VOR/DME and the Northbrook VOR/DME.

Finally, pilots, regardless of flying under instrument flight rules or visual flight rules, may always request radar vectors from air traffic control for navigation assistance in the area or file and fly point-to-point using the Fixes and waypoints that will remain in the area if their aircraft is RNAV equipped.

Lastly, the commenter stated that the FAA's plan to use VORs with the new VOR service volumes, labeled as VOR Low (VL) and VOR High (VH), as a backup plan in the event of a GPS outage did not provide sufficient coverage in the vicinity of the Polo VOR/DME due to the operational limitations imposed on the Dubuque VORTAC and the Northbrook VOR/DME. The commenter thought that the Polo VOR and associated V-158 and V-172 airways segments should be retained until the limitations currently being imposed on the Dubuque and Northbrook VORs can be removed and the service volumes of the Joliet VOR/DME and the Davenport VORTAC can be increased to ensure signal coverage throughout the entire area.

As stated previously, the FAA remains committed to its final policy statement and plan to retain an optimized VOR MON that enables pilots to revert from PBN to conventional navigation for approach, terminal, and enroute operations in the event of a GPS outage. The limitations with the four listed VORs, Dubuque, Northbrook, Joliet, and Davenport, exist today due to the VOR type, user retention requirements, or an increase in tree/terrain blockage occurring over time causing certain radials of the VORs to become unusable. The limitations imposed on these four VORs do not affect the normal operation of the VORs until exceeding 40 NM below 14,500 feet mean seal level (MSL). Whether the Polo VOR remains operational or is decommissioned does not change the existing limitations on the four VORs, nor would it effect the use of the VOR Federal airway alternatives identified for pilots to continue navigating through the affected area. The FAA has determined that with the planned decommissioning of the Polo VOR, there remains sufficient conventional navigation enroute structure in place to enable pilots to navigate from the

Dubuque, IA; Cedar Rapids, IA; or Moline, IL, areas into the Chicago Metropolitan Area.

Incorporation by Reference

VOR Federal airways are published in paragraph 6010(a) of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. This amendment action will be published in the next update to FAA Order JO 7400.11.

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

The Rule

This action amends 14 CFR part 71 by amending VOR Federal airways V-158 and V-172 due to the planned decommissioning of the VOR portion of the Polo, IL, VOR/DME. The airway actions are described below.

V-158: Prior to this final rule, V-158 extended between the Mason City, IA, VOR/DME and the intersection of the Polo, IL, VOR/DME 122° and Davenport, IA, VORTAC 087° radials (SHOOF Fix). The airway segment between the Dubuque, IA, VORTAC and the intersection of the Polo, IL, 122° and Davenport, IA, 087° radials (SHOOF Fix) is removed. As amended, the airway now extends between the Mason City VOR/DME and the Dubuque VORTAC.

V-172: Prior to this final rule, V-172 extended between the Columbus, NE, VOR/DME and the DuPage, IL, VOR/DME. The airway segment between the Cedar Rapids, IA, VOR/DME and the DuPage, IL, VOR/DME is removed. As amended, the airway now extends between the Columbus VOR/DME and the Cedar Rapids VOR/DME.

The NAVAID radials contained in the VOR Federal airway descriptions listed below in The Amendment section are unchanged and stated in degrees True north.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT

Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that 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 of amending VOR Federal airways V-158 and V-172, due to the planned decommissioning of the VOR portion of the Polo, IL, VOR/DME NAVAID, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5-6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points); and paragraph 5-6.5i, which categorically excludes from further environmental impact review the establishment of new or revised air traffic control procedures conducted at 3,000 feet or more above ground level (AGL); procedures conducted below 3,000 feet AGL that do not cause traffic to be routinely routed over noise sensitive areas; modifications to currently approved procedures conducted below 3,000 feet AGL that do not significantly increase noise over noise sensitive areas; and increases in minimum altitudes and landing minima. As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5-2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List 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 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V-158 [Amended]

From Mason City, IA; INT Mason City 106° and Dubuque, IA, 293° radials; to Dubuque.

* * * * *

V-172 [Amended]

From Columbus, NE; Omaha, IA; INT Omaha 066° and Newton, IA, 262° radials; Newton; to Cedar Rapids, IA.

* * * * *

Issued in Washington, DC.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023-24078 Filed 11-2-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 73

[Docket No. FDA-2020-C-2131]

Listing of Color Additives Exempt From Certification; Jagua (Genipin-Glycine) Blue

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or we) is amending the color additive regulations to provide for the safe use of jagua (genipin-glycine) blue as a color additive in various food categories at levels consistent with good

manufacturing practice (GMP). We are taking this action in response to a color additive petition (CAP) submitted by Exponent, Inc. on behalf of Ecoflora SAS (Ecoflora).

DATES: This rule is effective December 4, 2023. See section X for further information on the filing of objections. Either electronic or written objections and requests for a hearing on the final rule must be submitted by December 4, 2023.

ADDRESSES: You may submit objections and requests for a hearing 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 December 4, 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–2020–C–2131 for “Listing of Color Additives Exempt from Certification; Jagua (Genipin-Glycine) Blue.” 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: Shayla West-Barnette, Center for Food Safety and Applied Nutrition, Food and

Drug Administration, 5001 Campus Dr., College Park, MD 20740–3835, 240–402–1262.

SUPPLEMENTARY INFORMATION:

I. Introduction

In a notification published in the **Federal Register** on November 20, 2020 (85 FR 74304), we announced that we filed a color additive petition (CAP 0C0317) submitted by Ecoflora SAS, c/o Exponent, Inc., 1150 Connecticut Ave. NW, Suite 1100, Washington, DC 20036. The petition proposed to amend the color additive regulations in part 73 (21 CFR part 73), “Listing of Color Additives Exempt from Certification,” to provide for the safe use of jagua (genipin-glycine) blue, derived from the pulp of the unripe jagua fruit (*Genipa americana*), as a color additive at levels consistent with GMP in flavored milk; dairy drinks and substitutes; dairy and dairy alternative yogurt; ice cream, frozen dairy and dairy alternative desserts, puddings, gelatins, ices, sorbets; ready-to-eat multicolored cereals; flavored potato chips, tortilla, corn, and other chips; candy and chewing gum; non-alcoholic fruit based/ flavored drinks, nutritional beverages and smoothies; flavored cream cheese-based spreads; and icings, frostings, jams, syrups, and fruit toppings and fillings.

II. Background

The color additive that is the subject of this petition is a dark blue liquid or powder produced by reacting genipin (CAS Reg. No. 6902–77–8) in the juice of the unripe fruit of *Genipa americana* with an equivalent amount of the amino acid glycine (CAS Reg. No. 56–40–6) using mild heat. The principal coloring component in jagua (genipin-glycine) blue is a genipin-glycine polymer (CAS Reg. No. 1314879–21–4) consisting of repeating dimeric units containing two genipin moieties reacted to add glycine units as side chains. We will subsequently refer to this principal coloring component as “the polymer.” Iridoids, of which genipin is an example, are found in a wide variety of plants, and glycine is a common building block of proteins. The color additive jagua (genipin-glycine) blue also contains three dimers as minor coloring components (CAS Reg. No. 1313734–13–2, CAS Reg. No. 104359–67–3, and CAS Reg. No. 1313734–14–3) that are structural units of the polymer.

The petitioner proposed the following specifications for jagua (genipin-glycine) blue: appearance, dark blue; color value (E10 percent), 240–280 for the powder form and 120–240 for the liquid form; polymer, 20 to 40 percent for the

powder form and 10 to 35 percent for the liquid form; aflatoxins (B1, B2, G1, and G2), not more than 0.01 milligram per kilogram (mg/kg); fumonisin (B1, B2), not more than 0.5 mg/kg; *Escherichia coli*, negative in 1 gram (g); aerobic plate count, not more than 1,000 colony forming units per gram (cfu/g); yeast and mold, not more than 300 cfu/g, and *Staphylococcus aureus*, negative in 1 g.

FDA amended the proposed specifications to add the following: arsenic, not more than 1 mg/kg; cadmium, not more than 1 mg/kg; mercury, not more than 1 mg/kg; and lead, not more than 1 mg/kg (Ref. 1). We also amended the proposed specification for genipin, not more than 20 mg/kg, to be consistent with the petitioner’s analytical results. Furthermore, we concluded that the petitioner’s proposed specifications for appearance, color value, polymer, glycine, the minor coloring components, carbohydrate, modified starch, total fat, total protein, and ash content are not needed in the codified regulation (Ref. 1).

III. Safety Evaluation

Under section 721(b)(4) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 379e(b)(4)), a color additive may not be listed for a proposed use unless the data and information available to FDA establish that the color additive is safe for that use. Our color additive regulations at 21 CFR 70.3(i) define “safe” to mean that there is convincing evidence establishing with reasonable certainty that no harm will result from the intended use of the color additive.

To determine whether a color additive is safe under the general safety clause, the FD&C Act requires FDA to conduct a fair evaluation of the available data and consider, among other relevant factors: (1) probable consumption of, or other relevant exposure from, the additive and of any substance formed in or on food, drugs, devices, or cosmetics because of the use of the additive; (2) cumulative effect, if any, of such additive in the diet of man or animals, taking into account chemically or pharmacologically related substance or substances in such diet; and (3) safety factors recognized by experts as appropriate for the use of animal experimentation data (see section 721(b)(5)(A)(i) through (iii) of the FD&C Act).

As part of our safety evaluation to establish with reasonable certainty that a color additive is not harmful under its intended conditions of use, we consider the additive’s manufacturing and

stability, the projected human dietary exposure to the additive and any impurities resulting from the petitioned use of the additive, the additive's toxicological data, and other relevant information (such as published literature) available to us.

IV. Safety of the Petitioned Use of the Color Additive

A. Dietary Exposure Estimate

The petitioner requested that jagua (genipin-glycine) blue be permitted at levels consistent with GMP and provided the representative maximum use levels for the color additive for each proposed food use. The petitioner used food consumption data from the 2013–2016 National Health and Nutrition Examination Survey (NHANES) to estimate the dietary exposure to jagua (genipin-glycine) blue and to the polymer from the proposed uses. The petitioner stated that the use of the liquid form of jagua (genipin-glycine) blue would be substitutional for the powder form and that, on the polymer basis, the use levels are the same for both forms.

The petitioner estimated the eaters-only (*i.e.*, only those individuals in the population that consume the foods of interest) dietary exposure to jagua (genipin-glycine) blue to be 34 mg/person/day (mg/p/d) at the mean and 78 mg/p/d at the 90th percentile for the U.S. population aged 2 years and older, and 34 mg/p/d at the mean and 76 mg/p/d at the 90th percentile for children aged 2 to 5 years.

The petitioner provided a specification limit of 20 to 40 percent for the polymer in jagua (genipin-glycine) blue powder. We estimated the eaters-only dietary exposure to the polymer to be 14 mg/p/d at the mean and 31 mg/p/d at the 90th percentile for the U.S. population aged 2 years and older, and 14 mg/p/d at the mean and 30 mg/p/d at the 90th percentile for children aged 2 to 5 years (Ref. 2).

B. Toxicological Considerations

To establish that jagua (genipin-glycine) blue is safe for consumption at the proposed levels, the petitioner used aqueous jagua (genipin-glycine) blue containing a specified percentage of the polymer to conduct the following studies: (1) bacterial reverse mutation assay, mouse lymphoma assay, and in vitro mouse micronucleus assay addressing potential mutagenicity and genotoxicity of the polymer; (2) studies conducted in rats to address the potential toxic effects of acute oral exposure to the polymer; (3) 28-day oral toxicity studies in rats and beagle dogs

and 90-day repeated dose oral toxicity studies in rats and beagle dogs to address the potential toxic effects of subchronic oral exposure to the polymer; and (4) 12 months repeated dose toxicity study including in utero exposure in rats to address the potential toxic and/or reproductive effects of chronic oral exposure to the polymer.¹ FDA searched the publicly available literature to identify any new studies that might have examined toxicological effects of jagua (genipin-glycine) blue, or genipin or related compounds; however, no relevant studies were found.

We reviewed the mutagenicity and genotoxicity studies (a bacterial reverse mutation assay, an in vitro mouse lymphoma, and an in vivo mammalian micronucleus induction assay) and concluded that the polymer is not mutagenic or genotoxic under the experimental procedures and conditions applied (Ref. 3).

We reviewed the acute oral toxicity studies and concluded that the oral median lethal dose is greater than 661 mg/kg body weight (bw) of the polymer for the female rats used in the study (Ref. 3).

We reviewed the 28-day studies conducted in rats and in beagle dogs and consider these only as range-finding studies due to the limited number of animals tested per group and other study limitations, and thus not appropriate to establish a no-observed-effect-level (NOEL) or no-observed-adverse-effect-level (NOAEL). We reviewed the 90-day repeated dose oral toxicity study conducted in rats and concur with the study authors that the NOAEL for the rats under the conditions of the study was 330.5 mg/kg bw/d of the polymer for both sexes of the rats. We also reviewed the 90-day repeated dose oral toxicity study in dogs; however, due to the low number of dogs tested per group, and other inadequacies and limitations in the experimental design, we concluded that a NOAEL for the polymer could not be established from this study (Ref. 3).

We reviewed the 12-months repeated dose toxicity study including in utero exposure in rats. The lowest of all the NOAELs for F₀ (parental) generation male rats was 1,127 mg/kg bw/d of polymer² (Ref. 3).

¹ The polymer content of the test material used for toxicological studies varied slightly from batch to batch; therefore, the toxicological evaluation of studies and the resulting safety conclusions were based on the polymer content of the batch used.

² The NOAEL of the polymer (1,127 mg/kg bw/d) was derived from the NOAEL of the test material (3,094.7 mg/kg bw/d) used in the study. The polymer content of this test material was 36.4 percent. The NOAEL of the polymer (1,127 mg/kg

The study chosen to establish an acceptable daily intake (ADI) for the polymer was the 12 months repeated dose toxicity study including in utero exposure to rats over the 90-day study in rats. This study combined the in utero phase and a 1-year chronic toxicity phase of sufficient length and overall complexity to produce information on chronic exposure to the polymer. Based on the NOAEL of the polymer (1,127 mg/kg bw/d) in the 12 months repeated dose toxicity study in rats including in utero exposure, and applying a safety factor of 500 (10 to account for possible increased sensitivity of humans compared to test animals, 10 to account for sensitive individuals in determining safe intake for humans, and 5 for the lack of metabolism and pharmacokinetics and long-term chronic study), the ADI for the polymer is calculated as follows: 1,127 mg/kg bw/d (NOAEL)/500 = 2.3 mg/kg bw/d or 138 mg/p/d (based upon 60 kg bw/p) (Ref. 3).³

The petitioner estimated the highest dietary exposure (37 mg/p/d at 90th percentile based on the polymer) for children aged 6–12 years as well as adolescents aged 13–18 years. The highest estimated dietary exposure value of 37 mg/p/d at the 90th percentile based on the polymer is lower than the ADI value of 138 mg/p/d polymer.

Therefore, we conclude that the proposed use of jagua (genipin-glycine) blue as a color additive at levels consistent with GMP is considered to have reasonable certainty of no harm (Ref. 3).

V. Conclusion

Based on the data and information in the petition and other available relevant information, we conclude that the petitioned use of jagua (genipin-glycine) blue as a color additive in flavored milk; dairy drinks and substitutes; dairy and dairy alternative yogurt; ice cream, frozen dairy and dairy alternative desserts, puddings, gelatins, ices, sorbets; ready-to-eat multicolored cereals, flavored potato chips, tortilla, corn, and other chips; candy and chewing gum; non-alcoholic fruit based/ flavored drinks, nutritional beverages

bw/d) = NOAEL of the test material (3,094.7 mg/kg bw/d) $\times$ 0.364 = 1,127 mg/kg bw/d.

³ The Joint Expert Committee on Food Additives (2020) (Ref. 4) evaluated the 12 months repeated dose toxicity study including in utero exposure in rats with jagua (genipin-glycine) blue and reported that the dietary exposure of jagua (genipin-glycine) blue did not produce any treatment-related effects in this study. Therefore, the committee identified a NOAEL of 3,094.7 mg/kg bw/d (1,127 mg/kg bw/d based on 36.4 percent polymer content) and no effects observed in F₀ parental male rats.

and smoothies; flavored cream cheese-based spreads; and icings, frostings, jams, syrups, and fruit toppings and fillings, provided the amount of jagua (genipin-glycine) blue does not exceed levels consistent with GMP.

We further conclude that this color additive will achieve its intended technical effect and is suitable for the petitioned use. Therefore, we are amending the color additive regulations in part 73 to provide for the safe use of this color additive as set forth in this document. In addition, based on the factors in 21 CFR 71.20(b), we conclude that batch certification of jagua (genipin-glycine) blue is not necessary to protect the public health.

VI. Public Disclosure

In accordance with § 71.15 (21 CFR 71.15), the petition and the documents that we considered and relied upon in reaching our decision to approve the petition will be made available for public disclosure (see **FOR FURTHER INFORMATION CONTACT**). As provided in § 71.15, we will delete from the documents any materials that are not available for public disclosure.

VII. Analysis of Environmental Impact

As stated in the November 20, 2020, **Federal Register** notice of filing, the petitioner claimed that this action is categorically excluded under § 25.32(k) (21 CFR 25.32(k)) because jagua (genipin-glycine) blue would be added directly to food and is intended to remain in the food through ingestion by consumers and is not intended to replace macronutrients in food. We further stated that if FDA determines a categorical exclusion applies, neither an environmental assessment nor an environmental impact statement is required. We did not receive any new information or comments regarding this claim of categorical exclusion. We considered the petitioner's claim of categorical exclusion and determined that this action is categorically excluded under § 25.32(k). Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. Paperwork Reduction Act of 1995

This final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

IX. Section 301(l) of the FD&C Act

Our review of this petition was limited to section 721 of the FD&C Act. This final rule is not a statement regarding compliance with other

sections of the FD&C Act. For example, section 301(l) of the FD&C Act (21 U.S.C. 331(l)) prohibits the introduction or delivery for introduction into interstate commerce of any food that contains a drug approved under section 505 of the FD&C Act (21 U.S.C. 355), a biological product licensed under section 351 of the Public Health Service Act (42 U.S.C. 262), or a drug or biological product for which substantial clinical investigations have been instituted and their existence has been made public, unless one of the exemptions in section 301(l)(1) to (4) of the FD&C Act applies. In our review of this petition, we did not consider whether section 301(l) of the FD&C Act or any of its exemptions apply to food containing this color additive.

Accordingly, this final rule should not be construed to be a statement that a food containing this color additive, if introduced or delivered for introduction into interstate commerce, would not violate section 301(l) of the FD&C Act. Furthermore, this language is included in all color additive final rules that pertain to food and therefore should not be construed to be a statement of the likelihood that section 301(l) of the FD&C Act applies.

X. Objections

This rule is effective as shown in the **DATES** section, except as to any provisions that may be stayed by the filing of proper objections. If you will be adversely affected by one or more provisions of this regulation, you may file with the Dockets Management Staff (see **ADDRESSES**) either electronic or written objections. You must separately number each objection, and within each numbered objection you must specify with particularity the provision(s) to which you object, and the grounds for your objection. Within each numbered objection, you must specifically state whether you are requesting a hearing on the particular provision that you specify in that numbered objection. If you do not request a hearing for any particular objection, you waive the right to a hearing on that objection. If you request a hearing, your objection must include a detailed description and analysis of the specific factual information you intend to present in support of the objection in the event that a hearing is held. If you do not include such a description and analysis for any particular objection, you waive the right to a hearing on the objection.

Any objections received in response to the regulation may be seen in the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket

at <https://www.regulations.gov>. We will publish notice of the objections that we have received or lack thereof in the **Federal Register**.

XI. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they also are available electronically at <https://www.regulations.gov>. References without asterisks are not on public display at <https://www.regulations.gov> because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. *Memorandum from N. Belai, Division of Color Certification and Technology, Office of Cosmetics and Colors, Color Technology Branch to Division of Food Ingredients, Office of Food Additive Safety, Regulatory Review Branch, Team 1, Attention: Shayla West-Barnette, August 16, 2023.
2. *Memorandum from R. Kolanos, Division of Food Ingredients, Chemistry Review Group 2, Office of Food Additive Safety to Division of Food Ingredients, Regulatory Review Group 2, Attention: S. West-Barnette, August 7, 2023.
3. *Memorandum from Abu T. Khan, Office of Food Additive Safety, Division of Food Ingredients, to Mical Honigfort, Regulatory Review Branch, Office of Food Additive Safety, Division of Food Ingredients, August 16, 2023.
4. Food Agriculture Organization of the United Nations (FAO)/World Health Organization (WHO) Joint Expert Committee on Food Additives, Summary and Conclusions of Virtual Meeting, issued on July 10, 2020.

List of Subjects in 21 CFR Part 73

Color additives, Cosmetics, Drugs, Foods, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs, 21 CFR part 73 is amended as follows:

PART 73—LISTING OF COLOR ADDITIVES EXEMPT FROM CERTIFICATION

- 1. The authority citation for part 73 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 342, 343, 348, 351, 352, 355, 361, 362, 371, 379e.

■ 2. Add § 73.225 to subchapter A to read as follows:

§ 73.225 Jagua (genipin-glycine) blue.

(a) *Identity.* (1) The color additive jagua (genipin-glycine) blue is a dark blue powder or liquid prepared from the juice of the unripe fruit of *Genipa americana* by reacting the genipin in the juice with glycine using mild heat. The color additive contains a polymer as the principal coloring component and three dimers as minor coloring components.

(2) Color additive mixtures for food use made with jagua (genipin-glycine) blue may contain only those diluents that are suitable and are listed in this subpart as safe for use in color additive mixtures for coloring foods.

(b) *Specifications.* Jagua (genipin-glycine) blue must conform to the following specifications and must be free from impurities, other than those named, to the extent that such other impurities may be avoided by good manufacturing practice:

(1) Arsenic, not more than 1 milligram/kilogram (mg/kg) (1 part per million (ppm)).

(2) Cadmium, not more than 1 mg/kg (1 ppm).

(3) Lead, not more than 1 mg/kg (1 ppm).

(4) Mercury, not more than 1 mg/kg (1 ppm).

(5) Genipin, not more than 20 mg/kg (20 ppm).

(c) *Uses and restrictions.* Jagua (genipin-glycine) blue may be safely used for coloring flavored milk; dairy drinks and substitutes; dairy and dairy alternative yogurt; ice cream, frozen dairy and dairy alternative desserts, puddings, gelatins, ices, sorbets; ready-to-eat multicolored cereals; flavored potato chips, tortilla, corn, and other chips; candy and chewing gum; non-alcoholic fruit based/flavored drinks, nutritional beverages and smoothies; flavored cream cheese-based spreads; and icings, frostings, jams, syrups, and fruit toppings and fillings at levels consistent with good manufacturing practice, except that it may not be used for coloring foods for which standards of identity have been issued under section 401 of the Federal Food, Drug, and Cosmetic Act, unless the use of added color is authorized by such standards.

(d) *Labeling requirements.* The label of the color additive and any mixtures prepared therefrom intended solely or in part for coloring purposes must conform to the requirements of § 70.25 of this chapter.

(e) *Exemption from certification.* Certification of this color additive is not necessary for the protection of the

public health and therefore batches thereof are exempt from the certification requirements of section 721(c) of the Federal Food, Drug, and Cosmetic Act.

Dated: October 30, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–24352 Filed 11–2–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 582

Publication of Nicaragua Sanctions Regulations Web General Licenses 1, 2, and 2A

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of Web General Licenses.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing three general licenses (GLs) issued pursuant to the Nicaragua Sanctions Regulations: GLs 1, 2, and 2A, each of which was previously made available on OFAC's website.

DATES: GLs 1 and 2 were issued on March 5, 2020. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

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

SUPPLEMENTARY INFORMATION:

Electronic Availability

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

Background

On March 5, 2020, OFAC issued GLs 1 and 2 to authorize certain transactions otherwise prohibited by the Nicaragua Sanctions Regulations, 31 CFR part 582 (NSR). On March 25, 2020, OFAC issued GL 2A, which superseded GL 2, pursuant to the NSR and the Nicaragua Investment Conditionality Act of 2018 (50 U.S.C. 1701 note) (NICA Act), previously known as the “Nicaragua Human Rights and Anticorruption Act of 2018.” GL 2A expired on May 6, 2020. Also on March 25, 2020, OFAC issued GL 1A pursuant to the NSR and the NICA Act; GL 1A superseded GL 1

and was later incorporated into the NSR (85 FR 43436). Each GL was made available on OFAC's website (<https://ofac.treasury.gov>) when it was issued. The text of GLs 1, 2, and 2A is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Nicaragua Sanctions Regulations

31 CFR Part 582

GENERAL LICENSE NO. 1

Official Business of the United States Government

(a) Except as provided in paragraph (b) of this general license, all transactions that are for the conduct of the official business of the United States Government by employees, grantees, or contractors thereof are authorized.

(b) This general license does not authorize any transaction that is prohibited by any part of 31 CFR chapter V other than part 582.

Andrea Gacki,

Director, Office of Foreign Assets Control

Dated: March 5, 2020.

OFFICE OF FOREIGN ASSETS CONTROL

Nicaragua Sanctions Regulations

31 CFR Part 582

GENERAL LICENSE NO. 2

Authorizing the Wind Down of Transactions Involving the Nicaraguan National Police

(a) Except as provided in paragraph (b) of this general license, all transactions and activities prohibited by the Nicaragua Sanctions Regulations, 31 CFR part 582 (the NSR), that are ordinarily incident and necessary to the wind down of transactions involving the Nicaraguan National Police (NNP), or any entity in which the NNP owns, directly or indirectly, a 50 percent or greater interest, including the processing of salary payments from the NNP, or any entity in which the NNP owns, directly or indirectly, a 50 percent or greater interest, to its employees, are authorized through 12:01 a.m. eastern daylight time, May 6, 2020.

(b) This general license does not authorize:

(1) Any debit to an account of the NNP, or any entity in which the NNP owns, directly or indirectly, a 50 percent or greater interest, on the books of a U.S. financial institution; or

(2) Any transactions or activities prohibited by any part of 31 CFR chapter V other than the NSR, or any transactions or activities with any blocked person other than the blocked

persons identified in paragraph (a) of this general license.

Andrea Gacki,
Director, Office of Foreign Assets Control
Dated: March 5, 2020.

OFFICE OF FOREIGN ASSETS CONTROL

Nicaragua Sanctions Regulations

31 CFR Part 582

Nicaragua Human Rights and Anticorruption Act of 2018

50 U.S.C. 1701 Note

GENERAL LICENSE NO. 2A

Authorizing the Wind Down of Transactions Involving the Nicaraguan National Police

(a) Except as provided in paragraph (b) of this general license, all transactions and activities prohibited by the Nicaragua Sanctions Regulations, 31 CFR part 582 (the NSR) or the Nicaragua Human Rights and Anticorruption Act of 2018 (NHRAA), that are ordinarily incident and necessary to the wind down of transactions involving the Nicaraguan National Police (NNP), or any entity in which the NNP owns, directly or indirectly, a 50 percent or greater interest, including the processing of salary payments from the NNP, or any entity in which the NNP owns, directly or indirectly, a 50 percent or greater interest, to its employees, are authorized through 12:01 a.m. eastern daylight time, May 6, 2020.

(b) This general license does not authorize:

(1) Any debit to an account of the NNP, or any entity in which the NNP owns, directly or indirectly, a 50 percent or greater interest, on the books of a U.S. financial institution; or

(2) Any transactions or activities prohibited by any part of 31 CFR chapter V other than the NSR, or any transactions or activities with any blocked person other than the blocked persons identified in paragraph (a) of this general license.

(c) Effective March 25, 2020, General License No. 2, dated March 5, 2020, is replaced and superseded in its entirety by this General License No. 2A.

Andrea Gacki,
Director, Office of Foreign Assets Control.
Dated: March 25, 2020.

Bradley T. Smith,
Director, Office of Foreign Assets Control.
[FR Doc. 2023-24332 Filed 11-2-23; 8:45 am]
BILLING CODE 4810-AL-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0366]

RIN 1625-AA00

Safety Zone; Hurricanes, Tropical Storms, and Other Storms With High Winds; Captain of the Port Zone Sector Virginia

AGENCY: Coast Guard, Department of
Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a safety zone for the navigable waters of the Sector Virginia Captain of the Port (COTP) Zone, to be enforced in the event of hurricanes, tropical storms, and other storms with high winds. This action is necessary to ensure the safety of the waters of the Sector Virginia COTP Zone. This rule establishes actions to be completed by industry and vessels within the COTP Zone before hurricanes, tropical storms, and other storms with high winds threatening the State of Virginia make landfall, and afterwards as well.

DATES: This rule is effective December 4, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2023–0366 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email LCDR Ashley Holm, Chief Waterways Management Division U.S. Coast Guard; 757–617–7986, Ashley.E.Holm@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

Virginia has the potential to be affected by hurricanes and tropical storms on a yearly basis, especially between the months of June and November. Additionally, severe storms generating high winds and rough seas are also common in the winter months.

In response, on September 14, 2023, the Coast Guard published a notice of proposed rulemaking (NPRM) titled “Safety Zone; Hurricanes, Tropical Storms, and Other Storms with High Winds; Captain of the Port Zone Virginia” (88 FR 63042). There, we stated why we issued the NPRM and invited comments on our proposed regulatory action related to this safety zone. During the comment period that ended October 16, 2023, we received one comment.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Virginia (COTP) has determined that potential hazards associated with hurricanes, tropical storms, and other storms pose a safety concern to the maritime community. The purpose of this rule is to ensure safety of vessels and the navigable waters in the safety zone before, during, and after a hurricane, tropical storm, or other storm.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received one comment that concurred with the proposed rulemaking on our NPRM published September 14, 2023. The comment also addressed the need for Coast Guard Sector Virginia to maintain and update the Port Heavy Weather Plan. The comment is referring to the Maritime Severe Weather Contingency Plan, which advises the maritime community of the sequence and timing of COTP decisions and actions made pursuant to 33 CFR parts 160 and 165 that may be taken when there is the threat of a hurricane. The Plan also recommends actions to be taken to minimize storm related deaths, injury, damage, and threats to the environment. Coast Guard Sector Virginia will review and update the Maritime Severe Weather Contingency Plan as necessary to reflect the promulgation of this rule, and to provide guidance on advisable steps to take in addition to those required by the rule. Aside from adding the word “Sector” to the title of the regulation to conform to 33 CFR 3.25–10, there are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a safety zone on the navigable waters of the Sector Virginia COTP Zone during hurricanes, tropical storms, and other storms with high winds. This safety zone establishes actions to be completed by local industry and vessels in the COTP zone prior to landfall of hurricanes, tropical storms, and other storms with high

winds threatening Virginia and in the aftermath of landfall. Port Conditions (WHISKEY, X-RAY, YANKEE, ZULU, and RECOVERY) are standardized terms for states of operation instituted by the COTP which are clearly communicated to port facilities, vessels, and members of the Marine Transportation System (MTS).

Ports and waterfront facilities are encouraged to take action when specific Port Conditions are declared. Under Port Condition WHISKEY, ports and waterfront facilities should remove all debris and secure potential flying hazards. Upon a declaration that Port Condition X-RAY is in effect, port facilities should ensure that potential flying debris and hazardous materials are removed, and that loose cargo and cargo equipment is secured. Upon a declaration of Port Condition YANKEE, terminal operators should terminate all cargo operations not associated with storm preparations. All facilities should continue to operate in accordance with approved Facility Security Plans (as defined at 33 CFR 101.105, and as further described in 33 CFR 105.400 to 105.415), and to comply with all applicable requirements of the Maritime Transportation Security Act of 2002 (46 U.S.C. chapter 701).

The COTP retains flexibility in controlling and reconstituting vessel traffic during periods of heavy weather, and it will allow for the expedited resumption of the MTS following such events. The safety zone consists of all waters of the territorial seas within the Sector Virginia COTP Zone, as defined in 33 CFR 3.25–10. Portions of the safety zone might be activated at different times, as conditions dictated. Notice of Port Conditions and their requirements will be given via Marine Safety Information Bulletins and Broadcast Notice to Mariners. The regulatory text appears at the end of this document.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094

(Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time of day of the regulated area. This regulatory action determination is based on the necessity to protect life, port infrastructure, and the environment during hurricanes, tropical storms, and other storms with high winds. The scope of the regulation is narrow and will only apply when a hurricane, tropical storm, or other storm with high winds impacts the navigable waters of the Virginia COTP Zone. These events are infrequent and of short duration. Regulatory restrictions will be lifted as soon as practicable.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard 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 will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s

responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

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

individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that prohibits entry in certain waters of the Sector Virginia COTP Zone for the duration needed to ensure safe transit of vessels and industry before and after a hurricane, tropical storm, or other storm with high winds. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023-01-001-01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

- 2. Add § 165.520 to read as follows:

§ 165.520 Safety Zone; Hurricanes, Tropical Storms, and other Storms with High Winds; Captain of the Port Zone Sector Virginia.

(a) *Regulated areas.* All navigable waters, as defined in 33 CFR 2.36, within the Captain of the Port Zone Sector Virginia, as described in 33 CFR 3.25-10, or some portion of those waters, during specified conditions. Port conditions and safety zone activation may vary for different portions of the regulated area at different times, based on storm conditions and its projected track.

(b) *Definitions.*

Captain of the Port means Commander, Coast Guard Sector Virginia.

Representative means any Coast Guard commissioned, warrant, or petty officer or civilian employee who has been authorized to act on the behalf of the Captain of the Port.

Port Condition WHISKEY means a condition set by the COTP when National Weather Service (NWS) weather advisories indicate sustained gale force winds (39-54 mph/34-47

knots) are predicted to reach the COTP zone within 72 hours.

Port Condition X-RAY means a condition set by the COTP when NWS weather advisories indicate sustained gale force winds (39-54 mph/34-47 knots) are predicted to reach the COTP zone within 48 hours.

Port Condition YANKEE means a condition set by the COTP when NWS weather advisories indicate that sustained gale force winds (39-54 mph/34-47 knots) are predicted to reach the COTP zone within 24 hours.

Port Condition ZULU means a condition set by the COTP when NWS weather advisories indicate that sustained gale force winds (39-54 mph/34-47 knots) are predicted to reach the COTP zone within 12 hours.

Port Condition RECOVERY means a condition set by the COTP when NWS weather advisories indicate that sustained gale force winds (39-54 mph/34-47 knots) are no longer predicted for the regulated area. This port condition remains in effect until the regulated areas are deemed safe and are reopened to normal operations.

(c) *Regulations.* (1) Port Condition WHISKEY. All vessels must exercise due diligence in preparation for potential storm impacts. All oceangoing tank barges and their supporting tugs and all self-propelled oceangoing vessels over 500 gross tons (GT) must make plans to depart no later than setting of Port Condition Yankee unless authorized by the COTP. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition WHISKEY, based on the trajectory and forecasted storm conditions.

(2) Port Condition X-RAY. All vessels must ensure that potential flying debris and hazardous materials are removed, and that loose cargo and cargo equipment is secured. Vessels at facilities must carefully monitor their moorings and cargo operations. Additional anchor(s) must be made ready to let go, and preparations must be made to have a continuous anchor watch during the storm. Engine(s) must be made immediately available for maneuvering. Also, vessels must maintain a continuous listening watch on VHF Channel 16. All oceangoing tank barges and their supporting tugs and all self-propelled oceangoing vessels over 500 GT must prepare to depart the port and anchorages within the affected regulated area. These vessels shall depart immediately upon the setting of Port Condition YANKEE. During this condition, slow-moving vessels may be ordered to depart to ensure safe avoidance of the incoming

storm. Vessels that are unable to depart the port must contact the COTP to receive permission to remain in port. Vessels with COTP's permission to remain in port must implement their pre-approved mooring arrangement. The COTP may require additional precautions to ensure the safety of the ports and waterways. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition X-RAY based on the trajectory and forecasted storm conditions.

(3) Port Condition YANKEE. Affected ports are closed to all inbound vessel traffic. All oceangoing tank barges and their supporting tugs and all self-propelled oceangoing vessels over 500 GT must have departed the regulated area. The COTP may require additional precautions to ensure the safety of the ports and waterways. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition YANKEE based on the trajectory and forecasted storm conditions.

(4) Port Condition ZULU. Cargo operations are suspended, except final preparations that are expressly permitted by the COTP as necessary to ensure the safety of the ports and facilities. Other than vessels designated by the COTP, no vessels may enter, transit, move, or anchor within the regulated area. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition ZULU based on the trajectory and forecasted storm conditions.

(5) Port Condition RECOVERY. Designated areas are closed to all vessels. Based on assessments of channel conditions, navigability concerns, and hazards to navigation, the COTP may permit vessel movements with restrictions. Restrictions may include, but are not limited to, preventing, or delaying vessel movements, imposing draft, speed, size, horsepower or daylight restrictions, or directing the use of specific routes. Vessels permitted to transit the regulated area shall comply with the lawful orders or directions given by the COTP or representative.

(6) Regulated Area Notice. The Coast Guard will provide notice of where, within the regulated area, a declared Port Condition is to be in effect via Broadcast Notice to Mariners, Marine Safety Information Bulletins, or by on-scene representatives.

(7) Exception. This regulation does not apply to authorized law enforcement agencies operating within the regulated area.

Dated: October 27, 2023.

J.A. Stockwell,

Captain, U.S. Coast Guard, Captain of the Port, Sector Virginia.

[FR Doc. 2023–24304 Filed 11–2–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AR44

Presumptive Service Connection for Rare Respiratory Cancers Due to Exposure to Fine Particulate Matter

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This rulemaking adopts as final, without changes, an interim final rule amending the Department of Veterans Affairs (VA) adjudication regulations to establish presumptive service connection for nine rare respiratory cancers in association with presumed exposure to fine particulate matter. These presumptions apply to Veterans with a qualifying period of service, *i.e.*, who served on active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War (hereinafter Gulf War), from August 2, 1990, onward, as well as in Afghanistan, Syria, Djibouti, or Uzbekistan, on or after September 19, 2001, during the Gulf War. This rulemaking implements a decision by the Secretary of Veterans Affairs that determined there is sufficient evidence to support these cancers as presumptive based on exposure to fine particulate matter during service in the Southwest Asia theater of operations, Afghanistan, Syria, Djibouti, or Uzbekistan during certain periods and the subsequent development of the following rare respiratory cancers: squamous cell carcinoma (SCC) of the larynx, SCC of the trachea, adenocarcinoma of the trachea, salivary gland-type tumors of the trachea, adenosquamous carcinoma of the lung, large cell carcinoma of the lung, salivary gland-type tumors of the lung, sarcomatoid carcinoma of the lung, and typical and atypical carcinoid of the lung. The intended effect of this rulemaking is to ease the evidentiary burden of this population of Veterans who file claims with VA for these nine rare respiratory cancers.

DATES:

Effective date: This rule is effective November 3, 2023.

Applicability date: The provisions of this final rule shall apply to all

applications for service connection for squamous cell carcinoma (SCC) of the larynx, SCC of the trachea, adenocarcinoma of the trachea, salivary gland-type tumors of the trachea, adenosquamous carcinoma of the lung, large cell carcinoma of the lung, salivary gland-type tumors of the lung, sarcomatoid carcinoma of the lung, and typical and atypical carcinoid of the lung based on service in the Southwest Asia theater of operations during the Gulf War, from August 2, 1990, onward, as well as Afghanistan, Syria, Djibouti, or Uzbekistan, on or after September 19, 2001, during the Gulf War, received by VA on or after April 26, 2022, or that were pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on April 26, 2022.

FOR FURTHER INFORMATION CONTACT:

Bryant Coleman, Regulations Analyst; Robert Parks, Chief, Regulations Staff (211), Compensation Service (21C), 810 Vermont Avenue NW, Washington, DC, (202) 461–9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: On April 26, 2022, VA published an interim final rule at 87 FR 24421, to amend its adjudication regulations to establish presumptive service connection for nine rare respiratory cancers in association with presumed exposure to fine particulate matter. These presumptions apply to Veterans with a qualifying period of service, *i.e.*, who served on active military, naval, or air service in the Southwest Asia theater of operations during the Gulf War, from August 2, 1990, onward, as well as in Afghanistan, Syria, Djibouti, or Uzbekistan, on or after September 19, 2001, during the Gulf War. The 60-day comment period ended on June 27, 2022.

VA received nine comments from interested individuals and organizations. The comments are discussed below under the appropriate headings. VA made no changes based on comments received. However, we note that changes made to § 3.320 in the final rule for RIN 2900–AR25 are carried forward here and continue to remain in effect. Based on the rationale set forth in the interim final rule and in this final rule, VA adopts the provisions of the interim final rule as a final rule without change.

Confusion Regarding Qualifying Service Dates

VA received three comments that expressed confusion regarding whether service in the Southwest Asia theater of operations during the first Gulf War is

included under the definition of the phrase qualifying period of service. VA agrees with these comments that the rulemaking could have caused some confusion, and acknowledges that additional clarity is needed. So, to clarify, as currently written, the rule applies to those who served in Desert Shield or Desert Storm as part of the Persian Gulf War from August 2, 1990 to February 28, 1991. We note that the definition of qualifying period of service contained in paragraph (a)(5)(i) refers to § 3.2(i), which defines “Persian Gulf War” as: “August 2, 1990, through date to be prescribed by Presidential proclamation or law.” However, VA makes no changes based on these comments because this issue was addressed in the final rule for RIN 2900–AR25, which changes have been carried forward here and continue to remain in effect.

General Comments

One commenter expressed general support for the rulemaking. VA thanks the commenter for their view. VA makes no changes based on this comment.

VA received two comments that addressed time frames and locations that qualify for the presumption of exposure contained in § 3.320. In particular, one commenter stated that he was on an aircraft carrier in the theater of Southwest Asia in July of 1987. He went on to state that “[a]ll Military Service-members should qualify for all exposures during active duty in this theater of operations.” Another commenter asked “is this related to burn pits? If so, why are you just making this available to only veterans who served for that time period?” The commenter went on to state that they served in Beirut, Lebanon in 1982–1983 and were exposed to burning human waste during that time. While VA sympathizes with these commenters, VA’s rulemaking establishes presumptive service connection for nine rare respiratory cancers in association with presumed exposure to fine particulate matter; it does not address the locations or periods of service that qualify for the presumption of exposure to fine particulate matter. Thus, these comments are outside the scope of the present rulemaking.

Additionally, we note that the Secretary has made the decision to limit these presumptive conditions to a timeframe and locations during which VA has evidence of relevant levels of fine particulate matter in the air. When VA created the presumption of exposure to fine particulate matter in 38 CFR 3.320, it was based on scientific and medical studies that focused on the

respiratory effects of fine particulate matter for Veterans who served in the Southwest Asia theater of operations, Afghanistan, Syria, Djibouti, and Uzbekistan during the Gulf War. Veterans began reporting a variety of respiratory health issues during and after the initial Gulf War conflict, and as a result, Congress mandated that VA study the health outcomes of veterans deployed to the Southwest Asia theater of operations. VA then requested the National Academies of Sciences, Engineering, and Medicine (NASEM) to study the evidence regarding respiratory health outcomes in veterans of the Southwest Asia conflicts. The results of that study formed the basis for this rulemaking. As service prior to the Gulf War was not considered in these studies, it cannot be included as part of the qualifying timeframe under 38 CFR 3.320.

While this rulemaking is based on current medical and scientific evidence related to the respiratory health effects of fine particulate matter on Veterans who served during the Gulf War, VA will continue to review new scientific evidence as it develops relating to other exposures and to all health effects resulting from exposure to fine particulate matter. This rulemaking does not limit the future establishment of presumptive service connection for conditions related to respiratory or other body systems, or the establishment of presumptions of exposure for service in other locations or during other time frames. Additionally, VA encourages all Veterans who believe that they are entitled to VA compensation to file a claim with their local VA regional office. VA makes no change to the final rule based on the comment.

One commenter reported that they had filed 3 intent letters and had not received a response. The commenter went on to report that they had been turned down for compensation in the past. VA's rulemaking establishes presumptive service connection for nine rare respiratory cancers in association with presumed exposure to fine particulate matter. This comment, which relates to an individual case, is outside the scope of the present rulemaking. However, VA encourages all Veterans who believe that they are entitled to VA compensation to file a claim with their local VA regional office. VA makes no change to the final rule based on the comment.

One commenter stated that her husband served in the US Army and while serving he died of squamous cell carcinoma of the larynx. While VA sympathizes with this commenter, VA's rulemaking establishes presumptive

service connection for nine rare respiratory cancers in association with presumed exposure to fine particulate matter. This comment refers to a specific case, which is outside the scope of the present rulemaking. However, VA encourages all Veterans and dependents who believe that they are entitled to VA compensation to file a claim with their local VA regional office. VA makes no change to the final rule based on the comment.

Another commenter objected to the rulemaking because it did not cover all diseases and disabilities caused by open air burn pits or the chemical contamination in Gulf War I. Additionally, the commenter stated that the "interim final rule does not clearly define the provisions attaching to Gulf War I. Including coverage dates would eliminate any possible confusion." As noted above, while this rulemaking is based on current medical and scientific evidence related to the respiratory health effects of fine particulate matter on Veterans who served during the Gulf War, VA will continue to review new scientific evidence as it develops relating to other exposures and to all health effects resulting from exposure to fine particulate matter. This rulemaking does not limit the future establishment of presumptive service connection for conditions related to respiratory or other body systems, or the establishment of presumptions of exposure for service in other locations or during other time frames. Also, the potential confusion regarding service during the first Gulf War was addressed in the final rule for RIN 2900-AR25, which changes have been carried forward here and continue to remain in effect. VA makes no change to the final rule based on the comment.

Further, we again note that changes made to § 3.320 in the final rule for RIN 2900-AR25 are carried forward here and continue to remain in effect. Additionally, provisions of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, Public Law 117-168, relevant to this regulation will be the subject of separate and future rulemaking.

Administrative Procedure Act

This document affirms the amendment made by the interim final rule that is already in effect. The Secretary concluded that, pursuant to 5 U.S.C. 553(b)(B) and (d)(3), there was good cause to publish this rule without prior opportunity for public comment and good cause to publish this rule with an immediate effective date. Delay in the implementation of this rule would have been impracticable, unnecessary,

and contrary to public interest, particularly to Veterans.

Executive Orders 12866, 13563, and 14094

Executive Order 12866 (Regulatory Planning and Review) directs 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. Executive Order 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). The certification is based on the fact that no small entities or businesses determine service connection or the rating criteria, or assign evaluations for disability claims. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of sections 603 and 604 do not apply.

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 final rule will have no

such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act (PRA)

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

Assistance Listing

The Assistance Listing numbers and titles for this rule are 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.105, Pension to Veterans, Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, and Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on August 24, 2023, 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.

PART 3—ADJUDICATION

■ The interim final rule amending 38 CFR part 3 which was published at 87 FR 24421 on April 26, 2022, is adopted as final without change.

[FR Doc. 2023–24195 Filed 11–2–23; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2022–0391; FRL–11368–02–R4]

Air Plan Approval; North Carolina; Revisions to Miscellaneous Particulate Matter Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of North Carolina through the North Carolina Division of Air Quality (NCDAQ) via a letter dated April 13, 2021. The SIP revision seeks to modify the State's emission control standards by amending several air quality rules and removing a redundant rule for electric utility boilers. EPA is approving these changes pursuant to the Clean Air Act (CAA or Act).

DATES: This rule is effective December 4, 2023.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2022–0391. All documents in the docket are listed on the www.regulations.gov website. Although listed in the index, some information may not be publicly available, *i.e.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Pearlene Williams-Miles, Multi-Air Pollutant Coordination Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, GA 30303–8960. The telephone number

is (404) 562–9144. Ms. Williams-Miles can also be reached via electronic mail at WilliamsMiles.Pearlene@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Overview

EPA is approving a SIP revision submitted by North Carolina on April 14, 2021,¹ seeking to amend various air quality rules and to remove one rule from the North Carolina SIP.² Specifically, the SIP revision addresses State regulations amended in 15A North Carolina Administrative Code (NCAC) Subchapter 02D. The submission includes changes to multiple rules in Sections .0400 and .0500 of Subchapter 02D and the removal of Rule 02D .0536, *Particulate Emissions from Electric Utility Boilers*.³ To support the removal of Rule 02D .0536 from the SIP, the submission includes technical support materials to demonstrate that the removal of the rule would not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP) or any other applicable requirement of the CAA.⁴

Through a notice of proposed rulemaking (NPRM) published on September 1, 2023 (88 FR 60424), EPA proposed to approve the April 13, 2021, submission. The details of North Carolina's submission, which amends various air quality rules and removes Rule 02D .0536 from North Carolina's SIP, as well as EPA's rationale for approving the changes, are described in the September 1, 2023, NPRM. Comments on the September 1, 2023, NPRM were due on or before October 2, 2023. No comments were received on the September 1, 2023, NPRM, adverse or otherwise.

II. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, and as discussed in Section I of this preamble, EPA is finalizing the incorporation by reference of the following air quality rules under 15A

¹ EPA notes that the April 14, 2021, submission was received under a cover letter dated April 13, 2021. For clarity, throughout this document EPA will refer to the April 14, 2021, submission by its cover letter date of April 13, 2021.

² On April 13, 2021, North Carolina provided multiple SIP revisions related to other North Carolina SIP-approved rules. These SIP revisions are not addressed in this document. EPA will act or has acted on those SIP revisions in separate rulemakings.

³ EPA will not act on Rule 02D .0503, *Particulates from Fuel Burning Indirect Heat Exchangers*, since this section was withdrawn from EPA consideration in a letter dated January 17, 2023, which is in the docket of this action.

⁴ See 42 U.S.C. 7410(l).

NCAC Subchapter 02D, Air Pollution Control Requirements, state effective on November 1, 2020: 02D .0403, *Total Suspended Particulates*; 02D .0501, *Compliance with Emission Control Standards*; 02D .0504, *Particulates from Wood Burning Indirect Heat Exchangers*; 02D .0506, *Particulates from Hot Mix Asphalt Plants*;⁵ 02D .0507, *Particulates from Chemical Fertilizer Manufacturing Plants*; 02D .0508, *Particulates from Pulp and Paper Mills*; 02D .0509, *Particulates from Mica and Feldspar Processing Plants*; 02D .0510, *Particulates from Sand, Gravel or Crushed Stone Processes*; 02D .0511, *Particulates from Lightweight Aggregate Processes*; 02D .0513, *Particulates from Portland Cement Plants*; 02D .0514, *Particulates from Ferrous Jobbing Foundries*; and 02D .0515, *Particulates from Miscellaneous Industrial Processes*. Also in this document, EPA is finalizing the removal of Rule 02D .0536, *Particulate Emissions from Electric Utility Boilers*, from the North Carolina SIP, which is incorporated by reference in accordance with the requirements of 1 CFR part 51. EPA has made, and will continue to make, the SIP generally available at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, the revised materials as stated above, have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.⁶

⁵ As noted in the NPRM, EPA is not acting on the removal of the term "elsewhere" in Rule 02D .0506(e) because North Carolina withdrew the removal of this word from EPA consideration in a letter dated January 17, 2023, which is in the docket for this action. The term "elsewhere" is included in the August 1, 2004, state effective version of Rule 02D .0506(e). The April 13, 2021, SIP submittal includes the August 1, 2004, version of the Rule with redline/strikeout changes showing the differences between the August 1, 2004, version of the rule and the November 1, 2020, version of the Rule. Therefore, to implement the State's April 13, 2021, SIP submittal, as amended by the withdrawal letter, EPA is incorporating by reference the version of the Rule state effective on November 1, 2020, except for the phrase "not covered" in paragraph .0506(e), and is incorporating by reference the phrase "not covered elsewhere" from the version of .0506(e) state effective on August 1, 2004. The resulting regulatory text in paragraph .0506(e) in the SIP reads, "Fugitive emissions from sources at a hot mix asphalt plant not covered elsewhere by this Rule shall not exceed 20 percent opacity averaged over six minutes."

⁶ See 62 FR 27968 (May 22, 1997).

III. Final Action

EPA is approving the aforementioned changes to the North Carolina SIP. Specifically, EPA is finalizing the approval of the April 13, 2021, SIP revision which amends various air quality rules under 15A NCAC 02D, Air Pollution Control Requirements, and removes Rule 02D .0536 from North Carolina's SIP.

IV. 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. See 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 CAA. This action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

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, February 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."

NCDQA did not evaluate EJ 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. 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 EJ for people of color, low-income populations, and Indigenous peoples.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 2, 2024. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition

for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 24, 2023.

Jeananne Gettle,

Acting Regional Administrator, Region 4.

For the reasons stated in the preamble, EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart II—North Carolina

■ 2. In § 52.1770(c), amend “Table (1) EPA-Approved North Carolina Regulations” by:

■ a. Under the heading “Section .0400 Ambient Air Quality Standards”, revising the entry for “Rule .0403”;

■ b. Under the heading “Section .0500 Emission Control Standards”, revising the entries for “Rule .0501”, “Rule .0504”, “Rule .0506”, “Rule .0507”, “Rule .0508”, “Rule .0509”, “Rule .0510”, “Rule .0511”, “Rule .0513”, “Rule .0514”, and “Rule .0515”; and removing the entry for “Rule .0536”.

The revisions read as follows:

§ 52.1770 Identification of plan.

* * * * *

(c) * * *

(1) EPA-APPROVED NORTH CAROLINA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
Section .0400 Ambient Air Quality Standards				
Rule .0403	Total Suspended Particulates ...	11/1/2020	11/3/2023, [Insert citation of publication].	
*	*	*	*	*
Section .0500 Emission Control Standards				
Rule .0501	Compliance with Emission Control Standards.	11/1/2020	11/3/2023, [Insert citation of publication].	
Rule .0504	Particulates from Wood Burning Indirect Heat Exchangers.	11/1/2020	11/3/2023, [Insert citation of publication].	
Rule .0506	Particulates from Hot Mix Asphalt Plants.	11/1/2020	11/3/2023, [Insert citation of publication].	Except that, in paragraph (e), the phrase “not covered” is replaced with the phrase “not covered elsewhere” from paragraph (e), with a state effective date of August 1, 2004.
Rule .0507	Particulates from Chemical Fertilizer Manufacturing Plants.	11/1/2020	11/3/2023, [Insert citation of publication].	
Rule .0508	Particulates from Pulp and Paper Mills.	11/1/2020	11/3/2023, [Insert citation of publication].	
Rule .0509	Particulates from Mica or Feldspar Processing Plants.	11/1/2020	11/3/2023, [Insert citation of publication].	
Rule .0510	Particulates from Sand, Gravel, or Crushed Stone Operations.	11/1/2020	11/3/2023, [Insert citation of publication].	
Rule .0511	Particulates from Lightweight Aggregate Processes.	11/1/2020	11/3/2023, [Insert citation of publication].	
Rule .0513	Particulates from Portland Cement Plants.	11/1/2020	11/3/2023, [Insert citation of publication].	
Rule .0514	Particulates from Ferrous Jobbing Foundries.	11/1/2020	11/3/2023, [Insert citation of publication].	
Rule .0515	Particulates from Miscellaneous Industrial Processes.	11/1/2020	11/3/2023, [Insert citation of publication].	

(1) EPA-APPROVED NORTH CAROLINA REGULATIONS—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
* * * * * [FR Doc. 2023–24033 Filed 11–2–23; 8:45 am] BILLING CODE 6560–50–P				
ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 180 [EPA–HQ–OPP–2023–0507; FRL–11517–01–OCSPP] Extension of Tolerances for Emergency Exemptions; Multiple Chemicals AGENCY: Environmental Protection Agency (EPA). ACTION: Final rule.				
SUMMARY: This regulation extends time-limited tolerances for residues of clothianidin, kasugamycin, methyl bromide, and triclopyr in or on various commodities as identified in this document. These actions are in response to EPA’s granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of these pesticides. In addition, the Federal Food, Drug, and Cosmetic Act (FFDCA) requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under FIFRA. Additionally, EPA is removing time-limited tolerances for residues of flupyradifurone in or on sugar cane and sweet sorghum commodities. DATES: This regulation is effective November 3, 2023. Objections and requests for hearings must be received on or before January 2, 2024 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the SUPPLEMENTARY INFORMATION). ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2023–0507, is available at https://www.regulations.gov or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and the OPP Docket is (202) 566–1744. Please review the visitor instructions and additional information about the docket available at https://www.epa.gov/dockets. FOR FURTHER INFORMATION CONTACT: Charles Smith, Director, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: RDfRNotices@epa.gov. SUPPLEMENTARY INFORMATION: I. General Information <i>A. Does this action apply to me?</i> You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include: • Crop production (NAICS code 111). • Animal production (NAICS code 112). • Food manufacturing (NAICS code 311). • Pesticide manufacturing (NAICS code 32532). <i>B. How can I get electronic access to other related information?</i> You may access a frequently updated electronic version of 40 CFR part 180 through the Office of the Federal Register’s e-CFR site at https://www.ecfr.gov/current/title-40. <i>C. How can I file an objection or hearing request?</i> Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2023–0507 in the subject line on the first page of your submission. All requests must be in writing and must be received by the Hearing Clerk on or before January 2, 2024. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b). In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2023–0507, by one of the following methods: • <i>Federal eRulemaking Portal:</i> https://www.regulations.gov. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute. • <i>Mail:</i> OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. • <i>Hand Delivery:</i> To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at https://www.epa.gov/dockets/where-send-comments-epa-dockets. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at https://www.epa.gov/dockets. II. Background and Statutory Findings EPA previously published final rules establishing time-limited tolerances in the Federal Register for the chemicals and commodities listed below under FFDCA section 408, 21 U.S.C. 346a. EPA established the tolerances because FFDCA section 408(l)(6) requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under FIFRA section 18. Such tolerances can be				

established without providing notice or period for public comment.

EPA received requests to extend emergency uses of clothianidin, kasugamycin, methyl bromide, and triclopyr on various commodities for this year's growing season. After having reviewed the submissions, EPA concurs that emergency conditions continue to exist. EPA assessed the potential risks presented by residues of each chemical in or on the pertinent commodities. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2) and decided that the necessary tolerances under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. The data and other relevant material have been evaluated and were discussed in the final rules originally establishing the time-limited tolerances. Based on those data and information considered, the Agency reaffirms that extensions of the time-limited tolerances will continue to meet the requirements of FFDCA section 408(l)(6). Therefore, the time-limited tolerances are extended until December 31, 2026. Although these tolerances will expire and are revoked on December 31, 2026, under FFDCA section 408(l)(5), residues of the pesticides not in excess of the amounts specified in the tolerances remaining in or on the commodities after that date will not be unlawful, provided the residues are present as a result of an application or use of a pesticide at a time and manner that was lawful under FIFRA, the tolerance was in place at the time of the application, and the residues do not exceed the level that was authorized by the tolerance. EPA will take action to revoke the tolerances earlier if any experience with, scientific data on, or other relevant information on any of these pesticides indicate that the residues are not safe. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations (CFR).

Time-limited tolerances for the use of the following pesticide chemicals on specific commodities as noted are being extended:

Clothianidin. Pursuant to a request by the Florida Department of Agriculture and Consumer Services, EPA authorized under FIFRA section 18 the use of clothianidin on citrus for control of the Asian citrus psyllid in Florida. This regulation extends a time-limited tolerance for residues of the insecticide clothianidin and its metabolites and degradates in or on fruit, citrus, group 10–10 at 0.07 parts per million (ppm) for an additional 3-year period. This tolerance will expire and is revoked on

December 31, 2026. The time-limited tolerance was originally published in the **Federal Register** of February 25, 2015 (80 FR 10003) (FRL–9919–59).

Flupyradifurone. The time-limited tolerances are being removed at 40 CFR 180.679(b) for residues of the insecticide flupyradifurone and its metabolites in or on sorghum, syrup at 90.0 ppm and sweet sorghum, forage at 30.0 ppm which expired on December 31, 2022; and in or on sugarcane, cane at 3 ppm and sugarcane, molasses at 90 ppm, which expire on December 31, 2023. The applicant has not submitted a request for further use of flupyradifurone sugarcane; and use on sweet sorghum gained registration under Section 3 of FIFRA. The time-limited tolerances were originally published in the **Federal Register** of June 25, 2021 (86 FR 21944) (FRL–10029–49).

Kasugamycin. Pursuant to a request by the California Department of Pesticide Regulation, EPA authorized under FIFRA section 18 the use of kasugamycin on almonds for control of bacterial blast in California. This regulation extends time-limited tolerances for residues of the pesticide kasugamycin and its metabolites and degradates in or on almond at 0.04 (ppm); and almond hulls at 0.4 ppm for an additional 3-year period. The tolerances will expire and are revoked on December 31, 2026. The time-limited tolerances were originally published in the **Federal Register** of October 8, 2020 (85 FR 63450) (FRL–10013–94).

Methyl bromide. Pursuant to a request by the US Department of Agriculture, Animal and Plant Health Inspection Service, EPA authorized under FIFRA section 18 the use of methyl bromide on certain imported and domestic commodities, post-harvest for control of invasive non-indigenous quarantine plant pests and to prevent the introduction and/or spread of any new or recently introduced foreign pests to the United States. This regulation extends time-limited tolerances for residues of the pesticide methyl bromide, including its metabolites and degradates, in or on the commodities identified in 40 CFR 180.124(b) (and listed in the regulatory text section of this document) at the levels listed for an additional 3-year period. The tolerances will expire and are revoked on December 31, 2026. The time-limited tolerances were originally published in the **Federal Register** of March 1, 2018 (83 FR 8758) (FRL–9971–19) and October 16, 2020 (85 FR 65729) (FRL–10014–31).

Triclopyr. Pursuant to a request by the Louisiana Department of Agriculture

and Forestry, EPA authorized under FIFRA section 18 the use of triclopyr on sugarcane for control of divine nightshade in Louisiana. This regulation extends a time-limited tolerance for residues of the herbicide triclopyr and its metabolites and degradates in or on sugarcane, cane at 40 ppm for an additional 3-year period. The tolerance will expire and is revoked on December 31, 2026. A time-limited tolerance was originally published in the **Federal Register** of June 8, 2017 (82 FR 26599) (FRL–9961–29).

III. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established any MRLs for flupyradifurone, kasugamycin, methyl bromide, or triclopyr in or on the commodities listed in this document. The Codex has established an MRL for clothianidin in or on citrus at 0.07 ppm, the same as the tolerance established for fruit, citrus, group 10–10 in the United States. Therefore, there are no harmonization issues.

IV. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d). The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled “Regulatory Planning and Review” (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled “Protection of Children from Environmental Health Risks and Safety

Risks” (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established in accordance with FFDCA sections 408(e) and 408(l)(6), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal

Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

V. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to

publication of the rule in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 27, 2023.

Charles Smith,

Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.124, revise table 2 to paragraph (b) to read as follows:

§ 180.124 Methyl bromide; tolerances for residues.

* * * * *

(b) * * *

TABLE 2 TO PARAGRAPH (b)

Commodity	Parts per million	Expiration/revocation date
Berry and small fruit, group 13–07	5.0	12/31/26
Cactus	3.0	12/31/26
Coconut, copra	8.0	12/31/26
Coffee, green bean	150	12/31/26
Cola, seed	150	12/31/26
Cucurbit, seed	150	12/31/26
Fig	10	12/31/26
Fruit, citrus, group 10–10	2	12/31/26
Fruit, stone, group 12–12	5.0	12/31/26
Fruit, tropical and subtropical, edible peel, group 23	10	12/31/26
Fruit, tropical and subtropical, inedible peel, group 24	5.0	12/31/26
Herb and spice, group 19	35	12/31/26
Hibiscus, seed	150	12/31/26
Ivy gourd	5.0	12/31/26
Kaffir lime, leaves	0.50	12/31/26
Kenaf, seed	150	12/31/26
Oilseed group 20	150	12/31/26
Peppermint, tops	35	12/31/26
Pointed gourd	5.0	12/31/26
Spearmint, tops	35	12/31/26
Vegetable, bulb, group 3–07	2.0	12/31/26
Vegetable, cucurbit, group 9	5.0	12/31/26
Vegetable, foliage of legume, group 7	0.50	12/31/26
Vegetable, fruiting, group 8–10	7.0	12/31/26
Vegetable, head and stem <i>Brassica</i> , group 5–16	1.0	12/31/26
Vegetable, leafy, group 4–16	0.50	12/31/26
Vegetable, leaves of root and tuber, group 2	0.50	12/31/26
Vegetable, legume, group 6	3.0	12/31/26
Vegetable, root and tuber, group 1	3.0	12/31/26
Vegetable, stalk, stem and leaf petiole, group 22	0.50	12/31/26

* * * * *

■ 3. In § 180.417, revise table 3 to paragraph (b) to read as follows:

§ 180.417 Triclopyr; tolerances for residues.

(b) * * *

* * * * *

TABLE 3 TO PARAGRAPH (b)

Commodity	Parts per million	Expiration/revocation date
Sugarcane, cane	40	12/31/26

* * * * *

■ 4. In § 180.586, add a heading to the table in paragraph (b) and revise the

entry for “Fruit, citrus, group 10–10” in the table to read as follows:

§ 180.586 Clothianidin; tolerances for residues.

* * * * *

(b) * * *

TABLE 3 TO PARAGRAPH (b)

Commodity	Parts per million	Expiration/revocation date
Fruit, citrus, group 10–10	0.07	12/31/26
* * * * *	*	*

* * * * *

§ 180.679 [Amended]

■ 5. In § 180.679, remove and reserve paragraph (b).

[FR Doc. 2023–24190 Filed 11–2–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2018–0097; FF09E22000 FXES1113090FEDR 223]

RIN 1018–BD60

Endangered and Threatened Wildlife and Plants; Reinstatement of Endangered Species Act Protections for the Gray Wolf (*Canis Lupus*) in Compliance With Court Order

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are issuing this final rule to comply with a district court order that vacated our November 3, 2020, rule removing the gray wolf (*Canis lupus*) from the List of Endangered and Threatened Wildlife. As a result of the court’s order, the regulatory protections under the Endangered Species Act of 1973, as amended (Act), apply to the gray wolf in all or portions of the 45 U.S. States and Mexico where the species was listed at the time we issued the delisting

rule. The court order went into effect on February 10, 2022, and is the subject of several consolidated, pending appeals in the Ninth Circuit. While those appeals are pending, the Service is bound by the district court’s order. Thus, this final rule implements the court’s order by correcting the Code of Federal Regulations and officially reinstating threatened status for gray wolf in Minnesota; endangered status for gray wolf in all or portions of the remaining 44 U.S. States and Mexico where the species was listed prior to our November 2020 delisting rule; critical habitat for gray wolf in Minnesota and Michigan; and the rule promulgated under section 4(d) of the Act for gray wolf in Minnesota. Gray wolves in Montana, Idaho, Wyoming, the eastern third of Washington and Oregon, and north-central Utah (collectively, the Northern Rocky Mountains) retain their delisted status and are not affected by this final rule. This rule does not have any effect on the separate listing of the Mexican wolf subspecies (*Canis lupus baileyi*) as endangered under the Act.

DATES: This action is effective November 3, 2023. However, the court order had legal effect immediately upon its filing on February 10, 2022.

ADDRESSES: This final rule is available on the internet at <https://www.regulations.gov> in Docket No. FWS–HQ–ES–2018–0097.

FOR FURTHER INFORMATION CONTACT:

Rachel London, Chief, Branch of Delisting and Foreign Species, Ecological Services, U.S. Fish and Wildlife Service, Headquarters Office, MS:ES, 5275, Leesburg Pike, Falls

Church, VA 22041–3803; telephone (703) 358–2491. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

On November 3, 2020, we published a final rule to remove the gray wolf entities that were listed at that time in the lower 48 United States and Mexico from the Federal List of Endangered and Threatened Wildlife in title 50 of the Code of Federal Regulations (CFR) at 50 CFR 17.11(h) (85 FR 69778; hereafter referred to as “our 2020 delisting rule”). Additional background information on the gray wolf in the lower 48 United States and Mexico and on that rulemaking decision, including previous Federal actions, can be found in our 2020 delisting rule. The rule became effective on January 4, 2021.

Three lawsuits challenging our 2020 delisting rule were filed in the U.S. District Court for the Northern District of California. *Defenders of Wildlife v. U.S. Fish and Wildlife Service*, No. 21–00344 (N.D. Cal.), *WildEarth Guardians v. Bernhardt*, No. 21–00349 (N.D. Cal.), *NRDC v. U.S. Department of the Interior*, No. 21–00561 (N.D. Cal.). On February 10, 2022, the district court vacated and remanded our 2020

delisting rule. That decision reinstated Federal protections that were in place prior to the effective date of our 2020 delisting rule. Therefore, gray wolves are once again listed as threatened in Minnesota and endangered in all or portions of 44 U.S. States and Mexico. See *Effects of the Rule*, below, for a description of the CFR changes resulting from this final rule.

Multiple parties, including the Service, appealed the district court's order to the U.S. Court of Appeals for the Ninth Circuit (Nos. 21–16382, 16383, 16384, 22–15529, 15532, 15534, 15535, 15536, 15537, 15262, 15627, 15628). The parties have been engaged in mediation. On January 26, 2023, the Circuit Mediator issued an order temporarily staying the appeals for administrative purposes until February 2, 2024. During the abeyance, the Service is updating the status review for the gray wolf throughout the lower 48 United States and commencing a stakeholder engagement effort.

Administrative Procedure

To comply with the February 10, 2022, court order, we must reinstate the following:

- Threatened species status for gray wolf in Minnesota,

- Endangered species status for gray wolf in all or portions of 44 U.S. States and Mexico,
- Critical habitat designation for gray wolf in Minnesota and Michigan, and
- A section 4(d) rule for gray wolf in Minnesota.

Therefore, the Director has determined, pursuant to 5 U.S.C. 553(b), that prior notice and opportunity for public comment are impractical and unnecessary. The Director has further determined, pursuant to 5 U.S.C. 553(d), that the agency has good cause to make this rule effective upon publication.

We are also making the following technical revisions to the section 4(d) rule at 50 CFR 17.40(d):

- (1) correcting the misspelling of “Hoodoo Point” in § 17.40(d)(1)(i);
- (2) correcting the misspelling of “the Duluth, Missabe and Iron Range Railroad” in § 17.40(d)(1)(ii);
- (3) substituting a higher quality image of the map of regulatory zones that appears in § 17.40(d)(1)(vi); and
- (4) updating the contact information for providing notifications to the Service in § 17.40(d)(2)(D).

Rather than make these changes in a separate rulemaking, we are combining them with the section 4(d) rule reinstatement for administrative convenience. The Director has

determined, pursuant to 5 U.S.C. 553(b), that prior notice and an opportunity for public comment on these revisions are unnecessary because the changes are insignificant in nature and impact and inconsequential to the public.

Effects of the Rule

As a result of the February 10, 2022, district court order, any and all gray wolves in Minnesota are listed as threatened, and any and all gray wolves in all or portions of 44 U.S. States and Mexico are listed as endangered. In the United States, this includes: all of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Maine, Michigan, Missouri, Mississippi, North Carolina, North Dakota, Nebraska, New Hampshire, New Jersey, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Vermont, West Virginia, and Wisconsin; and portions of Arizona, New Mexico, Oregon, Utah, and Washington (as depicted in figure 1 below and our November 3, 2020, delisting rule; 85 FR 69778 at 69782).

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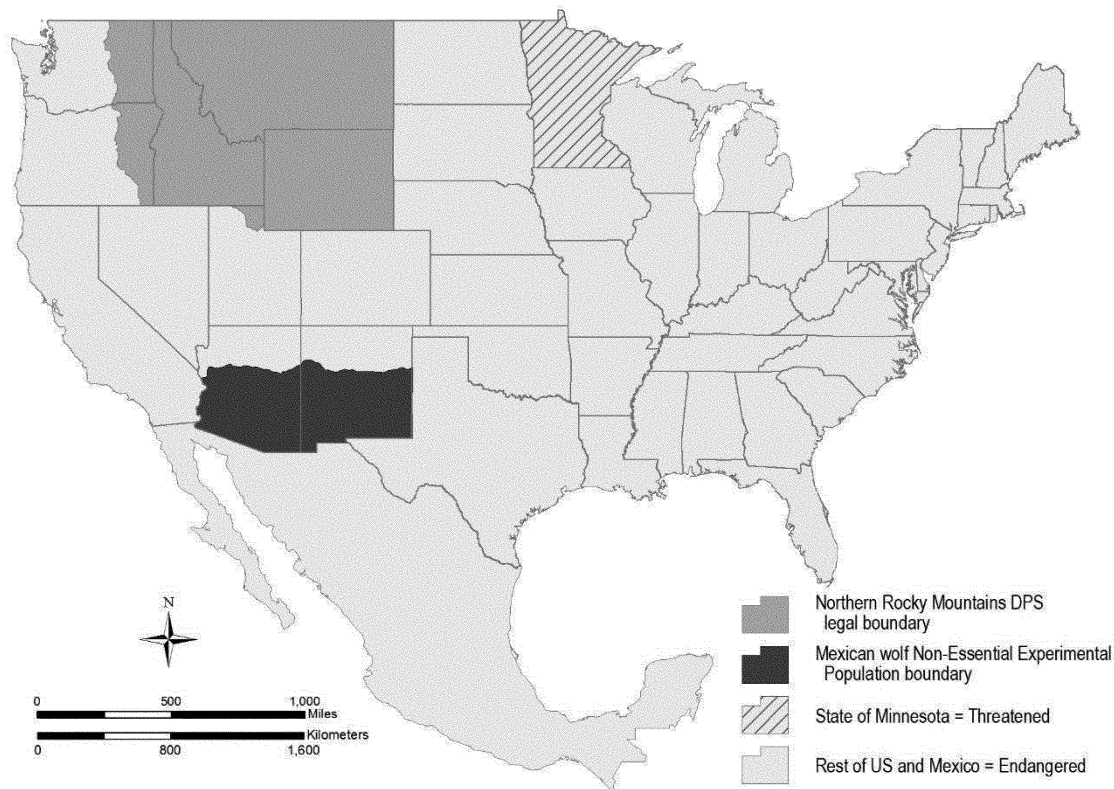


Figure 1. Current legal status of *C. lupus* under the Act in the lower 48 United States and Mexico following the February 10, 2022, court decision. The Northern Rocky Mountains distinct population segment (DPS) and the Mexican wolf nonessential experimental population are not part of the listed entities. All map lines are approximations; see 50 CFR 17.11 and 17.84(k) for exact boundaries.

BILLING CODE 4333–15–C

The reinstated regulations at 50 CFR 17.95(a) designate critical habitat for gray wolf in Minnesota and Michigan, and the reinstated regulations at 50 CFR 17.40(d) govern the regulation of gray wolf in Minnesota. The provisions of these regulations are the same as those in the regulations that were removed by our 2020 delisting rule (November 3, 2020; 85 FR 69778 at 69895).

This rule does not affect the status of gray wolf in Montana, Idaho, Wyoming, the eastern third of Washington and Oregon, and north-central Utah. Wolves in these areas retain their delisted status and will continue to be managed by the States and Tribes. Finally, this rule does not affect the gray wolf's Appendix II status under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Future Actions

By February 2, 2024, the Service intends to submit to the Office of the

Federal Register a proposed rule concerning the listing status of gray wolves in the lower 48 United States under the Act. Our status determination will be based on the best available information as of the time of publication. If the appeals described earlier in this document nonetheless proceed and the district court's order is reversed, then the Service will take appropriate action to comply with and implement the Court of Appeals' judgment, including, if required, publishing another final rule reinstating the Service's 2020 delisting rule.

Authors

The primary authors of this final rule are the staff members of the U.S. Fish and Wildlife Service's Headquarters Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and

recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

- 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

- 2. Amend § 17.11, in paragraph (h), by adding two entries for “Wolf, gray” in alphabetic order under Mammals in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *
(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
Mammals				
Wolf, gray	<i>Canis lupus</i>	U.S.A.: All of AL, AR, CA, CO, CT, DE, FL, GA, IA, IN, IL, KS, KY, LA, MA, MD, ME, MI, MO, MS, NC, ND, NE, NH, NJ, NV, NY, OH, OK, PA, RI, SC, SD, TN, TX, VA, VT, WI, and WV; and portions of AZ, NM, OR, UT, and WA as follows: (1) Northern AZ (that portion north of the centerline of Interstate Highway 40); (2) Northern NM (that portion north of the centerline of Interstate Highway 40); (3) Western OR (that portion of OR west of the centerline of Highway 395 and Highway 78 north of Burns Junction and that portion of OR west of the centerline of Highway 95 south of Burns Junction); (4) Most of UT (that portion of UT south and west of the centerline of Highway 84 and that portion of UT south of Highway 80 from Echo to the UT/WY Stateline); and (5) Western WA (that portion of WA west of the centerline of Highway 97 and Highway 17 north of Mesa and that portion of WA west of the centerline of Highway 395 south of Mesa) Mexico.	E	32 FR 4001, 3/11/1967; 41 FR 24062, 6/14/1976; 43 FR 9607, 3/9/1978; 73 FR 75356, 12/11/2008; 74 FR 47483, 9/16/2009; 80 FR 9218, 2/20/2015; 50 CFR 17.95(a). ^{CH}
Wolf, gray	<i>Canis lupus</i>	U.S.A. (MN)	T	43 FR 9607, 3/9/1978; 50 CFR 17.40(d); ^{4(d)} 50 CFR 17.95(a). ^{CH}

■ 3. Amend § 17.40 by adding paragraph (d) to read as follows:

§ 17.40 Special rules—mammals.

(d) Gray wolf (*Canis lupus*) in Minnesota.

(1) *Zones*. For purposes of these regulations, the State of Minnesota is divided into the following five zones:

(i) Zone 1—4,488 square miles. Beginning at the point of intersection of United States and Canadian boundaries in Section 22, Township 71 North, Range 22 West, in Rainy Lake, then proceeding along the west side of Sections 22, 27, and 34 in said Township and Sections 3, 10, 15, 22, 27, and 34 in Township 70 North, Range 22 West and Sections 3 and 10 in Township 69 North, Range 22 West; then east along the south boundaries of Sections 10, 11, and 12 in said Township; then south along the Koochiching and St. Louis Counties line to Highway 53; thence southeasterly along State Highway 53 to the junction with County Route 765; thence easterly along County Route 765 to the junction with Kabetogama Lake in Ash River Bay; thence along the south boundary of Section 33 in Township 69 North, Range

19 West, to the junction with the Moose River; thence southeasterly along the Moose River to Moose Lake; thence along the western shore of Moose Lake to the river between Moose Lake and Long Lake; thence along the said river to Long Lake; thence along the east shore of Long Lake to the drainage on the southeast side of Long Lake in NE 1/4, Section 18, Township 67 North, Range 18 West; thence along the said drainage southeasterly and subsequently northeasterly to Marion Lake, the drainage being in Sections 17 and 18, Township 67 North, Range 18 West; thence along the west shoreline of Marion Lake proceeding southeasterly to the Moose Creek; thence along Moose Creek to Flap Creek; thence southeasterly along Flap Creek to the Vermilion River; thence southerly along the Vermilion River to Vermilion Lake; thence along the Superior National Forest boundary in a southeasterly direction through Vermilion Lake passing these points: Oak Narrows, Muskrat Channel, South of Pine Island, to Hoodoo Point and the junction with County Route 697; thence southeasterly on County Route 697 to the junction with State Highway 169; thence easterly

along State Highway 169 to the junction with State Highway 1; thence easterly along State Highway 1 to the junction with the Erie Railroad tracks at Murphy City; thence easterly along the Erie Railroad tracks to the junction with Lake Superior at Taconite Harbor; thence northeasterly along the North Shore of Lake Superior to the Canadian Border; thence westerly along the Canadian Border to the point of beginning in Rainy Lake.

(ii) Zone 2—1,856 square miles. Beginning at the intersection of the Erie Mining Co. Railroad and State Highway 1 (Murphy City); thence southeasterly on State Highway 1 to the junction with County Road 4; thence southwesterly on County Road 4 to the State Snowmobile Trail (formerly the Alger-Smith Railroad); thence southwesterly to the intersection of the Old Railroad Grade and Reserve Mining Co. Railroad in Section 33 of Township 56 North, Range 9 West; thence northwesterly along the Railroad to Forest Road 107; thence westerly along Forest Road 107 to Forest Road 203; thence westerly along Forest Road 203 to the junction with County Route 2; thence in a northerly direction on County Route 2 to the junction with

Forest Road 122; thence in a westerly direction along Forest Road 122 to the junction with the Duluth, Missabe and Iron Range Railroad; thence in a southwesterly direction along the said railroad tracks to the junction with County Route 14; thence in a northwesterly direction along County Route 14 to the junction with County Route 55; thence in a westerly direction along County Route 55 to the junction with County Route 44; thence in a southerly direction along County Route 44 to the junction with County Route 266; thence in a southeasterly direction along County Route 266 and subsequently in a westerly direction to the junction with County Road 44; thence in a northerly direction on County Road 44 to the junction with Township Road 2815; thence westerly along Township Road 2815 to Alden Lake; thence northwesterly across Alden Lake to the inlet of the Cloquet River; thence northerly along the Cloquet River to the junction with Carrol Trail-State Forestry Road; thence west along the Carrol Trail to the junction with County Route 4 and County Route 49; thence west along County Route 49 to the junction with the Duluth, Winnipeg and Pacific Railroad; thence in a northerly direction along said Railroad to the junction with the Whiteface River; thence in a northeasterly direction along the Whiteface River to the Whiteface Reservoir; thence along the western shore of the Whiteface Reservoir to the junction with County Route 340; thence north along County Route 340 to the junction with County Route 16; thence east along County Route 16 to the junction with County Route 346; thence in a northerly direction along County Route 346 to the junction with County Route 569; thence along County Route 569 to the junction with County Route 565; thence in a westerly direction along County Route 565 to the junction with County Route 110; thence in a westerly direction along County Route 110 to the junction with County Route 100; thence in a north and subsequent west direction along County Route 100 to the junction with State Highway 135; thence in a northerly direction along State Highway 135 to the junction with State Highway 169 at Tower; thence in

an easterly direction along the southern boundary of Zone 1 to the point of beginning of Zone 2 at the junction of the Erie Railroad Tracks and State Highway 1.

(iii) Zone 3—3,501 square miles. Beginning at the junction of State Highway 11 and State Highway 65; thence southeasterly along State Highway 65 to the junction with State Highway 1; thence westerly along State Highway 1 to the junction with State Highway 72; thence north along State Highway 72 to the junction with an un-numbered township road beginning in the northeast corner of Section 25, Township 155 North, Range 31 West; thence westerly along the said road for approximately seven (7) miles to the junction with SFR 95; thence westerly along SFR 95 and continuing west through the southern boundary of Sections 36 through 31, Township 155 North, Range 33 West, through Sections 36 through 31, Township 155 North, Range 34 West, through Sections 36 through 31, Township 155 North, Range 35 West, through Sections 36 and 35, Township 155 North, Range 36 West to the junction with State Highway 89; thence northwesterly along State Highway 89 to the junction with County Route 44; thence northerly along County Route 44 to the junction with County Route 704; thence northerly along County 704 to the junction with SFR 49; thence northerly along SFR 49 to the junction with SFR 57; thence easterly along SFR 57 to the junction with SFR 63; thence south along SFR 63 to the junction with SFR 70; thence easterly along SFR 70 to the junction with County Route 87; thence easterly along County Route 87 to the junction with County Route 1; thence south along County Route 1 to the junction with County Route 16; thence easterly along County Route 16 to the junction with State Highway 72; thence south on State Highway 72 to the junction with a gravel road (un-numbered County District Road) on the north side of Section 31, Township 158 North, Range 30 West; thence east on said District Road to the junction with SFR 62; thence easterly on SFR 62 to the junction with SFR 175; thence south on SFR 175 to the junction with County

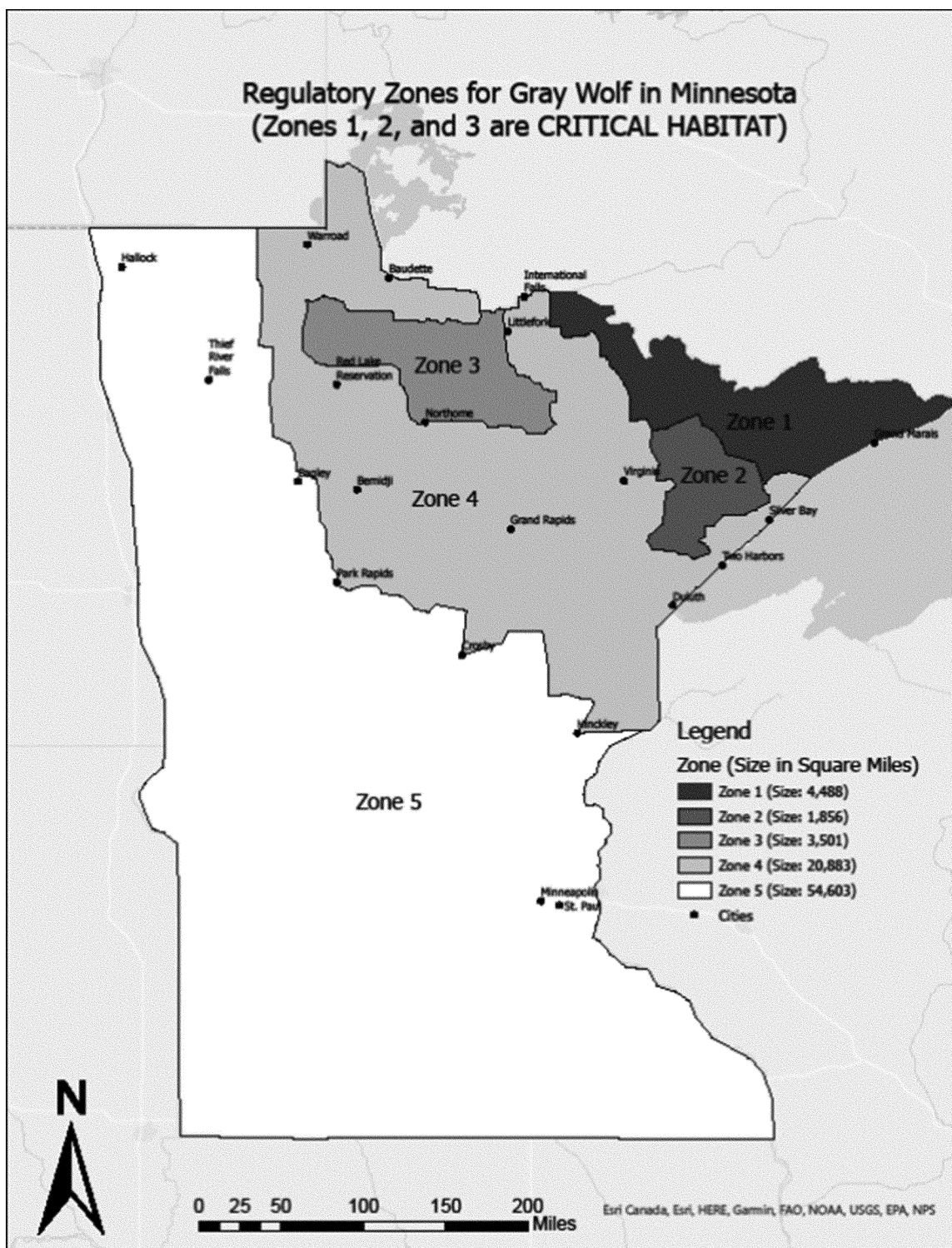
Route 101; thence easterly on County Route 101 to the junction with County Route 11; thence easterly on County Route 11 to the junction with State Highway 11; thence easterly on State Highway 11 to the junction with State Highway 65, the point of beginning.

(iv) Zone 4—20,883 square miles. Excluding Zones 1, 2 and 3, all that part of Minnesota north and east of a line beginning on State Trunk Highway 48 at the eastern boundary of the State; thence westerly along Highway 48 to Interstate Highway 35; thence northerly on I-35 to State Highway 23, thence west one-half mile on Highway 23 to State Trunk Highway 18; thence westerly along Highway 18 to State Trunk Highway 65, thence northerly on Highway 65 to State Trunk Highway 210; thence westerly along Highway 210 to State Trunk Highway 6; thence northerly on State Trunk Highway 6 to Emily; thence westerly along County State Aid Highway (CSAH) 1, Crow Wing County, to CSAH 2, Cass County; thence westerly along CSAH 2 to Pine River; thence northwesterly along State Trunk Highway 371 to Backus; thence westerly along State Trunk Highway 87 to U.S. Highway 71; thence northerly along U.S. 71 to State Trunk Highway 200; thence northwesterly along Highway 200, to County State Aid Highway (CSAH) 2, Clearwater County; thence northerly along CSAH 2 to Shevlin; thence along U.S. Highway 2 to Bagley; thence northerly along State Trunk Highway 92 to Gully; thence northerly along CSAH 2, Polk County, to CSAH 27, Pennington County; thence along CSAH 27 to State Trunk Highway 1; thence easterly on Highway 1 to CSAH 28, Pennington County; thence northerly along CSAH 28 to CSAH 54, Marshall County, thence northerly along CSAH 54 to Grygla; thence west and northerly along Highway 89 to Roseau; thence northerly along State Trunk Highway 310 to the Canadian border.

(v) Zone 5—54,603 square miles. All that part of Minnesota south and west of the line described as the south and west border of Zone 4.

(vi) Map of regulatory zones follows:

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BILLING CODE 4333-15-C

(2) *Prohibitions.* The following prohibitions apply to the gray wolf in Minnesota.

(i) *Taking.* Except as provided in this paragraph (d)(2)(i) of this section, no person may take a gray wolf in Minnesota.

(A) Any person may take a gray wolf in Minnesota in defense of his own life or the lives of others.

(B) Any employee or agent of the Service, any other Federal land management agency, or the Minnesota Department of Natural Resources, who is designated by his/her agency for such purposes, may, when acting in the course of his or her official duties, take

a gray wolf in Minnesota without a permit if such action is necessary to:

- (1) Aid a sick, injured, or orphaned specimen; or
- (2) Dispose of a dead specimen; or
- (3) Salvage a dead specimen which may be useful for scientific study.

(C) Designated employees or agents of the Service or the Minnesota Department of Natural Resources may

take a gray wolf without a permit in Minnesota, in zones 2, 3, 4, and 5, as delineated in paragraph (d)(l) of this section, in response to depredations by a gray wolf on lawfully present domestic animals: Provided, that such taking must occur within one-half mile of the place where such depredation occurred and must be performed in a humane manner: And provided further, that any young of the year taken on or before August 1 of that year must be released.

(D) Any taking pursuant to paragraph (d)(2)(i)(A), (d)(2)(i)(B), or (d)(2)(i)(C) of this section must be reported by email to the Twin Cities Ecological Service Field Office at twincities@fws.gov within 5 days. The specimen may only be retained, disposed of, or salvaged in accordance with directions from the Service.

(E) Any employee or agent of the Service or the Minnesota Department of Natural Resources, when operating under a Cooperative Agreement with the Service signed in accordance with section 6(c) of the Endangered Species Act of 1973, who is designated by the Service or the Minnesota Department of Natural Resources for such purposes,

may, when acting in the course of his or her official duties, take a gray wolf in Minnesota to carry out scientific research or conservation programs.

(ii) *Export and commercial transactions.* Except as may be authorized by a permit issued under § 17.32, no person may sell or offer for sale in interstate commerce, import or export, or in the course of a commercial activity transport, ship, carry, deliver, or receive any Minnesota gray wolf.

(iii) *Unlawfully taken wolves.* No person may possess, sell, deliver, carry, transport, or ship, by any means whatsoever, a gray wolf taken unlawfully in Minnesota, except that an employee or agent of the Service, or any other Federal land management agency, or the Minnesota Department of Natural Resources, who is designated by his/her agency for such purposes, may, when acting in the course of his official duties, possess, deliver, carry, transport, or ship a gray wolf taken unlawfully in Minnesota.

(3) *Permits.* All permits available under § 17.32 (General Permits—Threatened Wildlife) are available with regard to the gray wolf in Minnesota. All the terms and provisions of § 17.32

apply to such permits issued under the authority of this paragraph (d)(3).

* * * * *

■ 4. Amend § 17.95, in paragraph (a), by adding an entry for “Gray Wolf (*Canis lupus*)” after the entry for “Amargosa Vole (*Microtus californicus scirpensis*)” to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) *Mammals.*
* * * * *

Gray Wolf (*Canis Lupus*)

Michigan. Isle Royale National Park.
Minnesota. Areas of land, water, and airspace in Beltrami, Cook, Itasca, Koochiching, Lake, Lake of the Woods, Roseau, and St. Louis Counties, with boundaries (4th and 5th Principal meridians) identical to those of zones 1, 2, and 3, as delineated in 50 CFR 17.40(d)(l).
* * * * *

Stephen Guertin,
Acting Director, U.S. Fish and Wildlife Service.

Proposed Rules

Federal Register

Vol. 88, No. 212

Friday, November 3, 2023

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2021–1032; Notice No. 25–23–03–SC]

Special Conditions: Airbus Model A321neo XLR Airplanes; Flight Envelope Protection, Icing and Non-Icing Conditions; High Incidence Protection.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Airbus Model A321neo XLR airplane. The airplane will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is associated with flight-envelope protections, in icing and non-icing conditions, that use high-incidence protection and an alpha-floor system to automatically advance throttles when the airplane angle of attack reaches a predetermined value. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send comments on or before December 4, 2023.

ADDRESSES: Send comments identified by Docket No. FAA–2021–1032 using any of the following methods:

Federal eRegulations Portal: Go to <https://www.regulations.gov/> and follow the online instructions for sending your comments electronically.

Mail: Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 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 <https://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.

FOR FURTHER INFORMATION CONTACT: Troy Brown, Performance and Environment Unit, AIR–621A, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service, Federal Aviation Administration, 1801 S. Airport Rd., Wichita, KS 67209–2190; telephone and fax 405–666–1050; email troy.a.brown@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the proposed special conditions, explain the reason for any recommended change, and include supporting data.

Certification of the Airbus Model A321neo XLR airplane is currently scheduled for December 2023. The substance of these special conditions, in all material respects, has been subject to the notice and public-comment procedure in several prior instances. Therefore, because a delay would significantly affect the applicant's installation of the novel or unusual design feature, and delay certification of the airplane, the FAA is reducing the public-comment period to 30 days.

The FAA will consider all comments received by the closing date for comments, and will consider comments filed late if it is possible to do so without incurring delay. The FAA may change these special conditions based on the comments received.

Privacy

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in title 14, Code of Federal Regulations (14 CFR) 11.35, the FAA will post all comments received without change to <https://www.regulations.gov/>, including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about these special conditions.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to these special conditions contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to these special conditions, 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 the indicated comments will not be placed in the public docket of these special conditions. Send submissions containing CBI to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section below. Comments the FAA receives, which are not specifically designated as CBI, will be placed in the public docket for these special conditions.

Background

On September 16, 2019, Airbus applied for an amendment to Type Certificate No. A28NM to include the new Model A321neo XLR airplane. These airplanes are twin-engine, transport-category airplanes with seating for 244 passengers and a maximum take-off weight of 222,000 pounds.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Airbus must show that the Model A321neo XLR airplane meets the applicable provisions of the regulations

listed in Type Certificate No. A28NM, or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (e.g., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus Model A321neo XLR airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model A321neo XLR airplane must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in § 11.19, in accordance with § 11.38, and they become part of the type certification basis under 14 CFR 21.101.

Novel or Unusual Design Features

The Airbus Model A321neo XLR airplane will incorporate the following novel or unusual design feature:

Flight-envelope protections, in icing and non-icing conditions, that use high-incidence protection and an alpha-floor function to automatically advance throttles when the airplane angle of attack (AoA) reaches a predetermined value.

Discussion

The current airworthiness standards do not contain adequate safety standards for the high-incidence protection system and the alpha-floor system for the Airbus Model A321neo XLR series airplanes. This is because the current standards were designed for more traditional electronic flight control systems (EFCS), which involve less advanced envelope protections, such as stick shakers and pushers. These special conditions address the more advanced flight envelope protections, including icing and non-icing conditions, that are

part of the EFCS design of the A321neo XLR airplane.

The high-incidence protection system prevents the airplane from stalling and, therefore, the stall warning system is not needed during normal flight conditions. However, during failure conditions, which are not shown to be extremely improbable, the requirements of 14 CFR 25.203 and 25.207 apply, although slightly modified. If there are failures not shown to be extremely improbable, the flight characteristics at the angle-of-attack for C_{LMAX} must be suitable in the traditional sense, and stall warning must be provided in a conventional manner. These special conditions address the need for modification during icing conditions and non-icing conditions.

The alpha-floor function automatically advances the throttles on the operating engines under flight circumstances of low speed if the airplane reaches a predetermined high AoA. This function is intended to provide increased climb capability.

These special conditions address these novel or unusual design features on the Airbus Model A321neo XLR and contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions apply to Airbus Model A321neo XLR airplane. Should Airbus apply later for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model series of airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

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

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for Airbus Model A321neo XLR airplane. These special conditions are issued in lieu of

the paragraphs of 14 CFR part 25 referenced below.

Foreword

In the following paragraphs, “In icing conditions” means with the ice accretions, relevant for the flight phase, as defined in part 25, amendment 121, appendix C.

(a) Definitions

These special conditions address novel or unusual design features of the Airbus A321neo XLR and use terminology that does not appear in part 25. For the purpose of these special conditions, the following terms describe certain aspects of these novel or unusual design features:

High-Incidence Protection System Angle-of-Attack Limiting Function

A system that operates directly and automatically on the airplane's flying controls to limit the maximum angle of attack (AoA) that can be attained to a value below that at which an aerodynamic stall would occur.

Alpha-Floor System

A system that automatically increases thrust on the operating engines when AoA increases through a particular value.

Alpha Limit

The maximum angle of attack at which the airplane stabilizes with the high-incidence protection system operating and the longitudinal control held on its aft stop.

V_{CLmax}

An airspeed calculated from a variety of factors, including load factor normal to the flight path at V_{CLmax} , airplane gross weight, aerodynamic reference wing area, and dynamic pressure.

V_{min}

The minimum steady flight speed in the airplane configuration under consideration with the high-incidence protection system operating.

V_{min1g}

V_{min} corrected to 1g conditions. This is the minimum calibrated airspeed at which the airplane can develop a lift force normal to the flight path and equal to its weight when at an angle of attack not greater than that determined for V_{min} .

(b) Capability and Reliability of the High-Incidence Protection System

Acceptable capability and reliability of the high-incidence protection system can be established by flight test, simulation, and analysis, as appropriate.

The capability and reliability required are as follows:

(1) It must not be possible, during pilot-induced maneuvers, to encounter a stall; and handling characteristics must be acceptable, as required by condition (e) of these Special Conditions.

(2) The airplane must be protected against stalling due to the effects of wind-shears and gusts at low speeds as required by condition (f) of these Special Conditions.

(3) The ability of the high-incidence protection system to accommodate any reduction in stalling incidence must be verified in icing conditions.

(4) The high-incidence protection system must be provided in each abnormal configuration of the high-lift devices that are likely to be used in-flight following system failures.

(5) The reliability of the system and the effects of failures must be acceptable in accordance with § 25.1309.

(c) Minimum Steady Flight Speed and Reference Stall Speed

In lieu of § 25.103, minimum steady flight speed and reference stall speed, the following requirements apply:

(1) The minimum steady flight speed, V_{min} , is the final stabilized calibrated airspeed obtained when the airplane is decelerated until the longitudinal control is on its stop in such a way that the entry rate does not exceed 1 knot per second.

(2) The minimum steady flight speed, V_{min} , must be determined in icing and non-icing conditions with:

- (i) The high-incidence protection system operating normally;
- (ii) Idle thrust and alpha-floor system inhibited;
- (iii) All combinations of flaps setting and landing gear position for which V_{min} is required to be determined;
- (iv) The weight used when the reference stall speed, V_{SR} , is being used as a factor to determine compliance with a required performance standard;
- (v) The most unfavorable center of gravity allowable; and
- (vi) The airplane trimmed for straight flight at a speed achievable by the automatic trim system.

(3) The 1g minimum steady flight speed, V_{min1g} , is the minimum calibrated airspeed at which the airplane can develop a lift force (normal to the flight path) equal to its weight, while at an angle of attack not greater than that at which the minimum steady flight speed of condition (c)(1), above, was determined. It must be determined in icing and non-icing conditions.

(4) The reference stall speed, V_{SR} , is a calibrated airspeed the applicant defines. V_{SR} may not be less than a 1g

stall speed. V_{SR} must be determined in non-icing conditions and expressed as:

$$V_{SR} \geq \frac{V_{CLMAX}}{\sqrt{n_{ZW}}}$$

Where:

V_{CLMAX} = Calibrated airspeed obtained when the load factor corrected lift coefficient ($n_{ZW} W/qS$) is first a maximum during the maneuver prescribed in condition (c)(5)(viii) of these Special Conditions;

n_{ZW} = Load factor normal to the flight path at V_{CLMAX} ;

W = Airplane gross weight;

S = Aerodynamic reference wing area; and

q = Dynamic pressure.

(5) V_{CLMAX} is determined in non-icing conditions with:

(i) Engines idling, or, if that resultant thrust causes an appreciable decrease in stall speed, not more than zero thrust at the stall speed;

(ii) The airplane in other respects (such as flaps and landing gear) in the condition existing in the test or performance standard in which V_{SR} is being used;

(iii) The weight used when V_{SR} is being used as a factor to determine compliance with a required performance standard;

(iv) The center of gravity position that results in the highest value of reference stall speed;

(v) The airplane trimmed for straight flight at a speed achievable by the automatic trim system, but not less than $1.13 V_{SR}$ and not greater than $1.3 V_{SR}$;

(vi) Alpha-floor system inhibited; and

(vii) The high-incidence protection system adjusted, at the option of the applicant, to allow higher incidence than is possible with the normal production system.

(viii) Starting from the stabilized trim condition, apply the longitudinal control to decelerate the airplane so that the speed reduction does not exceed 1 knot per second.

(d) Stall Warning

In lieu of § 25.207, the following requirements apply:

(1) Normal Operation.

If the capabilities of the high-incidence protection system are met, then condition (b) of these Special Conditions are satisfied. These conditions provide an equivalent level of safety to § 25.207, Stall Warning, so the provision of an additional, unique warning device is not required.

(2) High-Incidence Protection System Failure.

(i) In non-icing conditions, following failures of the high-incidence protection system, not shown to be extremely

improbable, such that the capability of the system no longer satisfies conditions (b)(1), (2), and (3) of these Special Conditions, stall warning must be provided in accordance with § 25.207(a), (b), and (f).

(ii) In icing conditions, after a failure leading to the loss of the high-incidence protection system, a safety margin not less than 3 percent or 3 knots between stall warning and stall must be maintained.

(e) Handling Characteristics at High Incidence

(1) High Incidence Handling Demonstrations.

In lieu of § 25.201: High-incidence handling demonstration in icing and non-icing conditions:

(i) Maneuvers to the limit of the longitudinal control, in the nose up sense, must be demonstrated in straight flight and in 30-degree banked turns with:

(A) The high-incidence protection system operating normally.

(B) Initial power conditions of:

(1) Power off.

(2) The power necessary to maintain level flight at $1.5 V_{SR1}$, where V_{SR1} is the reference stall speed with flaps in approach position, the landing gear retracted, and maximum landing weight.

(C) Alpha-floor system operating normally unless more severe conditions are achieved with inhibited alpha floor.

(D) Flaps, landing gear, and deceleration devices in any likely combination of positions.

(E) Representative weights within the range for which certification is requested; and

(F) The airplane trimmed for straight flight at a speed achievable by the automatic trim system.

(ii) The following procedures must be used to show compliance in non-icing and icing conditions:

(A) Starting at a speed sufficiently above the minimum steady flight speed to ensure that a steady rate of speed reduction can be established, apply the longitudinal control so that the speed reduction does not exceed 1 knot per second until the control reaches the stop.

(B) The longitudinal control must be maintained at the stop until the airplane has reached a stabilized flight condition, and must then be recovered through normal recovery techniques.

(C) Maneuvers with increased deceleration rates:

(1) In non-icing conditions, the requirements must also be met with increased rates of entry to the incidence limit, up to the maximum rate achievable.

(2) In icing conditions, with the anti-ice system working normally, the requirements must also be met with increased rates of entry to the incidence limit up to 2 knots per second.

(D) Maneuvers with ice accretion prior to operation of the normal anti-ice system: With the ice accretion prior to operation of the normal anti-ice system, the requirement must also be met in deceleration at 1 knot per second up to full back stick maintained for at least 3 seconds before normal recovery is performed (requirement to be met with and without alpha floor operating).

(2) Characteristics in High-Incidence Maneuvers.

In lieu of § 25.203: Characteristics in High Incidence.

In icing and non-icing conditions:

(i) Throughout maneuvers with a rate of deceleration of not more than 1 knot per second, both in straight flight and in 30-degree banked turns, the airplane's characteristics must be as follows:

(A) The airplane must not exhibit abnormal nose-up pitching.

(B) The airplane must not exhibit uncommanded nose-down pitching, which would be indicative of stall. However, reasonable attitude changes associated with stabilizing the incidence at alpha limit, as the longitudinal control reaches the stop, would be acceptable.

(C) The airplane must not exhibit uncommanded lateral or directional motion, and the pilot must retain good lateral and directional control through conventional use of the controls, throughout the maneuver.

(D) Buffeting:

(1) In non-icing conditions, the airplane must not exhibit buffeting of a magnitude and severity that would act as a deterrent from completing the maneuver specified in condition (e)(1)(i) of these Special Conditions.

(2) In icing conditions, the airplane may exhibit buffeting of a stronger magnitude and severity than in non-icing conditions, provided that the airplane is demonstrated to be free from excessive vibration and buffeting over the range of speeds adequate for normal operation.

(ii) In maneuvers with increased rates of deceleration, some degradation of characteristics are acceptable, associated with a transient excursion beyond the stabilized alpha limit. However, the airplane must not exhibit dangerous characteristics, nor characteristics that would deter the pilot from holding the longitudinal control on the stop for a period of time appropriate to the maneuver.

(iii) The pilot must always be able to reduce incidence through conventional use of the controls.

(iv) The rate at which the airplane can be maneuvered from trim speeds associated with scheduled operating speeds such as V_2 and V_{ref} , up to alpha limit, must not be unduly damped or be significantly slower than can be achieved on conventionally controlled transport airplanes.

(3) Characteristics up to V_{CLmax} .

Maneuvers with a rate of deceleration of not more than 1 knot per second, up to the angle of attack at which V_{CLmax} was obtained as defined in condition (c)(4) of these Special Conditions, must be demonstrated in straight flight and in 30-degree banked turns with:

(i) The high-incidence protection system deactivated or adjusted, at the option of the applicant, to allow higher incidence than is possible with the normal production system,

(ii) Alpha-floor system inhibited,

(iii) Engines idling,

(iv) Flaps and landing gear in any likely combination of positions, and

(v) The airplane trimmed for straight flight at a speed achievable by the automatic trim system.

During such maneuvers, the airplane must not exhibit dangerous characteristics; the pilot must always be able to reduce angle of attack by conventional use of the controls. The pilot must retain good lateral and directional control, by conventional use of the controls, throughout the maneuver.

(f) Atmospheric Disturbances

Operation of the high-incidence protection system must not adversely affect airplane control during expected levels of atmospheric disturbances, nor impede the application of recovery procedures in case of wind shear. This must be demonstrated in non-icing conditions only, and must allow for drawing conclusion for icing conditions without further demonstration.

(g) Speed Associated With Other Requirements

The design must meet the following modified requirements:

a. Section 25.145(a): V_{min} in lieu of "stall identification."

b. Section 25.145(b): V_{min} in lieu of V_{sw} .

c. Section 25.1323(d): "From 1.23 V_{SR} to V_{min} " in lieu of "1.23 V_{SR} to stall warning speed" and "speeds below V_{min} " in lieu of "speeds below stall warning."

(h) Alpha Floor

In icing and non-icing conditions, the alpha-floor setting must be such that the

airplane can be flown at the speeds and bank angles specified in § 25.143(h). The applicant also must show that the alpha-floor setting does not interfere with normal maneuvering of the airplane. In addition, the airplane must exhibit no alpha-floor triggering unless appropriate when the airplane is flown in usual operational maneuvers and in turbulence.

(i) Proof of Compliance

In addition to the requirements in § 25.21(b), the following requirement applies:

The flying qualities will be evaluated at the most unfavorable center-of-gravity (CG) position.

(j) Performance in Icing Conditions

(1) Take-off

In lieu of compliance with § 25.105(a)(2)(i), the following special conditions apply:

(a) In icing conditions, if in the configuration used in showing compliance with § 25.121(b), and with the most critical of the "Take-off Ice" accretion(s) defined in 14 CFR part 25, amendment 121, appendix C:

(i) The V_2 speed scheduled in non-icing conditions does not provide the maneuvering capability specified in § 25.143(h) for the take-off configuration.

Note: This requirement does not apply if the V_{min1g} is increased in icing conditions, with the "Take-off Ice" accretion defined in part 25, amendment 121, appendix C, by less than 2.5 knots or 2.5 percent, whichever is greater.

(2) Climb: one-engine inoperative.

In lieu of compliance with § 25.121(b)(2)(ii)(A), the following special conditions apply:

(a) In icing conditions, with the most critical of the take-off ice accretion(s) defined in appendix C, if in the configuration used to show compliance with § 25.121(b) with this take-off ice accretion:

(i) The V_2 speed scheduled in non-icing conditions does not provide the maneuvering capability specified in § 25.143(h), for the take-off configuration.

Note: This requirement does not apply if the V_{min1g} is increased in icing conditions, with the "Take-off Ice" accretion defined in 14 CFR part 25, amendment 121, appendix C, by less than 2.5 knots or 2.5 percent, whichever is greater.

In lieu of compliance with § 25.121(c)(2)(ii)(A) and (B), the following special conditions apply:

(a) In icing conditions, with the most critical of the final take-off ice accretion(s) defined in appendix C, if in

the configuration used to show compliance with § 25.121(b) with the take-off ice accretion used to show compliance with § 25.111(c)(5)(i):

(i) The V_{FTO} (final take-off speed) scheduled in non-icing conditions does not provide the maneuvering capability, specified in § 25.143(h), for the en-route configuration.

Note: This requirement does not apply if the V_{min1g} is increased in icing conditions, with the “Final Take-off Ice” accretion defined in 14 CFR part 25, amendment 121, appendix C, by less than 2.5 knots or 2.5 percent, whichever is greater.

(ii) The degradation of the gradient of climb, determined in accordance with § 25.121(b), with the take-off ice accretion used in showing compliance with § 25.111(c)(5)(i), is greater than one-half of the applicable actual-to-net take-off flight path gradient reduction defined in § 25.115(b);

In lieu of compliance with 25.121(d)(2)(ii), the following special conditions apply:

(a) In icing conditions, with the most critical of the approach ice accretion(s) defined in 14 CFR part 25, amendment 121, appendix C, as applicable, in a configuration corresponding to the normal all-engines-operating procedure, the V_{min1g} for this configuration does not exceed 110 percent of the V_{min1g} for the related all-engines-operating landing configuration in icing conditions, with a climb speed established with normal landing procedures, but not more than 1.4 V_{SR} (V_{SR} determined in non-icing conditions).

(3) En-route flight paths.

In lieu of compliance with 25.123(b)(2)(i), the following special conditions apply:

(a) In icing conditions with the most critical of the en-route ice accretion(s) defined in 14 CFR part 25, amendment 121, appendix C, if:

(i) The V_{FTO} speed scheduled in non-icing conditions does not provide the maneuvering capability, specified in § 25.143(h), for the en-route configuration.

Issued in in Kansas City, Missouri, on October 27, 2023.

Patrick R. Mullen,

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

[FR Doc. 2023–24311 Filed 11–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2021–1034; Notice No. 25–23–02–SC]

Special Conditions: Airbus Model A321neo XLR Airplane; Electronic Flight-Control System: Lateral-Directional and Longitudinal Stability, and Low-Energy Awareness.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Airbus Model A321neo XLR airplane. The airplane will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is an electronic flight-control system (EFCS) associated with lateral-directional and longitudinal stability, and low-energy awareness. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send comments on or before December 4, 2023.

ADDRESSES: Send comments identified by Docket No. FAA–2021–1034 using any of the following methods:

Federal eRegulations Portal: Go to <https://www.regulations.gov/> and follow the online instructions for sending your comments electronically.

Mail: Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 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 <https://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.

FOR FURTHER INFORMATION CONTACT: Troy Brown, Performance and Environment Unit, AIR–621A, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service, Federal Aviation Administration, 1801 S Airport Rd., Wichita, KS 67209–2190; telephone and fax 405–666–1050; email troy.a.brown@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the proposed special conditions, explain the reason for any recommended change, and include supporting data.

Certification of the Airbus Model A321neo XLR airplane is currently scheduled for December 2023. The substance of these special conditions, in all material respects, has been subject to the notice and public-comment procedure in several prior instances. Therefore, because a delay would significantly affect the applicant's installation of the new or unusual feature, and delay certification of the airplane, the FAA is reducing the public-comment period to 30 days.

The FAA will consider all comments received by the closing date for comments, and will consider comments filed late if it is possible to do so without incurring delay. The FAA may change these special conditions based on the comments received.

Privacy

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in title 14, Code of Federal Regulations (14 CFR) 11.35, the FAA will post all comments received without change to <https://www.regulations.gov/>, including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about these special conditions.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your

comments responsive to these special conditions contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to these special conditions, 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 the indicated comments will not be placed in the public docket of these special conditions. Send submissions containing CBI to the individual listed in the For Further Information Contact section below. Comments the FAA receives, which are not specifically designated as CBI, will be placed in the public docket for these special conditions.

Background

On September 16, 2019, Airbus applied for an amendment to Type Certificate No. A28NM to include the new Model A321neo XLR airplane. These airplanes are twin-engine, transport-category airplanes with seating for 244 passengers and a maximum takeoff weight of 222,000 pounds.

Static Lateral-Directional Stability

The EFCS on the Airbus Model A321neo XLR airplane contains fly-by-wire control laws that can result in neutral static lateral-directional stability. Therefore, the airplane does not meet the conventional requirements in the regulations which require positive static lateral-directional stability.

Positive static directional stability is defined as the tendency to recover from a skid with the rudder free. Positive static lateral stability is defined as the tendency to raise the low wing in a sideslip with the aileron controls free. These control criteria are intended to accomplish the following:

- (a) Provide additional cues of inadvertent sideslips and skids through control-force changes.
- (b) Ensure that short periods of unattended operation do not result in any significant changes in yaw or bank angle.
- (c) Provide predictable roll and yaw response.
- (d) Provide an acceptable level of pilot attention (workload) to attain and maintain a coordinated turn.

Neutral static lateral-directional stability, conversely, means that the airplane will stay in its new attitude when disturbed by an external force (e.g., crosswind). Therefore, the

regulations under 14 CFR 25.171 for the Airbus Model A321neo XLR airplane are inadequate.

Static Longitudinal Stability

Static longitudinal stability on airplanes with mechanical links to the pitch-control surface means that a pull force on the controller results in a reduction in speed relative to the trim speed, and a push force results in higher than trim speed. Longitudinal stability is required by the regulations for the following reasons:

- (a) Speed-change cues are provided to the pilot through increased and decreased forces on the controller.
- (b) Short periods of unattended control of the airplane do not result in significant changes in attitude, airspeed, or load factor.
- (c) A predictable pitch response is provided to the pilot.
- (d) An acceptable level of pilot attention (workload) to attain and maintain trim speed and altitude is provided to the pilot.
- (e) Longitudinal stability provides gust stability.

The pitch-control movement of the side stick on the Airbus Model A321neo XLR airplane is designed to be a normal load factor, or "g" command, that results in an initial movement of the elevator surface to attain the commanded load factor that is then followed by integrated movement of the stabilizer and elevator to automatically trim the airplane to a neutral, 1g, stick-free stability. The flight path commanded by the initial side-stick input will remain stick-free until the pilot provides another command. This control function is applied during "normal" control law within the speed range, from initiation of the angle-of-attack protection limit, $V_{\alpha_{prot}}$, to V_{MO}/M_{MO} . Once outside this speed range, the control laws introduce the conventional longitudinal static stability as described above.

As a result of neutral static stability, the Airbus Model A321neo XLR airplane does not meet the regulatory requirements for static longitudinal stability during normal operations.

Low Energy Awareness

Past experience on airplanes fitted with a flight-control system providing neutral longitudinal stability reveals insufficient feedback cues to the pilot of excursion below normal operational speeds. The maximum angle-of-attack protection system limits the airplane angle of attack and prevents stall during normal operating speeds, but this EFCS is not sufficient to prevent stall at low-speed excursions below normal

operational speeds. Until intervention, there are no stability cues because the aircraft remains trimmed. Additionally, feedback from the pitching moment due to thrust variation is reduced by the flight-control laws. Low-speed excursions may become more hazardous without the typical longitudinal stability, and recovery is more difficult when the low-speed situation is associated with a low altitude, and with the engines at low thrust or with performance-limiting conditions.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Airbus must show that the Model A321neo XLR airplane meets the applicable provisions of the regulations listed in Type Certificate No. A28NM, or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (e.g., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus Model A321neo XLR airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model A321neo XLR airplane must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in § 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.101.

Novel or Unusual Design Features

The Airbus Model A321neo XLR airplane will incorporate the following novel or unusual design feature:

An electronic flight-control system (EFCS) associated with lateral-directional and longitudinal stability, and low-energy awareness.

Discussion

In the absence of positive lateral stability, the curve of lateral control-surface deflections against sideslip angle should be, in a conventional sense and reasonably in harmony with, rudder deflection during steady-heading sideslip maneuvers.

Because conventional relationships between stick forces and control-surface displacements do not apply to the “load-factor command” flight-control system on the Airbus Model A321neo XLR airplane, longitudinal stability characteristics should be evaluated by assessing the airplane’s handling qualities during simulator and flight-test maneuvers appropriate to operation of the airplane. Additionally, there is recognition that under icing and non-icing conditions, there may be a difference in full pedal deflection. This difference may result in changes to testing before reaching full pedal and the special conditions account for these differences.

The airplane must provide adequate awareness cues to the pilot of a low-energy (low-speed/low-thrust/low-height) state to ensure that the airplane retains sufficient energy to recover when flight-control laws provide neutral longitudinal stability significantly below the normal operating speeds. “Adequate awareness” means that information must be provided to alert the crew of unsafe operating conditions and to enable them to take appropriate corrective action. Testing of these awareness cues should occur by simulator and flight test in the operational flight envelope for which certification is requested. Testing should include a sufficient number of tests to allow the level of energy awareness, and the effects of energy-management errors, to be assessed.

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions apply to Airbus Model A321neo XLR airplane. Should Airbus apply later for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model series of airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

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

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for Airbus Model A321neo XLR airplane. These special conditions are issued in lieu of the paragraphs of 14 CFR part 25 referenced below.

Static Lateral-Directional Stability

(a) In lieu of compliance with § 25.171, the airplane must have lateral and directional stability characteristics in accordance with § 25.177. In addition, both suitable stability and suitable control feel are required in any condition normally encountered in service.

(b) In lieu of compliance with § 25.177(c), the following requirement must be met for the configurations and speed specified in § 25.177(a).

(1) In straight, steady sideslips over the range of sideslip angles appropriate to the operation of the airplane, the directional control movements and forces must be substantially proportional to the angle of sideslip in a stable sense. The factor of proportionality must lie between limits found necessary for safe operation. During these straight, steady sideslips, necessary lateral control movements and forces must not be in the unstable sense with the exception of speeds above V_{mo}/M_{mo} per § 25.177(b)(2). The range of sideslip angles evaluated must include those sideslip angles resulting from the lesser of:

(i) One-half of the available directional (pedal) control input; and
(ii) A directional (pedal) control force of 180 pounds.

(c) In lieu of compliance with § 25.177(d), the following requirements must be met:

(2) In non-icing conditions, for sideslip angles greater than those prescribed by § 25.177(a), up to the angle at which full rudder control is used or a rudder control force of 180 pounds is obtained, the rudder control forces may not reverse, and increased rudder deflection must be needed for increased angles of sideslip. Compliance with this requirement must be shown using straight, steady sideslips, unless

full lateral control input is achieved before reaching either full rudder control input or a rudder control force of 180 pounds; a straight, steady sideslip need not be maintained after achieving full lateral control input. This requirement must be met at all approved landing gear and flap positions for the range of operating speeds and power conditions appropriate to each landing gear and flap position with all engines operating.

(3) In icing conditions, in the configurations listed below, trim the airplane at the specified speed and conduct steady heading sideslips over the range of sideslip angles appropriate to the operation of the airplane but not less than those obtained with one-half of available rudder control input.

(i) High lift devices retracted configuration: trim at best rate of climb speed but not less than minimum all engines operating climb speed defined for icing conditions.

(ii) Lowest lift take-off configuration: trim at the all engines operating initial climb speed defined for icing conditions.

(iii) Landing configurations: trim at minimum landing speed defined for icing conditions.

Longitudinal Stability

In lieu of compliance with the requirements of §§ 25.171, 25.173, and 25.175, the airplane must be shown to have longitudinal stability characteristics in accordance with the following conditions. In addition, both suitable stability and suitable control feel are required in any condition normally encountered in service, including the effects of atmospheric disturbance.

(a) Strong positive static longitudinal stability (1 pound per 6 knots applied through the sidestick) must be present which provides adequate awareness cues to the crew that the speed is above V_{mo}/M_{mo} or below the minimum speed for hands-free stabilized flight. Static longitudinal characteristics must be shown to be suitable based on the airplane handling qualities, including an evaluation of pilot workload and pilot compensation, for specific test procedures during the flight-test evaluations. These characteristics must be shown for appropriate combinations of airplane configuration (*i.e.*, flaps extended or retracted, gear deployed or stowed) and thrust for climb, cruise, approach, landing and go-around.

(1) Release of the controller at speeds above V_{mo}/M_{mo} , or below the minimum speed for hands-free stabilized flight, must produce a prompt recovery towards normal operating speeds

without resulting in a hazardous condition.

(2) The design must not allow a pilot to re-trim the controller forces resulting from this stability.

Low Energy Awareness

The airplane must provide adequate awareness cues to the pilot of a low-energy (low-speed/low-thrust/low-height) state to ensure that the airplane retains sufficient energy to recover when flight-control laws provide neutral longitudinal stability significantly below the normal operating speeds. This should be accomplished as follows:

(a) Adequate low speed/low thrust cues at low altitude should be provided by a strong positive static stability force gradient (1 pound per 6 knots applied through the sidestick), or

(b) The low energy awareness should be provided by an appropriate warning with the following characteristics. The low-energy awareness should:

(1) Be unique, unambiguous, and unmistakable.

(2) Be active at appropriate altitudes and in appropriate configurations (*i.e.*, at low altitude, in the approach and landing configurations).

(3) Be sufficiently timely to allow recovery to a stabilized flight condition inside the normal flight envelope while maintaining the desired flight path and without entering the flight controls angle-of-attack protection mode.

(4) Not be triggered during normal operation, including operation in moderate turbulence for recommended maneuvers at recommended speeds.

(5) Not be cancelable by the pilot other than by achieving a higher energy state.

(6) Have an adequate hierarchy among the various warnings so that the pilot is not confused and led to take inappropriate recovery action if multiple warnings occur.

Global energy awareness and non-nuisance on low-energy cues must be evaluated by simulator and flight tests in the whole take-off and landing altitude range for which certification is requested. This includes all relevant combinations of weight, center-of-gravity position, configuration, airbrakes position, and available thrust, including reduced and derated take-off thrust operations and engine-failure cases. The tests must assess the level of energy awareness, and the effects of energy-management errors.

Issued in in Kansas City, Missouri, on October 27, 2023.

Patrick R. Mullen,

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

[FR Doc. 2023–24312 Filed 11–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2141; Project Identifier MCAI–2023–00689–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 reports of corrosion on lavatory floor fittings at various locations. This proposed AD would require repetitive general visual inspections of the affected parts, applicable corrective actions, and reporting of the inspection results, 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 December 18, 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](https://www.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](https://www.regulations.gov) under Docket No. FAA–2023–2141; 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 AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; website easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu. It is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–2141.

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

FOR FURTHER INFORMATION CONTACT: Dat Le, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 228–7300; email: 9-avs-nyaco-cos@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA–2023–2141; Project Identifier MCAI–2023–00689–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](https://www.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, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 228-7300; email: 9-avs-nyaco-cos@faa.gov. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023-0102, dated May 31, 2023 (EASA AD 2023-0102) (also referred to as the MCAI), to correct an unsafe condition for all Airbus SAS Model A350-941 and -1041 airplanes. The MCAI states there are reports of corrosion on lavatory floor fittings at various locations on Model A350 airplanes.

The FAA is proposing this AD to address this corrosion, which could lead to lavatory module detachment, with consequent injury to cabin crew and passengers, and possibly resulting in reduced evacuation capacity from the airplane in case of an emergency.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-2141.

Related Service Information Under 1 CFR Part 51

EASA AD 2023-0102 specifies procedures for repetitive general visual inspections for corrosion and other damage (including cracks, pitting, discoloration, and dents) of the affected lavatory floor fittings and, depending on findings, corrective actions including repair or replacement. EASA AD 2023-0102 also requires reporting of the inspection results after each inspection.

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

FAA's Determination

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

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in EASA AD 2023-0102 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD

process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2023-0102 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023-0102 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023-0102 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 2023-0102. Service information required by EASA AD 2023-0102 for compliance will be available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-2141 after the FAA final rule is published.

Interim Action

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

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 32 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × \$85 per hour = \$170	\$0	\$170	\$5,440

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on

the results of any required actions. The FAA has no way of determining the

number of aircraft that might need these on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
3 work-hours × \$85 per hour = \$255	\$10	\$265

The FAA has included all known costs in its cost estimate. According to

the manufacturer, however, some or all of the costs of this proposed AD may be

covered under warranty, thereby

reducing the cost impact on affected operators.

Paperwork Reduction Act

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

responsibilities among the various levels of government.

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Would not affect intrastate aviation in Alaska, and
- (3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus SAS: Docket No. FAA–2023–2141; Project Identifier MCAI–2023–00689–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by December 18, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus SAS Model A350–941 and –1041 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by reports of corrosion on lavatory floor fittings at various locations on Model A350 airplanes. The unsafe condition, if not addressed, could lead to lavatory module detachment, with consequent injury to cabin crew and passengers, and possibly resulting in reduced evacuation capacity from the airplane in case of an emergency.

(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 2023–0102, dated May 17, 2023 (EASA AD 2023–0102).

(h) Exceptions to EASA AD 2023–0102

(1) Where EASA AD 2023–0102 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the “Remarks” section of EASA AD 2023–0102.

(3) Paragraph (4) of EASA AD 2023–0102 specifies to report inspection results to Airbus within a certain compliance time. For this AD, report inspection results at the applicable time specified in paragraph (h)(3)(i) or (ii) of this AD.

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

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

(4) Where paragraph (2) of EASA AD 2023–0102 specifies “any discrepancy, as defined in the SB, is detected,” this AD requires replacing those words with “any corrosion and other damage is detected.”

(i) No Requirement for Return of Parts

Although the service information referenced in EASA AD 2023–0102 specifies to return parts to the manufacturer, this AD does not include that requirement.

(j) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(3) *Required for Compliance (RC):* Except as required by paragraph (j)(2) of this AD, if any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified

as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(k) Additional Information

For more information about this AD, contact Dat Le, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 228-7300; email: 9-avs-nyaco-cos@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) European Union Aviation Safety Agency (EASA) AD 2023-0102, dated May 17, 2023.

(ii) [Reserved]

(3) For EASA AD 2023-0102, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; website easa.europa.eu. You may find this EASA AD on the EASA website at ad.easa.europa.eu.

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

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

Issued on October 27, 2023.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023-24166 Filed 11-2-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 180

[Docket No. FDA-2023-N-0937]

RIN 0910-A181

Revocation of Authorization for Use of Brominated Vegetable Oil in Food

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

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

proposing to amend our regulations to revoke the authorization for the use of brominated vegetable oil (BVO) in food. This action is being taken because there is no longer a reasonable certainty of no harm from the continued use of BVO in food. Specifically, the proposed rule would revoke the authorization for the use of BVO as a food ingredient intended to stabilize flavoring oils in fruit-flavored beverages. There are no authorizations for other uses of BVO in food.

DATES: Either electronic or written comments on the proposed rule must be submitted by January 17, 2024.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 17, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2023-N-0937 for "Revocation of Authorization for Use of Brominated Vegetable Oil in Food." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." 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:
Jason Downey, Center for Food Safety and Applied Nutrition (HFS–255), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–9241; or Philip L. Chao, 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:

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I. Executive Summary

A. Purpose of the Proposed Rule

The proposed rule would amend our regulations to revoke the authorization for the use of brominated vegetable oil (BVO) in food. We are taking this action because there is no longer a basis to conclude that this use is safe.

BVO is a complex mixture of plant-derived triglycerides that have been reacted to contain atoms of the element bromine bonded to the molecules. BVO is used primarily to help emulsify citrus-flavored soft drinks, preventing them from separating during distribution.

B. Summary of the Major Provisions of the Proposed Rule

The proposed rule would revoke the authorization for the use of BVO as an ingredient in food. Specifically, the proposed rule would remove § 180.30 (21 CFR 180.30).

C. Legal Authority

We are proposing this rule consistent with our authority under the Federal Food, Drug, and Cosmetic Act (FD&C

Act). We discuss our legal authority in greater detail in part V.

D. Costs and Benefits

The costs of this proposed rule come from reformulating products currently manufactured with BVO, relabeling products currently manufactured with BVO, ingredient substitutes for BVO, and possible changes to sensory product properties (which could lead to decreased consumption). The benefits of this proposed rule come in the form of public health gains from reduced exposure to BVO. The annualized costs of this rulemaking (with a discount rate of 7 percent), minus the costs of the baseline of gradual voluntary reduction, are \$0.09 million to \$0.23 million. The first-year costs of the proposed rule are \$6.4 million to \$15.9 million. We estimate the annualized reduction in BVO exposure under the proposed rule relative to the baseline of gradual voluntary reduction to be roughly 0.02 million ounces (oz).

II. Table of Abbreviations/Acronyms Used in This Document

Abbreviation/ acronym	What it means
BVO	Brominated vegetable oil.
CFR	Code of Federal Regulations.
FDA	Food and Drug Administration.
FD&C Act	Federal Food, Drug, and Cosmetic Act.
GRAS	Generally Recognized as Safe.
NCTR	National Center for Toxicological Research.
ppm	parts per million.

III. Background

Brominated vegetable oil has been used as a flavoring oil stabilizer and emulsifier since the 1920s and was generally recognized as safe (GRAS) for this use by FDA. In 1970, FDA concluded that BVO could no longer be regarded as GRAS because of toxicity concerns under the conditions of use at the time, at a level of approximately 150 parts per million (ppm) in beverages (Ref. 1). FDA removed BVO from the list of “Substances generally recognized as safe” in 21 CFR part 121 (now codified under 21 CFR part 182) (35 FR 1049, January 27, 1970). In response, the Flavor and Extract Manufacturers Association submitted a food additive petition (FAP 0A2532) to FDA requesting approval for use of BVO as a food additive in beverages at a maximum use level of 15 ppm. FDA reviewed the petition, including results from unpublished BVO studies, and

while the available information did not indicate an immediate threat to health from the use of BVO in beverages at 15 ppm, we concluded in our petition response that additional long-term studies were needed to support the 15-ppm limit (Ref. 2).

Based on the data available at the time and the history of use of BVO in food without apparent harm, FDA determined in October 1970 that there would be an adequate margin of safety from the use of BVO in beverages at the reduced use level of 15 ppm on an interim basis while additional, longer-term safety studies with BVO were conducted (Ref. 1). FDA established an interim food additive regulation under 21 CFR 121.1234 (now codified at § 180.30) authorizing the use of BVO as a stabilizer for flavoring oils used in fruit-flavored beverages in an amount not to exceed 15 ppm in the finished beverage. FDA initially authorized this use of BVO on a 3-year interim basis pending the receipt of additional data (35 FR 12062, July 28, 1970), and then for an indefinite period to allow for completion of subsequent safety studies (39 FR 36113, October 8, 1974). BVO is not permitted for use in beverages in some jurisdictions, including Australia, the European Union, Japan, and New Zealand. Some BVO-containing products have been reformulated to replace BVO to market the products in jurisdictions that do not permit the use of BVO in those products.

Safe and authorized substitutes for BVO are available and have long been in use for the same functions as BVO. For example, sucrose acetate isobutyrate (SAIB; 21 CFR 172.833), glycerol ester of rosin (ester gum; 21 CFR 172.735), and locust (carob) bean gum (21 CFR 184.1343) are approved food additives or affirmed by FDA as GRAS when used to stabilize or adjust the density of flavoring oils in beverages. To date, FDA has not taken further regulatory action regarding BVO use in food because new data or information had not been available that was sufficient to issue a permanent food additive regulation for this use of BVO in food or to revoke authorization for this use of BVO.

IV. Regulation of Food Additives

Food additives are regulated under section 409 of the FD&C Act (21 U.S.C. 348). A food additive is deemed unsafe under section 402(a)(2)(C) of the FD&C Act (21 U.S.C. 342(a)(2)(C)), unless, in relevant part, the use of the food additive is authorized under a food additive regulation. FDA may not issue such an authorization unless the use of the food additive is safe. FDA defines “safe,” in relevant part, to mean that

there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under the conditions of its intended use (see 21 CFR 170.3(i)). Certain food additives are authorized on an interim basis as provided under 21 CFR 180.1. Section 409(i) of the FD&C Act provides that the procedure by which food additive regulations may be amended or repealed are to be prescribed by FDA regulation and that such procedure must conform to the procedure specified in the statute for promulgating these regulations. Under § 171.130(a) (21 CFR 171.130(a)), FDA may propose the issuance of a regulation amending or repealing a regulation pertaining to a food additive or granting or repealing an exception for such additive.

V. Legal Authority

We are issuing this proposed rule under sections 409(i) and 701(a) of the FD&C Act. The FD&C Act defines “food additive,” in relevant part, as any substance, the intended use of which results or may reasonably be expected to result, directly or indirectly, in it becoming a component of food, if such substance is not generally recognized by qualified experts as safe under the conditions of its intended use (section 201(s) of the FD&C Act (21 U.S.C. 321(s))). Section 409(i) of the FD&C Act provides that the procedure by which food additive regulations may be amended or repealed are to be prescribed by FDA regulation and that such procedure must conform to the procedure specified in the statute for promulgating these regulations. Under § 171.130(a), FDA may propose repealing a regulation pertaining to a food additive. Section 701(a) of the FD&C Act (21 U.S.C. 371(a)) provides the authority to issue regulations for the efficient enforcement of the FD&C Act.

VI. Safety of Brominated Vegetable Oil Consumption

A. 2014 Evaluation of Safety Data

In 2014, as part of our work to reevaluate food and color additives when, for example, new safety information becomes available about an authorized substance, we reviewed all available data and information that were relevant to the safety of BVO used as a food ingredient. For this reevaluation, we also reviewed the memoranda and safety studies in our files regarding BVO and considered current scientific principles and study design practices (Ref. 3).

In our 2014 review, we identified four unresolved safety questions with respect to the use of BVO in food: the potential

for thyroid toxicity, bioaccumulation, developmental neurotoxicity, and reproductive toxicity. We determined that the safety data and information available did not provide evidence of a health threat resulting from the limited permitted use of BVO as a flavoring stabilizer in fruit-flavored beverages, but many studies that we reviewed did not clearly establish safe levels of chronic use (Ref. 3). We identified deficiencies in the existing studies, including poor study design by modern standards, equivocal results, inconsistencies in measured parameters between studies, and suboptimal dose selection (Ref. 3). We concluded that high-quality data from contemporary studies, performed under current guideline standards, were needed to address the knowledge gaps regarding the safety of BVO (Ref. 3).

Therefore, through a collaboration between FDA’s Center for Food Safety and Applied Nutrition, the National Center for Toxicological Research (NCTR), and the National Institute of Environmental Health Sciences’ Division of Translational Toxicology (formerly the Division of the National Toxicology Program), new rodent safety studies on BVO were designed and executed with the goal of addressing two of the unresolved safety questions: the potential for thyroid toxicity and bioaccumulation. We selected these two safety questions to study first because if these studies indicated safety concerns, we would not need to conduct more complex studies on the additional outcomes to take regulatory action.

B. New Findings Do Not Support Safety of BVO Used as a Food Ingredient

The rodent safety studies conducted by NCTR were published in 2022 (Ref. 4) and confirmed previous reports that dietary exposure to BVO is toxic to the thyroid and results in bioaccumulation of lipid-bound bromine in the body at doses relevant to human exposure. To account for uncertainty in translating animal studies to humans, risk assessors evaluate the safety of food ingredients in animal studies at use levels greater than probable human dietary exposure. For example, FDA typically requires food additives to be safe in animal studies at exposures at least 100-fold higher than probable human dietary exposure (21 CFR 170.22) to account for uncertainty in applying results from animal studies to humans. Using the combined 2015–2018 National Health and Nutrition Examination Survey and the conservative assumption that all beverages labeled as containing BVO contain the 15 ppm use level permitted by § 180.30, we estimated mean and 90th percentile dietary exposures of 5

and 9 milligrams (mg) BVO/person (p)/day (d) for the U.S. population aged 2 years and older (Ref. 5), or 0.08 and 0.15 mg/kilogram (kg) body weight (bw)/d on a 60 kg bw basis. The doses of BVO used in the recently published studies more closely approximate levels of dietary exposure to BVO in humans than the doses used in many of the earlier studies.

NCTR’s first 90-day study conducted in rats described adverse effects on the thyroids of test animals following dietary exposure to BVO. Histological changes in the thyroid, specifically follicular cell hypertrophy, were observed in males at all exposure levels and in females at the highest exposure level, suggestive of a sex-specific effect. The incidence of abnormal histopathological findings in male thyroids increased in a dose-dependent manner. This study also demonstrated alterations in hormone signaling along the hypothalamic-pituitary-thyroid axis as a result of dietary exposure to BVO (Ref. 6). Overall, these new data corroborate previous studies in rats and pigs that also reported thyroid toxicity after dietary exposure to BVO (Ref. 3).

Additionally, in both studies, dietary exposure to BVO led to the accumulation of inorganic and organic bromine in test animals (Ref. 6), a finding previously related to the onset of central nervous system toxicity (*i.e.*, lethargy, ataxia, and disorientation) in pigs exposed to BVO (Ref. 3). After 90 days of dietary exposure to BVO, accumulation had not reached steady state, but brominated fatty acids appeared to accumulate in a dose-dependent manner in the heart, liver, and inguinal fat of all animals fed BVO. Based on these study results, we estimated that bioaccumulated brominated fatty acids could persist in test animals for up to 587 days after BVO was removed from the diet (Ref. 6). The observed potential for brominated fatty acids to bioaccumulate in these studies confirms previous studies in laboratory animals and humans that raised safety questions with the use of BVO as a food ingredient (Ref. 3). Importantly, the bioaccumulation of lipid-bound bromine makes it difficult to estimate cumulative dietary exposure to BVO and to interpret subchronic studies that reported no adverse effect from dietary exposure to BVO (Ref. 6).

These studies provide important new data on two of the previously mentioned unresolved safety questions for BVO use in foods. In total, they demonstrate BVO consumption can result in thyroid toxicity in both male and female rats, interference with the hypothalamic-pituitary-thyroid axis in male rats, and

bioaccumulation of lipid-bound bromine in both sexes. As a result of these new data, we can no longer conclude that there is a reasonable certainty of no harm from the use of BVO as a stabilizer for flavoring oils in fruit-flavored beverages. While safety questions remain regarding the potential for developmental and reproductive toxicity resulting from dietary exposure to BVO, we do not believe that addressing these remaining unresolved safety questions is needed to conclude that there is no longer a reasonable certainty of no harm from this use. Therefore, we propose to revoke the interim authorization of BVO as a food additive.

VII. Description of the Proposed Rule

The proposed rule, if finalized, would revoke § 180.30, which authorizes on an interim basis the use of BVO as a stabilizer for flavoring oils generally used in fruit-flavored beverages, for which any applicable standards of identity do not preclude such use, in an amount not to exceed 15 ppm in the finished beverage. As we have previously determined that this use of BVO is not GRAS, the use of BVO in food will no longer be authorized. Our proposal to remove § 180.30 is supported by animal and human data, including those summarized in Ref. 3 and the new safety studies described above, which demonstrate that there is no longer a reasonable certainty of no harm from the authorized use of BVO in food.

VIII. Proposed Effective/Compliance Dates

We propose that any final rule resulting from this rulemaking be effective 30 days after the final rule's date of publication in the **Federal Register**. We also recognize that the food industry would need sufficient time to reformulate products and for these products to work their way through distribution. Therefore, the compliance date for this rule, if finalized, will be 1 year after the effective date, to provide the opportunity for companies to reformulate, relabel, and deplete the inventory of BVO-containing products prior to enforcing the requirements of the final rule.

IX. Preliminary Economic Analysis of Impacts

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, Executive Order 14094, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Orders 12866, 13563, and 14094 direct us to assess all benefits, costs, and transfers of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Rules are significant under Executive Order 12866 Section 3(f)(1) (as amended by Executive Order 14094) if they “have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of the Office of Information and Regulatory Affairs [OIRA] for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities.” OIRA has determined that this proposed rule is not a significant regulatory action under Executive Order 12866 Section 3(f)(1).

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because we estimate that this proposed rule will impact at most 2.5 percent of small businesses within the beverage manufacturing industry, and because we believe that costly disruptions to small entities are likely to be small due to replacement formulas for BVO having been in place and widely used for decades, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes estimates of anticipated impacts, before proposing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal Governments, in the

aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$177 million, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

Food producers would not be permitted to use BVO as a food additive if the rule is finalized. For the purposes of this analysis, we assume that all products currently using BVO will be reformulated to use some other kind of stabilizer.

The costs of this proposed rule come from reformulating products currently manufactured with BVO, relabeling products currently manufactured with BVO, ingredient substitutes for BVO, and changes to sensory product properties. The benefits of this proposed rule come in the form of public health gains from reduced exposure to BVO. The annualized costs (with a discount rate of 7 percent) of this rulemaking, minus the costs of the baseline of gradual voluntary reduction, are \$0.09 million to \$0.23 million. The first-year costs of the proposed rule are \$6.4 million to \$15.9 million. We estimate the annualized reduction in BVO exposure under the proposed rule relative to the baseline of gradual voluntary reduction to be roughly 0.02 million ounces (oz). For the proposed rule to be cost effective, it would have to prevent \$0.15 million worth of illness (with a discount rate of 7 percent) on an annual basis to cover the domestic costs to industry. This amounts to almost \$9 worth of public health benefits per oz of reduced BVO exposure.

It is possible that the cost of reformulation and relabeling could be passed on to consumers in the form of higher prices. We do not know what percentage of the costs will be passed on to consumers. However, replacement formulas have been in place for decades and are widely used in beverage products throughout the United States and the world. The time between the publication of our proposal and any subsequent final rule as well as that rule's compliance period should minimize costly disruptions to manufacturers still using BVO.

TABLE 1—SUMMARY OF BENEFITS, COSTS AND DISTRIBUTIONAL EFFECTS OF PROPOSED RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered	
Benefits:							
Annualized Monetized \$millions/year.	.....	.....	.....	.....	7 3		
Annualized Quantified	0.02 million oz ...	0.01 million oz ...	0.03 million oz ...	.....	.....	2026–2045	The benefits of the proposed rule come in the form of reduction in exposure to BVO.
Qualitative	For the rule to be cost effective, it would have to prevent almost \$9 worth of illness annually per oz of reduced BVO exposure.						
Costs:							
Annualized Monetized \$millions/year.	\$0.15	\$0.09	\$0.23	2022	7	2026–2045	The first-year costs are roughly \$6.4 million to \$15.9 million.
Annualized Quantified	\$0.06	\$0.03	\$0.08	2022	3	2026–2045	
Qualitative .....	.....	.....	.....	.....	7 3		
Transfers:							
Federal Annualized Monetized \$millions/year.	.....	.....	.....	.....	7 3		
From/To	From:			To:			
Other Annualized Monetized \$millions/year.	.....	.....	.....	.....	7		
.....	.....	.....	.....	.....	3		
From/To	From: Producers			To: Consumers			We do not know what percentage of producer costs will be passed on to consumers.

Effects:

State, Local or Tribal Government:

Small Business:

Wages:

Growth:

We have developed a comprehensive Preliminary Economic Analysis of Impacts that assesses the impacts of the proposed rule. We request comment on our estimates of benefits, costs, and transfers of this proposed rule. The full preliminary analysis of economic impacts is available in the docket for this proposed rule (Ref. 7) and at <https://www.fda.gov/about-fda/reports/economic-impact-analyses-fda-regulations>.

X. Analysis of Environmental Impacts

We have determined under 21 CFR 25.32(m) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

XI. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed rule contains no collection of information. Therefore, clearance by the

Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

XII. Consultation and Coordination with Indian Tribal Governments

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13175. We have tentatively determined that the rulemaking does not contain policies that would have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. We invite comments from tribal officials on any potential impact on Indian tribes from this proposed action.

XIII. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. We have determined that the proposed rule

does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

XIV. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (see ADDRESSES) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they also are available electronically at <https://www.regulations.gov>. References without asterisks are not on public display at <https://www.regulations.gov>.

because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

- * 1. FDA Memorandum from S. Shibko to Division of Regulations and Petitions Control, May 25, 1970.
- * 2. FDA Memorandum from L. Friedman to L. Buckley, Division of Regulations and Petitions Control, October 21, 1970.
- * 3. FDA Memorandum from Y. Zang to T. Croce, Division of Petition Review, September 2, 2014.4. Woodling K.A., P. Chitranshi, C.C. Jacob, et al., "Toxicological Evaluation of Brominated Vegetable Oil in Sprague Dawley Rats." *Food and Chemical Toxicology*, 165:113137, 2022.
- * 5. FDA Memorandum from D. Doell to J. Downey, Regulatory Review Branch—Team 1, March 1, 2023.
- * 6. FDA Memorandum from J. Gingrich to J. Downey, Regulatory Review Branch—Team 1, March 1, 2023.
- * 7. FDA Preliminary Economic Analysis of Rule to Revoke Uses of Brominated Vegetable Oil in Foods (<https://www.fda.gov/about-fda/reports/economic-impact-analyses-fda-regulations>).

List of Subjects in 21 CFR Part 180

Food additives.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 180 be amended as follows:

PART 180—FOOD ADDITIVES PERMITTED IN FOOD OR IN CONTACT WITH FOOD ON AN INTERIM BASIS PENDING ADDITIONAL STUDY

- 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 343, 348, 371; 42 U.S.C. 241.

§ 180.30 [Removed]

- 2. Remove § 180.30.

Dated: October 25, 2023.

Robert M. Califf,

Commissioner of Food and Drugs.

[FR Doc. 2023-24084 Filed 11-2-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 950

[SATS WY-051-FOR; Docket ID: OSM-2023-0004; S1D1S SS08011000 SX064A000 223S180110; S2D2S SS08011000 SX064A000 22XS501520]

Wyoming Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are announcing receipt of a proposed regulatory and statutory amendment to the Wyoming coal program (Wyoming program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). On September 25, 2018 the Wyoming Environmental Quality Council approved a number of revisions to rules governing permitting, operation, and abandonment of Class III underground injection and recovery wells associated with in situ mining of coal. Specifically, the proposed revisions update regulations to be consistent with Environmental Protection Agency Underground Injection Control regulations for class III wells, reorganize the chapter to better correlate with other key Land Quality Division (LQD) regulations and to reference existing LQD regulations and definitions, update regulations to be consistent with other Wyoming regulations pertaining to well construction, well abandonment, and aquifer exemptions, and update regulations to include current best management practices specific to in situ coal mining.

This document gives the times and locations that the Wyoming program and this proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., M.D.T., December 4, 2023. If requested, we may hold a public hearing or meeting on the amendment on November 28, 2023. We will accept requests to speak at a hearing until 4 p.m., M.D.T., on November 20, 2023.

ADDRESSES: You may submit comments, identified by SATS No. WY-051-FOR, by any of the following methods:

- *Mail/Hand Delivery:* OSMRE, Attn: Jeffrey Fleischman, P.O. Box 11018, 100 East B Street, Room 4100, Casper, Wyoming 82602.

- *Fax:* (307) 261-6552.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Comment Procedures" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Wyoming program, this amendment, a listing of any scheduled public hearings or meetings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSMRE's Casper Field Office or the full text of the program amendment is available for you to read at www.regulations.gov.

Attn: Jeffrey Fleischman, Field Office Director, Office of Surface Mining Reclamation and Enforcement, 100 East B Street, Casper, Wyoming 82602, Telephone: (307) 261-6550, Email: jfleischman@osmre.gov

In addition, you may review a copy of the amendment during regular business hours at the following location:

Attn: Kyle Wendtland, Administrator, Wyoming Department of Environmental Quality, Land Quality Division, 200 West 17th Street, Suite 10, Cheyenne, Wyoming 82002, Telephone: (307) 777-7046, Email: kyle.wendtland@wyo.gov

FOR FURTHER INFORMATION CONTACT:

Jeffrey Fleischman, Field Office Director, Office of Surface Mining Reclamation and Enforcement, 100 East B Street, Casper, Wyoming 82602, Telephone: (307) 261-6550, Email: jfleischman@osmre.gov

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background on the Wyoming Program
- II. Description of the Proposed Amendment
- III. Public Comment Procedures
- IV. Procedural Determinations

I. Background on the Wyoming Program

Subject to OSMRE's oversight, section 503(a) of the Act permits a State to

assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its approved State program includes, among other things, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. See 30 U.S.C. 1253(a)(1) and (7).

On the basis of these criteria, the Secretary of the Interior conditionally approved the Wyoming program on November 26, 1980. You can find background information on the Wyoming program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Wyoming program in the November 26, 1980 **Federal Register** 45 FR 78637. You can also find later actions concerning the Wyoming program and program amendments at 30 CFR 950.10.

II. Description of the Proposed Amendment

By letter dated February 14, 2023 (Document ID No. OSM–2023–0004), Wyoming sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). We found Wyoming's proposed amendment administratively complete on March 7, 2023.

Between 1994 and 2002 Wyoming enacted several revisions to the Coal Chapter 18 Rules. On September 25, 2018 the Wyoming Environmental Quality Council approved a number of revisions to the rules governing Class III well associated with in situ mining. The proposed amendment is a state initiative intended to update Chapter 18, which was last revised in 2002. Specifically the proposed revisions: (1) update regulations to be consistent with Environmental Protection Agency Underground Injection Control regulations for class III wells, (2) reorganize the chapter to better correlate with other key LQD regulations and to reference existing LQD regulations and definitions, (3) update regulations to be consistent with other Wyoming regulations pertaining to well construction, well abandonment, and aquifer exemptions, and (4) update regulations to include current best management practices specific to in situ coal mining.

The full text of the program and/or plan amendment is available for you to read at the locations listed above under **ADDRESSES** or at www.regulations.gov.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Electronic or Written Comments

If you submit written or electronic comments on the proposed rule during the 30-day comment period, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., M.D.T. on November 20, 2023. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak

has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review, Executive Order 13563—Improving Regulation and Regulatory Review, and Executive Order 14094—Modernizing Regulatory Review

Executive Order 12866, as amended by Executive Order 14094, provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State program and/or AML plan amendments is exempted from OMB review under Executive Order 12866, as amended by Executive Order 14094. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSMRE for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment.

We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and Executive Orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 950

Intergovernmental relations, Required program amendments, State regulatory program approval, State-Federal cooperative agreement, Surface mining, Underground mining.

David A. Berry,

Regional Director, Unified Regions 5, 7–11.

[FR Doc. 2023–24272 Filed 11–2–23; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF AGRICULTURE**Forest Service****36 CFR Part 251**

RIN 0596–AD55

Land Uses; Special Uses; Carbon Capture and Storage Exemption

AGENCY: Forest Service, USDA.

ACTION: Proposed rule; request for public comment.

SUMMARY: The United States Department of Agriculture, Forest Service (Forest Service or Agency), is proposing to amend its special use regulations, which prohibit authorizing exclusive and perpetual use and occupancy of National Forest System lands, to provide an exemption for carbon capture and storage. The Forest Service is also proposing to add a definition for “Carbon capture and storage.”

DATES: Comments on this proposed rule must be received in writing by January 2, 2024.

ADDRESSES: Comments, identified by RIN 0596–AD55, should be sent via one of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for sending comments;
- *Mail:* Director, Lands, Minerals, and Geology Management Staff, 201 14th Street SW, Washington, DC 20250–1124; or
- *Hand Delivery/Courier:* Director, Lands, Minerals, and Geology Management Staff, 1st Floor Southeast, 201 14th Street SW, Washington, DC 20250–1124.

Comments should be confined to issues pertinent to the proposed rule, should explain the reasons for any recommended changes, and should reference the specific section and wording being addressed, where possible. All timely comments, including names and addresses when provided, will be placed in the record and will be available for public inspection and copying. The public may inspect comments received on this

proposed rule at the Office of the Director, Lands, Minerals, and Geology Management Staff, 1st Floor Southeast, Sidney R. Yates Federal Building, 201 14th Street SW, Washington, DC, on business days between 8:30 a.m. and 4 p.m. Visitors are encouraged to call ahead at 202–205–1680 to facilitate entry into the building. Comments may also be viewed on the Federal eRulemaking Portal at <https://www.regulations.gov>. In the search box, enter “RIN 0596–AD55,” and click the “Search” button.

FOR FURTHER INFORMATION CONTACT:

Mark Chandler, Realty Specialist, Washington Office Lands, Minerals, and Geology Management Staff, 202–205–1117 or mark.chandler@usda.gov. Individuals who use telecommunication devices for the hearing impaired may call the Federal Relay Service at 800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Forest Service administers approximately 74,000 special use authorizations for use and occupancy of National Forest System (NFS) lands for a wide variety of purposes, including powerline facilities, communications facilities, outfitting and guiding, campground concessions, and resorts. The activities and facilities authorized by special use authorizations contribute significantly to the national economy and the social and economic foundation of rural communities.

To obtain a special use authorization for a new use or activity, a proponent must submit a special use proposal which meets two sets of screening criteria in the Agency’s existing special uses regulations at 36 CFR 251.54(e)(1) and (5). If the proposal meets all the screening criteria, the proponent may submit a special use application for evaluation by the Forest Service. Per the existing initial screening criterion at 36 CFR 251.54(e)(1)(iv), the Forest Service may not authorize exclusive and perpetual use and occupancy of NFS lands.

Carbon capture and storage entail injecting and storing carbon dioxide in pore spaces below the surface of the earth. Pore spaces are subsurface geological formations that can be used to store fluids from mining, manufacturing, and other industrial processes. Typically, the United States owns the pore spaces below the surface of NFS lands. Storing carbon dioxide in pore spaces is intended to mitigate greenhouse gas emissions and is performed via Class VI underground injection control wells. Carbon dioxide injected in pore spaces may remain for

over 1,000 years after injection and would be tantamount to an exclusive and perpetual use and occupancy if authorized on NFS lands. Therefore, the Forest Service is proposing to amend the initial screening criterion at 36 CFR 251.54(e)(1)(iv) that prohibits authorizing exclusive and perpetual use and occupancy of NFS lands to provide an exemption for carbon capture and storage. The Forest Service is also proposing a definition for “carbon capture and storage” in 36 CFR 251.51.

The United States Environmental Protection Agency (EPA) has excluded carbon capture and storage from classification as a hazardous waste (40 CFR 261.4(h)) if carbon dioxide is captured, transported, and stored in compliance with the requirements for Class VI Underground Injection Control wells and the requirements in 40 CFR parts 144 and 146 of the Underground Injection Control Program of the Safe Drinking Water Act, including the requirements for EPA authorization by rule or by permit. A Class VI Underground Injection Control well is used to inject carbon dioxide into deep rock formations. Before issuing a permit for a Class VI Underground Injection Control well, the EPA conducts a detailed technical review to ensure that the area around the proposed location for the well does not have abandoned wells that could leak carbon dioxide and to determine whether the well would be constructed in a manner that would protect it from seismic activity and from leaking carbon dioxide into the groundwater (40 CFR parts 144 and 146, Underground Injection Control (UIC) Program Class VI Implementation Manual for UIC Program Directors).

The proposed rule would define “carbon capture and storage” as “the capture, transportation, injection, and storage of carbon dioxide in subsurface pore spaces in such a manner as to qualify the carbon dioxide stream for the exclusion from classification as a ‘hazardous waste’ pursuant to United States Environmental Protection Agency regulations at 40 CFR 261.4(h).” Therefore, carbon capture and storage authorized under the proposed rule would not constitute a hazardous waste and would not be inconsistent with the initial screening criterion at 36 CFR 251.54(e)(1)(ix) that prohibits authorizing storage of hazardous substances on NFS lands.

To protect public health and underground sources of drinking water for these wells, including for those that may be sited on NFS lands, the EPA regulates all aspects of the wells, including siting, construction, injection operations, testing and monitoring,

emergency response, financial responsibility, and plugging and closure of the wells and injection sites through permitting, site inspections, required reporting, and compliance reviews. The public may comment on proposed permits for Class VI Underground Injection Control wells, as well as request and attend public hearings and in some cases file appeals with EPA's Environmental Appeals Board regarding permits for Class VI Underground Injection Control wells.

Carbon capture and storage can be used to reduce carbon dioxide emissions to the atmosphere. Possible sources of carbon dioxide include point source emissions from industrial facilities, energy production, and direct air capture from the atmosphere. Authorizing carbon capture and storage on NFS lands would support the Administration's goal to reduce greenhouse gas emissions by 50 percent below the 2005 levels by 2030.

The proposed rule would not authorize carbon capture and storage on NFS lands. Rather, the proposed rule would exempt proposals for carbon capture and storage from the initial screening criterion prohibiting authorization of exclusive use and occupancy of NFS lands, thereby allowing the Forest Service to review proposals and applications for carbon capture and storage and to authorize proposed carbon capture and storage on NFS lands if, where, and as deemed appropriate by the Agency. An exemption for the exclusive and perpetual use and occupancy for carbon capture and storage on NFS lands would be consistent with the intent of EPA's Class VI Well permitting requirement for injecting carbon dioxide for the primary purpose of long-term storage. No other type of exclusive and perpetual use and occupancy would be authorized on NFS lands under the proposed rule.

Proposals for underground storage of carbon dioxide would have to meet all other screening criteria, including but not limited to consistency with the applicable land management plan, potential risks to public health or safety, conflicts or interference with authorized uses of NFS lands or use of adjacent non-NFS lands. Accepted applications for carbon capture and storage would be subject to the requisite environmental analysis.

Regulatory Certifications

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Consistent with Executive Order (E.O.) 12866, the Office of Information

and Regulatory Affairs (OIRA) in the Office of Management and Budget will determine whether proposed, interim, and final rules that impose, eliminate, or modify requirements on non-Forest Service parties are significant and will review any proposed, interim, or final rules that OIRA has designated as significant. This proposed rule has been designated as nonsignificant by OIRA. E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Forest Service has developed the proposed rule consistent with E.O. 13563.

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), OIRA has designated this proposed rule as not a major rule as defined by 5 U.S.C. 804(2).

National Environmental Policy Act

This proposed rule would amend the Forest Service's special use regulations at 36 CFR 251.54(e)(1)(iv), which prohibits authorizing exclusive and perpetual use and occupancy of NFS lands, to provide an exemption for carbon capture and storage. Forest Service regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement "rules, regulations, or policies to establish service-wide administrative procedures, program processes, or instructions." The Forest Service's preliminary assessment is that this proposed rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. A final determination will be made upon adoption of the final rule.

Regulatory Flexibility Act Analysis

The Forest Service has considered the proposed rule under the requirements of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). This proposed rule would not have any direct effect on small entities as defined by the Regulatory Flexibility Act. The proposed rule would not impose recordkeeping requirements on small entities; would not affect their competitive position in relation to large entities; and would not affect their cash flow, liquidity, or ability to remain in the market.

Therefore, the Forest Service has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

Federalism

The Forest Service has considered this proposed rule under the requirements of E.O. 13132, *Federalism*. The Forest Service has determined that the proposed rule conforms with the federalism principles set out in this E.O.; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Forest Service has concluded that this proposed rule would not have federalism implications.

Consultation and Coordination With Indian Tribal Governments

This proposed rule has been reviewed in accordance with the requirements of E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*. E.O. 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that 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. The Forest Service has determined that this proposed rule could have substantial direct effects on one or more Tribes and is subject to Tribal consultation per E.O. 13175 and Forest Service Handbook 1509.13. Accordingly, the Forest Service is conducting Tribal consultation on the proposed rule.

Environmental Justice

The Forest Service has considered the proposed rule under the requirements of E.O. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. The Forest Service has determined that the proposed rule is not expected to result in disproportionately high and adverse impacts on minority or low-income populations or the exclusion of minority and low-income

populations from meaningful involvement in decision making.

No Takings Implications

The Forest Service has analyzed this proposed rule in accordance with the principles and criteria in E.O. 12630, *Governmental Actions and Interference with Constitutionally Protect Property Rights*. The Forest Service has determined that the proposed rule would not pose the risk of a taking of private property.

Energy Effects

The Forest Service has reviewed this proposed rule under E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*. The Forest Service has determined that the proposed rule would not constitute a significant energy action as defined in E.O. 13211.

Civil Justice Reform

The Forest Service has analyzed this proposed rule in accordance with the principles and criteria in E.O. 12988, *Civil Justice Reform*. After adoption of this proposed rule, (1) all State and local laws and regulations that conflict with this proposed rule or that impede its full implementation would be preempted; (2) no retroactive effect would be given to this proposed rule; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), signed into law on March 22, 1995, the Forest Service has assessed the effects of the proposed rule on State, local, and Tribal governments and the private sector. This proposed rule would not compel the expenditure of \$100 million or more by any State, Tribal, or local government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

The proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use and therefore imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 251

Administrative practice and procedure, Alaska, Electric power, Mineral resources, National forests, Public lands-rights-of-way, Reporting and recordkeeping requirements, and Water resources.

Therefore, for the reasons set forth in the preamble, the Forest Service proposes to amend 36 CFR part 251 as follows:

PART 251—LAND USES

Subpart B—Special Uses

- 1. The authority citation for part 251, subpart B, continues to read:

Authority: 16 U.S.C. 460l-6a, 460l-6d, 472, 497b, 497c, 551, 580d, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761–1772.

- 2. Amend § 251.51 by adding a definition in alphabetical order for “Carbon capture and storage” to read as follows:

* * * * *

Carbon capture and storage—the capture, transportation, injection, and storage of carbon dioxide in subsurface pore spaces in such a manner as to qualify the carbon dioxide stream for the exclusion from classification as a “hazardous waste” pursuant to United States Environmental Protection Agency regulations at 40 CFR 261.4(h).

* * * * *

- 3. Amend § 251.54 by revising paragraph (e)(1)(iv) to read as follows.

§ 251.54 Proposal and application requirements and procedures.

* * * * *

(e) * * *

(1) * * *

(iv) The proposed use will not create an exclusive or perpetual right of use or occupancy, provided that the Forest Service may authorize exclusive and perpetual use and occupancy for carbon capture and storage in subsurface pore spaces.

* * * * *

Andrea Delgado Fink,

Chief of Staff, Natural Resources and Environment.

[FR Doc. 2023–24341 Filed 11–2–23; 8:45 am]

BILLING CODE 3411–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 27

[WT Docket No. 21–333; DA 23–999; FR ID 181482]

Mongoose Works, Ltd., 3.7–4.2 GHz Band Transition Clearinghouse Dispute Referrals and Appeals

AGENCY: Federal Communications Commission.

ACTION: Notification of hearing.

SUMMARY: In this document, the Wireless Telecommunications Bureau (Bureau) of the Federal Communications Commission (Commission) grants Mongoose Works, Ltd.’s (Mongoose) Petition for *De Novo* Review (Petition), and commences a hearing in connection with the 3.7–4.2 GHz Band (C-band) Transition Relocation Payment Clearinghouse’s (RPC or clearinghouse) decision which adjusted downward part of Mongoose’s reimbursement claim based upon its August 12, 2020 lump sum election. The issues designated for hearing are whether the Bureau erred in determining that Mongoose had not met its burden of proof to demonstrate that the RPC erred in its classification of, and reimbursement for, the two antennas at issue; whether the Bureau erred in separately determining that the RPC properly classified the two antennas at issue based on Commission guidance; and whether the reimbursed amount of \$33,994 for the two antennas at issue should be adjusted to restore the disallowed amount of \$69,686.

DATES: Mongoose shall file a written appearance by November 9, 2023, stating its intention to appear on the date fixed for the hearing and present evidence on the issues specified in the *Hearing Designation Order*.

ADDRESSES: Federal Communications Commission, 45 L St. NE, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Susan Mort of the Wireless Telecommunications Bureau, at (202) 418–2429 or Susan.Mort@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Hearing Designation Order, in WT Docket No. 21–333, DA 23–999, adopted and released on October 20, 2023. The full text of this document is available for public inspection online at <https://docs.fcc.gov/public/attachments/DA-23-999A1.pdf>.

1. By this *Hearing Designation Order*, pursuant to §§ 0.131, 0.331, and

27.1421(c) of the Commission's rules, the *3.7 GHz Report and Order*, and the *RPC Appeals Procedures Public Notice*, the Wireless Telecommunications Bureau (Bureau) grants a Petition for *De Novo* Review (Petition), filed on September 14, 2023, by Mongoose Works, Ltd. (Mongoose), and designates this case to be tried as a written proceeding under the Commission's rules for hearing proceedings, with the Administrative Law Judge serving as the presiding officer. As discussed below, the issues designated for hearing relate to the 3.7–4.2 GHz Band (C-band) Transition Relocation Payment Clearinghouse's (RPC or clearinghouse) decision which adjusted downward part of Mongoose's reimbursement claim based upon its August 12, 2020 lump sum election.

2. In the 3.7 GHz Report and Order, the Commission adopted rules to make 280 megahertz of mid-band spectrum available for flexible use throughout the contiguous United States by transitioning existing services out of the lower portion of the band and into the upper 200 megahertz of the C-band. The Commission required new 3.7 GHz Service licensees to reimburse the reasonable relocation costs of eligible Fixed Satellite Service (FSS) space station operators, incumbent FSS earth station operators, and incumbent Fixed Service licensees (collectively, incumbents) to transition out of the band. The 3.7 GHz Report and Order also specified that incumbent FSS earth station operators may accept either: (1) reimbursement for their actual, reasonable relocation costs; or (2) a lump sum reimbursement "based on the average, estimated costs of relocating all of their incumbent earth stations" to the upper 200 megahertz of the C-band.

3. The 3.7 GHz Report and Order further provided for the creation of an independent clearinghouse to administer, subject to the Commission's rules and oversight, the cost-related aspects of the transition in a fair and transparent manner, "to mitigate financial disputes among stakeholders, and to collect and distribute payments in a timely manner." To provide the clearinghouse, incumbents, and new 3.7 GHz Service licensees with a range of reasonable transition costs, the 3.7 GHz Report and Order directed the Bureau to establish a cost catalog of the types of expenses that incumbents were likely to incur. Further, incumbent FSS earth station operators opting to receive a lump sum amount were required to make an irrevocable election and accompanying certification with the Commission by September 14, 2020 with the proviso that the information

contained in such election would be "subject to verification as part of the [c]learinghouse's role to prevent waste, fraud, and abuse" through its claims review process.

4. All reimbursement claims—whether for actual costs or lump sum amounts—must be submitted to the clearinghouse for review pursuant to § 27.1416 of the Commission's rules. The clearinghouse "will determine in the first instance whether costs submitted for reimbursement are reasonable" and whether they comply with the requirements adopted in the 3.7 GHz Report and Order. To the extent a claimant or one or more responsible 3.7 GHz Service licensees wish to dispute the clearinghouse's determination with respect to a submitted claim, they must file a notice of objection as required by § 27.1421(a) of the Commission's rules. The clearinghouse may in the first instance mediate any disputes or refer the disputant parties to alternative dispute resolution fora. Subsequent appeals to the Bureau may be submitted pursuant to the procedures set forth in the *RPC Appeals Procedures Public Notice*. Following a Bureau decision in either a single-party or multi-party dispute, any party to a specific matter wishing to appeal that decision may do so by filing with the Commission, within ten (10) days of the effective date of the Bureau decision, a petition for *de novo* review, whereupon the Commission will set the matter for an evidentiary hearing before an Administrative Law Judge.

5. *Mongoose's Lump Sum Election and RPC Claim*. Mongoose is an earth station operator with multiple antennas registered with the Commission under callsign E191601, which appear on the incumbent earth station list for purposes of the C-band transition. Mongoose filed a lump sum election with the Commission on August 12, 2020 for eight incumbent earth station antennas, and on August 16, 2021, filed a claim with the RPC seeking \$356,052 as its lump sum payment. Specifically, Mongoose requested a lump sum payment for six Small Multi-beam (2–4 beams) Earth Station Antennas (SMBEAs) at \$42,062 each and two Large Multi-beam (5+ beams) Earth Station Antennas (LMBEAs) at \$51,840 each. After review of Mongoose's claim and supplemental information provided by the claimant, the RPC Decisional Memorandum was issued on June 1, 2022, fully approving Mongoose's claim for six SMBEAs. The RPC classified the two remaining antennas as Receive-Only ES Multi-feed Antennas rather than LMBEAs and adjusted Mongoose's claim amount for those antennas from

\$103,680 down to \$33,994. Mongoose filed a notice of objection with the RPC for the downward adjusted portion of its claim on June 25, 2022, seeking restoration of the full amount. On July 7, 2022, Mongoose received payment for the undisputed amount of \$286,366.

6. *Mongoose's Appeal to the Bureau*. Mongoose filed a single-party appeal of the RPC decision on July 31, 2022, asking the Bureau to order the RPC to restore the disallowed amount of \$69,686. The RPC filed its response on August 22, 2022. Mongoose filed its reply on August 29, 2022, and the RPC supplemented its response with an attestation on September 2, 2022. The instant matter arises from the Bureau's denial of Mongoose's appeal of the RPC's decision.

7. Specifically, the Bureau noted that the RPC's underlying Decisional Memorandum determined that two of the earth stations included in Mongoose's lump sum election, for which it sought reimbursement as LMBEAs, were properly classified as Receive-Only ES Multi-feed Antennas pursuant to the Final Cost Catalog Public Notice as the two relevant antennas each had only one C-band feed, and as such, Mongoose was not eligible for the higher lump sum payment for LMBEAs. The Bureau decision denied Mongoose's appeal, finding that it had not met its burden of proof in demonstrating that the RPC erred in its classification of, and reimbursement for, the two antennas at issue. The Bureau separately and independently found that the RPC both correctly interpreted the relevant Commission rules, guidance, and policies and applied them to the antennas in question. The Bureau also found that Mongoose's procedural arguments were unavailing.

8. The *RPC Appeals Procedures Public Notice* allows any party to a specific single-party or multi-party dispute to appeal a Bureau decision on disputed issues relating to an RPC reimbursement decision by petitioning for an evidentiary hearing before an Administrative Law Judge. The petition for a hearing must be filed within ten (10) days of the effective date of the Bureau order.

9. Mongoose filed its appeal of the Bureau's decision within ten (10) days of the effective date thereof, and we thus find that the Petition satisfies the requirements of the *RPC Appeals Procedures Public Notice*. Therefore, the Petition is hereby granted, and the disputed issues are designated for hearing.

10. *Written Hearings Report and Order*. The Commission recently

supplemented its formal hearing processes by adopting rules that, *inter alia*, expand the use of a hearing procedure that relies in appropriate cases on written submissions and documentary evidence. These hearing proceedings shall be resolved on a written record consisting of affirmative case, responsive case, and reply case submissions, along with all associated evidence in the record, including stipulations and agreements of the parties and official notice of material facts. Based on that record, the presiding officer will issue an Initial Decision pursuant to section 409(a) of the Communications Act and §§ 1.267 and 1.274(c) of the Commission's rules. The Bureau finds that this is an appropriate case for use of those procedures.

11. *Notice of Appearance.* Parties to this matter who wish to avail themselves of the opportunity to participate in the hearing proceeding must file a written appearance consistent with § 1.221(d) and (e) of the Commission's rules. The written appearance must be filed within twenty (20) days of the mailing of this Hearing Designation Order and must state, among other things, that they will present evidence on the matters specified in this order, and, if required, appear before a presiding officer at a time and place to be determined (which shall be no earlier than thirty (30) days after receipt of this order).

12. *Initial Case Order.* After release of this Hearing Designation Order, the presiding officer shall promptly release an Initial Case Order. The Initial Case Order shall put all parties on notice that they are expected to be fully cognizant of part 1 of the Commission's rules concerning Practice and Procedure, 47 CFR part 1, subparts A and B. The Initial Case Order shall also set a date for the initial status conference and a date by which each party should file a pre-conference submission that would include: (a) whether discovery is expected in this case, and if so, a proposed discovery schedule; (b) any preliminary motions they are intending to file; and (c) a proposed case schedule. The parties' pre-conference submissions should also indicate whether they request that a Protective Order be entered in this case.

13. *Initial Status Conference and Initial Status Conference Order.* The presiding officer shall set the case schedule, including any deadlines by which the parties should submit the motions they identified in their pre-conference submissions. The presiding officer shall also set the deadlines for the parties' affirmative case, responsive

case, and reply case submissions in accordance with §§ 1.371 through 1.375 of the Commission's rules. If the parties have requested the entrance of a Protective Order, the presiding officer shall also set a deadline by which a joint proposed Protective Order shall be submitted for consideration. In accordance with § 1.248(b) of the Commission's rules, the presiding officer may adopt the case schedule during the status conference or in an order following the conference.

14. Additional status conferences may be scheduled throughout the course of the proceeding at the request of the parties and/or at the discretion of the presiding officer. Any request by a party for a status conference must be made in writing to the presiding officer and shall be copied on all other parties.

15. *Transcripts.* In accordance with § 1.248 of the Commission's rules, an official transcript of all case conferences shall be made, unless the parties and the presiding officer agree to forego a transcript. Transcripts shall be made available to the public as part of the official record in the Commission's Electronic Comment Filing System (ECFS) in WT Docket No. 21–333.

16. *Requests for Admissions.* In accordance with § 1.246 of the Commission's rules, any party may serve upon any other party written requests for the admission of the genuineness of any relevant documents or of the truth of any relevant matters of fact. Such requests shall be served within twenty (20) days after the deadline for filing a notice of appearance unless the presiding officer sets a different time frame.

17. *Available Discovery Methods.* Sections 1.311 through 1.325 of the Commission's rules set forth procedures that may be used for the discovery of relevant facts and/or for the production and preservation of evidence for use in the hearing proceeding. These sections of the Commission's rules provide, *inter alia*, for the taking of depositions, for interrogatories, and for the production of documents and things.

18. *Evidentiary Rules.* In the Written Hearings Report and Order, the Commission amended § 1.351 of the Commission's rules to adopt the evidentiary standard set forth in the formal APA hearing requirements. In relevant part, § 1.351 of the Commission's rules now states, "any oral or documentary evidence may be adduced, but the presiding officer shall exclude irrelevant, immaterial, or unduly repetitious evidence." The parties remain free to make evidentiary arguments based on the Federal Rules of Evidence.

19. *Petitions to Intervene.* Any person or entity seeking status as a party in interest in this proceeding must file a petition to intervene in accordance with § 1.223(a) of the Commission's rules. Any person or entity seeking to participate in this proceeding as a party may file a petition for leave to intervene in accordance with § 1.223(b) of the Commission's rules.

20. *Motions to Enlarge, Change or Delete Issues.* Motions to enlarge, change, or delete issues to be considered in this proceeding shall be allowed, consistent with § 1.229 of the Commission's rules.

21. *Restricted Proceeding.* This hearing proceeding is a "restricted" proceeding pursuant to § 1.1208 of the Commission's rules and thus *ex parte* presentations to or from Commission decision-making personnel, including the presiding officer and her staff and staff of the Commission's Wireless Telecommunications Bureau, are prohibited, except as otherwise provided in the Commission's rules.

22. *Electronic Filing of Documents.* All written submissions such as motions, letters, discovery requests and objections and written responses thereto, excluding confidential and/or other protected material, must be filed in WT Docket No. 21–333 using ECFS. ECFS shall also act as the repository for records of actions taken in this proceeding, excluding confidential and/or other protected material, by the presiding officer and the Commission. Documents responsive to any party's requests for production of documents should not be filed in ECFS. Such responsive documents shall be served directly on counsel for the party requesting the documents and produced either in hard copy or in electronic form (e.g., hard drive, thumb drive) with files named in such a way as it is clear how the documents are organized.

23. *Case Caption.* The caption of any pleading filed in this proceeding, as well as all letters, documents, or other written submissions including discovery requests and objections and responses thereto, shall indicate whether it is to be acted upon by the Commission or the presiding officer. The presiding officer shall be identified by name.

24. *Service.* All documents submitted in this proceeding must also be served on all other parties in accordance with § 1.211 of the Commission's rules and shall be accompanied by a proof of service. Service on the Enforcement Bureau shall be made using the following email address: EBHearings@fcc.gov.

25. *Confidential and/or Otherwise Protected Materials.* To the extent any party to this proceeding wishes to submit materials or information that it would like withheld from the public record, it may do so in accordance with the procedures set forth in § 1.314 of the Commission's rules. The parties may also enter into a Protective Order. As stated above, requests for a Protective Order should be made in the parties' pre-conference submission in accordance with the schedule set forth in the Initial Case Order.

26. *Initial Decision.* The presiding officer shall issue an Initial Decision on the issues set forth herein, as well as any other issues designated for hearing in the course of the proceeding. This Initial Decision shall contain, at a minimum, findings of fact and conclusions of law, as well as the reasons or basis therefor, and the appropriate rule or order or policy and the sanction, relief or denial thereof, as appropriate.

27. Accordingly, *it is ordered* that the Petition for *De Novo* Review, filed on September 14, 2023, by Mongoose, is granted.

28. *it is further ordered* that, pursuant to the *RPC Appeals Procedures Public Notice*, this matter, as described above, is designated for hearing before an Administrative Law Judge, at a time and place to be specified in a subsequent order, on the following issues:

a. To determine whether the Bureau erred in determining that Mongoose had not met its burden of proof to demonstrate that the RPC erred in its classification of, and reimbursement for, the two antennas at issue;

b. To determine whether the Bureau erred in separately determining that the RPC properly classified the two antennas at issue based on Commission guidance; and

c. To determine whether the reimbursed amount of \$33,994 for the two antennas at issue should be adjusted to restore the disallowed amount of \$69,686.

29. *it is further ordered* that the burden of proceeding with the introduction of evidence and the burden of proof with respect to all issues specified herein SHALL BE UPON Mongoose.

30. *it is further ordered*, that Mongoose Works, Ltd. (Mongoose) is made a party to the proceeding pursuant to § 1.221(d) of the Commission's rules, 47 CFR 1.221(d). To avail itself of the opportunity to be heard, pursuant to § 1.221(e) of the Commission's rules, Mongoose, in person or by its attorneys, shall file a written appearance, stating its intention to appear on the date fixed

for the hearing and present evidence on the issues specified in this Hearing Designation Order. Such written appearance shall be filed within twenty (20) days of the mailing of this Order pursuant to Paragraph 32 below. If Mongoose fails to file an appearance within the time specified, it shall, unless good cause for such failure is shown, forfeit its hearing rights.

31. *it is further ordered* that the Chief, Enforcement Bureau, SHALL BE MADE A PARTY to this proceeding without the need to file a written appearance.

32. *it is further ordered* that a copy of this *Hearing Designation Order* shall be sent, via Certified Mail—Return Receipt Requested to: Mongoose Works, Ltd., c/o Mark Derbyshire, 4950 S El Camino Dr, Cherry Hills Village, CO 80111.

33. *it is further ordered* that a copy of each document filed in this proceeding subsequent to the date of adoption of this Hearing Designation Order shall be served on the counsel of record appearing on behalf of the Chief, Enforcement Bureau. Parties may inquire as to the identity of such counsel by calling the Investigations & Hearings Division of the Enforcement Bureau at (202) 418-1420. Electronic service on counsel of record for the Enforcement Bureau shall be made using the following email address: EBHearings@fcc.gov.

34. *it is further ordered* that this *Hearing Designation Order* or a summary thereof SHALL BE PUBLISHED at the earliest practicable date in the **Federal Register**.

Federal Communications Commission.

Amy Brett,

Acting Chief of Staff, Wireless Telecommunications Bureau.

[FR Doc. 2023-23788 Filed 11-2-23; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[RTID 0648-XD197]

Fisheries of the Exclusive Economic Zone off Alaska; Scallop Specification Process Flexibility

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

ACTION: Notice of availability of fishery management plan amendment; request for comments.

SUMMARY: The North Pacific Fishery Management Council (Council) submitted Amendment 18 to the Fishery Management Plan (FMP) for the Scallop Fishery off Alaska (Scallop FMP) to the Secretary of Commerce for review. If approved, Amendment 18 would revise timing requirements for Stock Assessment and Fishery Evaluation (SAFE) reports to allow more flexibility for non-annual assessments and to set scallop harvest specifications less frequently than on an annual basis. This would reduce the burden on staff and provide more time for the development of new stock assessment methods. Amendment 18 is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Scallop FMP, and other applicable laws.

DATES: Comments must be received no later than January 2, 2024.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2023-0094, 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-2023-0094 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, Attn: Records Office. 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 <https://www.regulations.gov> without change. All personal identifying information (e.g., name, address), 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).

Electronic copies of proposed Amendment 18 and the draft Analysis prepared for this action may be obtained from <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Megan Mackey, 907-586-7228.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Act requires that each regional fishery management

council submit any FMP amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce (Secretary). The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP amendment, immediately publish a notice in the **Federal Register** announcing that the amendment is available for public review and comment. The Council has submitted Amendment 18 to the Secretary for review. This document announces that proposed Amendment 18 is available for public review and comment.

The scallop fishery in the exclusive economic zone off Alaska under the Scallop FMP is jointly managed by NMFS and the State of Alaska. The Council prepared the FMP under the authority of the Magnuson-Stevens Act, (16 U.S.C. 1801 *et seq.*). Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600 and 679.

The Scallop FMP delegates many management aspects of the scallop fishery to the State of Alaska but maintains Federal oversight. This authority is limited by the Magnuson-Stevens Act and the FMP. While the FMP includes scallop stocks off the coast of Alaska, including weathervane scallop (*Patinopecten caurinus*), reddish scallop (*Chlamys rubida*), spiny scallop (*Chlamys hastata*), and rock scallop (*Crassadoma gigantea*), the weathervane scallop is the only commercially targeted stock at this time. Commercial fishing for weathervane scallops occurs in the Gulf of Alaska, Bering Sea, and waters off the Aleutian Islands. There is currently no formal stock assessment model for the scallop fishery. Instead, the State sets guideline harvest levels

(GHLs) informed by data collected through the scallop fishery observer program and fishery-independent scallop dredge surveys. Standardized catch per unit effort (CPUE) indices are estimated to account for depth, month, vessel, bed, and season variations.

Previously, the overfishing level (OFL) and acceptable biological catch (ABC) have been set based on the definition of optimal yield (OY). More recently, OFL and ABC have been based on the OY re-defined in 2012 (Amendment 13), when OY was re-defined as 0 to 1.29 million pounds (lb) (585 tons (t)) of shucked scallop meats to include estimated discards over the reference time frame. Annual specifications have been defined as: max OFL = OY, and ABC = 90 percent of OFL. Alaska scallop harvests have not exceeded OY in any year since it was first established.

In the absence of stock-size estimates, the status of the scallop stock relative to its overfished state is unknown. Consistent with assessments since the 2011/12 season, the 2022/23 OFL is set equal to the OY (1.284 million lb.; 582 t) as defined in the Scallop FMP and the 2022/23 ABC is set equal to the maximum ABC control rule value (90 percent of OFL or 1.156 million lb.; 524 t). Estimated total fishing removals (retained and discarded) for the 2021/22 and 2022/23 seasons were 311,978 lb (141.5 t) and 345,690 lb (156.8 t) of shucked meats, respectively (table 1). These estimates are less than 30 percent of the ABC/annual catch limit (ACL) and OFL; therefore, overfishing did not occur in 2021/22 or 2022/23.

Currently, the Scallop FMP requires the SAFE report to be created on an annual basis. The proposed

management measure in Amendment 18 would amend the FMP to allow flexibility for non-annual assessments. This would remove prescriptive language dictating that SAFE reports are produced on an annual basis. Amendment 18 would give the Council flexibility in modifying the assessment cycle with the potential to set multi-year specifications, based on a period of no more than 3 years, that best suit the needs of the stock. If a formal stock assessment model is developed, or there is a decrease in estimated stock abundance, the Council could request that the development of the SAFE report revert to being reviewed annually.

NMFS is soliciting public comments on proposed Amendment 18 through the end of the comment period (see **DATES**). All relevant written comments received by the end of the applicable comment period will be considered by NMFS in the approval/partial approval/disapproval decision for Amendment 18 and addressed in the response to comments in the final decision. Comments received after the end of the applicable comment period will not be considered in the approval/disapproval decision on Amendment 18. To be considered, comments must be received, not just postmarked or otherwise transmitted, by the last day of the comment period (see **DATES**).

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

Dated: October 31, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–24309 Filed 11–2–23; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 88, No. 212

Friday, November 3, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

USAID/MEXICO—RFI 2023–003, Local Partner and Sub-Partner Outreach

AGENCY: United States Agency for International Development/Mexico Mission (USAID/Mexico).

ACTION: Notice of information collection; request for comment.

SUMMARY: USAID/Mexico is seeking to increase understanding of the organizational landscape throughout the country to enhance USAID's development approach and understand local organizations' priority topic areas and capacities. USAID is issuing this Request for Information (RFI) to solicit information and potential interest from organizations to diversify USAID's partner and sub-partner base. The goal of the RFI is to better understand the organizational landscape in Mexico; diversify USAID/Mexico's partner and sub-partner base by creating avenues for new and underutilized partners and sub-partners to work with USAID; and brainstorm methods to support partners and sub-partners to become self-reliant and capable of achieving their development goals. The research data will be aggregated and not provide PII or other privacy-related information. USAID/Mexico invites the general public and other Federal agencies to take this opportunity to comment on the following new information collection, as required by the Paperwork Reduction Act of 1995.

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please access the survey questionnaire at https://docs.google.com/forms/d/e/1FAIpQLSc8c7OMyjoEGV_Rpr8M7q1K9cYUnqz_zYKFCdq-Luz00nbifA/viewform?usp=sharing.

Comments submitted in response to this notice should be submitted electronically through the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Written requests for information or comments should be addressed to Andrea Capellan, Director, Office of Acquisition and Assistance, USAID/Mexico via email at Acapellan@usaid.gov.

Verbal requests for information or comments submitted can contact +1 571–277–0121.

SUPPLEMENTARY INFORMATION:

Title of Information Collection: USAID/MEXICO—RFI 2023–003, Local Partner and Sub-Partner Outreach.

Type of Request: Notice for public comment; generic clearance.

Originating Office: USAID/Mexico.

Respondents: Members of Mexican public, members of Mexican civil society organizations, members of Mexican for-profit organizations.

Respondent's Obligation To Respond: Voluntary.

Estimated Number of Respondents: 300.

Average Time per Response: 20 minutes for survey respondents.

Frequency of Response: Approximately every year.

Total Estimated Burden: 90 hours.

Total Estimated Cost: \$3,000.

We are soliciting public comments to permit USAID to:

- 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.

No comments were received during the 60-day notice. 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.

Please note that comments submitted in response to this Notice are public record.

Andrea Capellan,

Director, Office of Acquisition and Assistance, USAID/Mexico.

[FR Doc. 2023–24286 Filed 11–2–23; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by December 4, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it

displays a currently valid OMB control number.

Food and Nutrition Service

Title: Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) Breastfeeding Award of Excellence.

OMB Control Number: 0584–0591.

Summary of Collection: The Healthy, Hunger-Free Kids Act of 2010 (HHFKA) (*Pub. L. 111–296*, Sec 231) requires the U.S. Department of Agriculture (USDA) to implement a program to recognize exemplary breastfeeding support practices at Women, Infants, and Children (WIC) local agencies and clinics. The WIC program, of which the breastfeeding award of excellence is a part, is authorized by the Child Nutrition Act of 1966 (42 *U.S.C.* 1787). The WIC Program provides breastfeeding promotion and support for pregnant and postpartum mothers as a part of its mission to improve the health of the approximately 6 million Americans it serves each month. Breastfeeding is a priority in WIC and WIC mothers are strongly encouraged to breastfeed their infants unless medically contraindicated.

Need and Use of the Information: While HHFKA mandates that the USDA provide a program to recognize exemplary breastfeeding support practices, it is voluntary for the WIC local agencies and clinics to apply for an award. Information is collected from the WIC local agencies to apply for an award and used by the WIC state agencies to evaluate the applications. The award application period is open once annually and has been designed to allow local WIC agencies at different stages of progress in breastfeeding promotion and support program development to apply for an award. The information collection will meet the HHFKA requirement to implement a program to recognize exemplary breastfeeding support practices at WIC local agencies and clinics. The information collected through this program will be used to evaluate components of existing breastfeeding programs and support within WIC local agencies, to recognize local WIC agencies that provide exemplary breastfeeding programs and support services, and to provide examples of model programs to motivate local agencies and clinics to strengthen their breastfeeding promotion and support activities.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 239.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 514.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–24264 Filed 11–2–23; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0068]

Addition of Belarus to the List of Regions Affected With Highly Pathogenic Avian Influenza

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that we added Belarus to the list of regions that the Animal and Plant Health Inspection Service considers to be affected by highly pathogenic avian influenza (HPAI). This action follows our imposition of HPAI-related restrictions on avian commodities originating from or transiting Belarus, as a result of reports of HPAI in that country.

DATES: Belarus was added to the list of regions APHIS considers to be affected with HPAI, effective on August 22, 2023.

FOR FURTHER INFORMATION CONTACT: Dr. Heather Sriranganathan, APHIS Veterinary Services, Regionalization Evaluation Services, 4700 River Road, Riverdale, MD 20747; phone: (717) 818–3582; email: AskRegionalization@usda.gov.

SUPPLEMENTARY INFORMATION: The regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation of certain animals and animal products into the United States to prevent the introduction of various animal diseases, including Newcastle disease and highly pathogenic avian influenza (HPAI). The regulations prohibit or restrict the importation of live poultry, poultry meat, and other poultry products from regions where these diseases are considered to exist.

Section 94.6 of the regulations contains requirements governing the importation into the United States of carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds from regions of the world where HPAI exists or is reasonably believed to exist. HPAI is an extremely infectious and potentially fatal form of avian

influenza in birds and poultry that, once established, can spread rapidly from flock to flock. The Animal and Plant Health Inspection Service (APHIS) maintains a list of restricted regions it considers affected with HPAI of any subtype on the APHIS website at <https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-and-animal-product-import-information/animal-health-status-of-regions>.

APHIS receives notice of HPAI outbreaks from veterinary officials of the exporting country, from the World Organization for Animal Health (WOAH),¹ or from other sources the Administrator determines to be reliable.

On August 22, 2023, APHIS added Belarus to the list of regions where HPAI exists based on credible media and interagency reports of HPAI outbreaks in poultry in Belarus. On that same day, APHIS issued an import alert notifying stakeholders that APHIS imposed restrictions on the importation of poultry, commercial birds, ratites, avian hatching eggs, unprocessed avian products and byproducts, and certain fresh poultry commodities from Belarus to mitigate risk of HPAI introduction into the United States.

With the publication of this notice, we are informing the public that we added Belarus to the list of regions APHIS considers affected with HPAI of any subtype, effective August 22, 2023. This notice serves as an official record and public notification of this action.

Congressional Review Act

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

Authority: 7 *U.S.C.* 1633, 7701–7772, 7781–7786, and 8301–8317; 21 *U.S.C.* 136 and 136a; 31 *U.S.C.* 9701; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 30th day of October 2023.

Michael Watson,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–24347 Filed 11–2–23; 8:45 am]

BILLING CODE 3410–34–P

¹ The World Organization for Animal Health internationally follows a British English spelling of “organisation” in its name; also, it was formerly the Office International des Epizooties, or OIE, but on May 28, 2022, the Organization announced that the acronym was changed from OIE to WOAH.

DEPARTMENT OF AGRICULTURE**Forest Service****Notice of Issuance of Final Permanent Seasonal Recreational Shooting Order in the Laramie Ranger District of the Medicine Bow-Routt National Forests and Thunder Basin National Grassland**

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice.

SUMMARY: The Forest Service (Forest Service or Agency), United States Department of Agriculture, is issuing a final permanent seasonal order prohibiting recreational shooting annually from March 31 to September 10 in the Pole Mountain area of the Laramie Ranger District in the Medicine Bow-Routt National Forests and Thunder Basin National Grassland, an area which covers approximately 55,714 acres in Albany County, Wyoming.

ADDRESSES: The final permanent seasonal recreational shooting order, map, and justification for the final permanent seasonal order are posted on the Medicine Bow-Routt National Forests and Thunder Basin National Grassland's web page at <https://www.fs.usda.gov/detailfull/mbr/alerts-notices/?cid=stelprdb5139680&width=full>.

FOR FURTHER INFORMATION CONTACT: Frank Romero, District Ranger, 307-745-2337 or frank.e.romero@usda.gov. Individuals who use telecommunication devices for the hearing-impaired may call the Federal Relay Service at 800-877-8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: Section 4103 of the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019 (Pub. L. 116-9, Title IV (Sportsmen's Access and Related Matters)), hereinafter "the Dingell Act," requires the Forest Service to provide advance notice and opportunity for public comment before temporarily or permanently closing any National Forest System lands to hunting, fishing, or recreational shooting.

The final permanent seasonal order prohibiting recreational shooting annually from March 31 to September 10 in the Pole Mountain area of the Laramie Ranger District in the Medicine Bow-Routt National Forests and Thunder Basin National Grassland has completed the public notice and comment process required under the Dingell Act. The Forest Service is issuing the final permanent seasonal recreational shooting order. The final

permanent seasonal order, the justification for the final permanent seasonal order, and the response to comments on the permanent seasonal order are posted on the Medicine Bow-Routt National Forests and Thunder Basin National Grassland's web page at <https://www.fs.usda.gov/detailfull/mbr/alerts-notices/?cid=stelprdb5139680&width=full>.

Dated: October 30, 2023.

Jacqueline Emanuel,

Associate Deputy Chief, National Forest System.

[FR Doc. 2023-24330 Filed 11-2-23; 8:45 am]

BILLING CODE 3411-15-P

DEPARTMENT OF AGRICULTURE**Rural Business-Cooperative Service**

[DOCKET #: RBS-23-BUSINESS-0010]

Notice of Solicitation of Applications for Inviting Applications for the Rural Economic Development Loan and Grant Programs for Fiscal Year 2024; Correction

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice, correction.

SUMMARY: The Rural Business-Cooperative Service (RBCS or Agency), an agency of the United States Department of Agriculture (USDA), published a Notice of Solicitation of Applications in the **Federal Register** (FR) on September 14, 2023, entitled Notice of Solicitation of Applications for Inviting Applications for the Rural Economic Development Loan and Grant Programs for Fiscal Year 2024, to announce that it was accepting applications for Fiscal Year (FY) 24 and the availability of an estimated \$90,000,000 in available funding. In addition, the Notice described requirements that are determined at the time a funding announcement is published as outlined in the program regulation. This notice will amend Section E.2.(c) of the notice to add a third option to request Priority Points under the Addressing Climate Change and Environmental Justice category. RD will work with any applicants that have previously submitted an application for FY 2024 funding to ensure they have the opportunity to utilize this option.

DATES: The deadlines for completed applications to be received in the USDA Rural Development (RD) State Office for quarterly funding competitions is no later than 4:30 p.m. (local time) on: Second Quarter—December 31, 2023,

Third Quarter—March 31, 2024, and Fourth Quarter—June 30, 2024.

FOR FURTHER INFORMATION CONTACT:

Cindy Mason, Program Management Division, Business Programs, Rural Business-Cooperative Service, U.S. Department of Agriculture, 1400 Independence Avenue SW, MS 3226, Room 5160-S, Washington, DC 20250-3226, cindy.mason@usda.gov, or call (202) 720-1400. For further information on this Notice, please contact the USDA RD State Office in the State in which the applicant's headquarters is located. A list of RD State Office contacts is provided at the following link: <https://www.rd.usda.gov/about-rd/state-offices>.

SUPPLEMENTARY INFORMATION:**Correction**

In FR Doc. 2023-19925 of September 14, 2023 (88 FR 63057), on page 63060, in column 1, under Section E.2.(c) the details on how to receive priority points under reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities is being expanded. There will now be a third way to receive priority points. The paragraph and following bullets are being replaced to now read:

“(3) Reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities. Using the Disadvantaged Community and Energy Community Look-Up Map (available at <https://www.rd.usda.gov/priority-points>), applicants may receive priority in three ways:

- If the project is located in or serves a Disadvantaged Community as defined by the Climate and Economic Justice Screening Tool (CEJST), from the White House Council on Environmental Quality (CEQ);
- If the project is located in or serves an Energy Community as defined by the Inflation Reduction Act (IRA); and
- If applicants can demonstrate through a written narrative how the proposed climate-impact projects will improve the livelihoods of community residents and meet pollution mitigation or clean energy goals.

See the website, <https://www.rd.usda.gov/priority-points>, for options.”

Karama Neal,

Administrator, Rural Business-Cooperative Service, USDA Rural Development.

[FR Doc. 2023-24314 Filed 11-2-23; 8:45 am]

BILLING CODE 3410-XY-P

DEPARTMENT OF AGRICULTURE**Rural Business-Cooperative Service****[DOCKET #: RBS-23-BSINESS-0011]****Notice of Solicitation of Applications for the Intermediary Relending Program for Fiscal Year 2024; Correction****AGENCY:** Rural Business-Cooperative Service, USDA.**ACTION:** Notice, correction.

SUMMARY: The Rural Business-Cooperative Service (RBCS or Agency), an agency of the United States Department of Agriculture (USDA), published a Notice of Solicitation of Applications in the **Federal Register** (FR) on September 14, 2023, entitled Notice of Solicitation of Applications for the Intermediary Relending Program for Fiscal Year 2024, to announce that it was accepting applications for Fiscal Year (FY) 24 and the availability of an estimated \$18,889,000 in available funding. In addition, the Notice described requirements that are determined at the time a funding announcement is published as outlined in the program regulation. This notice will amend Section E.1.(a)(3) of the notice to add a third option to request Priority Points under the Addressing Climate Change and Environmental Justice category. RD will work with any applicants that have previously submitted an application for FY 2024 funding to ensure they have the opportunity to utilize this option.

DATES: The deadlines for completed applications to be received in the USDA Rural Development (RD) State Office for quarterly funding competitions is no later than 4:30 p.m. (local time) on: Second Quarter—December 31, 2023, Third Quarter—March 31, 2024, and Fourth Quarter—June 30, 2024.

FOR FURTHER INFORMATION CONTACT: Lori Pittman, Program Management Division, Business Programs, Rural Business-Cooperative Service, U.S. Department of Agriculture, 1400 Independence Avenue SW, MS 3226, Room 5160-S, Washington, DC 20250-3226, lori.pittman1@usda.gov, or call (202) 720-9815. For further information on this Notice, please contact the USDA RD State Office in the State in which the applicant's headquarters is located. A list of RD State Office contacts is provided at the following link: <https://www.rd.usda.gov/about-rd/state-offices>.

SUPPLEMENTARY INFORMATION:**Correction**

In FR Doc. 2023-19927 of September 14, 2023 (88 FR 63050), on page 63052,

in column 2, under Section E.1.(a)(3) the details on how to receive priority points under reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities is being expanded. There will now be a third way to receive priority points. The paragraph and following bullets are being replaced to now read:

“(3) Reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities. Using the Disadvantaged Community and Energy Community Look-Up Map (available at <https://www.rd.usda.gov/priority-points>), applicants may receive priority in three ways:

- If the project is located in or serves a Disadvantaged Community as defined by the Climate and Economic Justice Screening Tool (CEJST), from the White House Council on Environmental Quality;
- If the project is located in or serves an Energy Community as defined by the Inflation Reduction Act (IRA); and
- If applicants can demonstrate through a written narrative how the proposed climate-impact projects will improve the livelihoods of community residents and meet pollution mitigation or clean energy goals.

See the website, <https://www.rd.usda.gov/priority-points>, for options.”

Karama Neal,

Administrator, Rural Business-Cooperative Service, USDA Rural Development.

[FR Doc. 2023-24313 Filed 11-2-23; 8:45 am]

BILLING CODE 3410-XY-P**COMMISSION ON CIVIL RIGHTS****Notice of Public Meeting of the Indiana Advisory Committee; Correction****AGENCY:** Commission on Civil Rights.**ACTION:** Notice; Revision to registration link and telephone access information.

SUMMARY: The U.S. Commission on Civil Rights published a notice in the **Federal Register** on Monday, June 5, 2023, concerning meetings of the Indiana Advisory Committee. The registration link and telephone access information for the upcoming meetings have been updated.

FOR FURTHER INFORMATION CONTACT: Ivy Davis, Director of Eastern Regional Office and Designated Federal Officer, at ero@usccr.gov or 1-202-539-8468.

Correction: In the **Federal Register** on Monday, June 5, 2023, in FR Document Number 2023-11830, on page 36529,

second column, correct the registration link to <https://bit.ly/3FFKaVq> and correct the telephone access information to 1-833-435-1820, Webinar ID: 161 660 6833#.

Dated: October 31, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023-24360 Filed 11-2-23; 8:45 am]

BILLING CODE P**COMMISSION ON CIVIL RIGHTS****Notice of Public Meeting of the District of Columbia Advisory Committee; Correction****AGENCY:** Commission on Civil Rights.**ACTION:** Notice; Revision to registration links and telephone access information.

SUMMARY: The U.S. Commission on Civil Rights published a notice in the **Federal Register** on Monday, June 5, 2023, concerning meetings of the District of Columbia Advisory Committee. The registration links and telephone access information for the upcoming meetings have been updated.

FOR FURTHER INFORMATION CONTACT: Ivy Davis, Director of Eastern Regional Office and Designated Federal Officer, at ero@usccr.gov or 1-202-539-8468.

Correction: In the **Federal Register** on Monday, June 5, 2023, in FR Document Number 2023-11829, on page 36527, second column, correct the registration links and telephone access information as follows:

- Meeting on Tuesday, November 21, 2023: <http://bit.ly/46S4uyX>; Telephone Access (Audio Only): 1-833-435-1820, Webinar ID: 160 065 4861#.
- Meeting on Tuesday, December 19, 2023: <https://bit.ly/3QlnqiE>; Telephone Access (Audio Only): 1-833-435-1820, Webinar ID: 161 082 8553#.

Dated: October 31, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023-24362 Filed 11-2-23; 8:45 am]

BILLING CODE P**DEPARTMENT OF COMMERCE****Foreign-Trade Zones Board****[Order No. 2154]****Reorganization of Foreign-Trade Zone 128 Under Alternative Site Framework**

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones (FTZ) Act provides for “. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,” and authorizes the Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, the Lummi Indian Business Council, grantee of Foreign-Trade Zone 128, submitted an application to the Board (FTZ Docket B–32–2023, docketed May 9, 2023) for authority to reorganize under the ASF with a service area that includes all Lummi Nation property which encompasses the Lummi Indian Reservation plus all property owned by the Lummi Nation outside the exterior boundaries of the Lummi Indian Reservation, in and adjacent to the Bellingham Customs and Border Protection port of entry, and FTZ 128’s existing Site 1 would be categorized as a magnet site;

Whereas, notice inviting public comment was given in the **Federal Register** (88 FR 30718, May 9, 2023) and the application has been processed pursuant to the FTZ Act and the Board’s regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiners’ report, and finds that the requirements of the FTZ Act and the Board’s regulations are satisfied;

Now, Therefore, the Board hereby orders:

The application to reorganize FTZ 128 under the ASF is approved, subject to the FTZ Act and the Board’s regulations, including section 400.13, to the Board’s standard 2,000-acre activation limit for the zone.

Dated: October 30, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2023–24358 Filed 11–2–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2150]

Reorganization of Foreign-Trade Zone 281 (Expansion of Service Area) Under Alternative Site Framework; Miami, Florida

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones (FTZ) Act provides for “. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,” and authorizes the Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, Miami-Dade County, grantee of Foreign-Trade Zone 281, submitted an application to the Board (FTZ Docket B–22–2023, docketed March 22, 2023) for authority to expand the service area of the zone to include all of Miami-Dade County, Florida, as described in the application, within the Miami Customs and Border Protection port of entry;

Whereas, notice inviting public comment was given in the **Federal Register** (88 FR 18295–18296, March 28, 2023) and the application has been processed pursuant to the FTZ Act and the Board’s regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiners’ report, and finds that the requirements of the FTZ Act and the Board’s regulations are satisfied;

Now, Therefore, the Board hereby orders:

The application to reorganize FTZ 281 to expand the service area under the ASF is approved, subject to the FTZ Act and the Board’s regulations, including section 400.13, and to the Board’s standard 2,000-acre activation limit for the zone.

Dated: October 30, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2023–24357 Filed 11–2–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Order Renewing Order Temporarily Denying Export Privileges

Mahan Airways, Mahan Tower, No. 21, Azadegan St., M.A. Jenah Exp. Way, Tehran, Iran;

Pejman Mahmood Kosarayanifard, a/k/a Kosarian Fard, P.O. Box 52404, Dubai, United Arab Emirates;

Mahmoud Amini, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404, Dubai, United Arab Emirates, and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates;

Kerman Aviation, a/k/a GIE Kerman Aviation, 42 Avenue Montaigne 75008, Paris, France;

Sirjanco Trading LLC, P.O. Box 8709, Dubai, United Arab Emirates;

Mahan Air General Trading LLC, 19th Floor Al Moosa Tower One, Sheik Zayed Road, Dubai 40594, United Arab Emirates;

Mehdi Bahrami, Mahan Airways—Istanbul Office, Cumhuriye Cad. Sibil Apt No: 101 D:6, 34374 Emadad, Sisli Istanbul, Turkey;

Al Naser Airlines, a/k/a al-Naser Airlines, a/k/a Al Naser Wings Airline, a/k/a Alnaser Airlines and, Air Freight Ltd., Home 46, Al-Karrada, Babil Region, District 929, St. 21, Beside Al Jadriya Private Hospital, Baghdad, Iraq, and Al Amirat Street, Section 309, St. 3/H.20) Al Mansour, Baghdad, Iraq, and P.O. Box 28360, Dubai, United Arab Emirates, and P.O. Box 911399, Amman 11191, Jordan;

Ali Abdullah Alhay, a/k/a Ali Alhay, a/k/a Ali Abdullah Ahmed Alhay, Home 46, Al-Karrada, Babil Region, District 929, St. 21, Beside Al Jadriya Private Hospital, Baghdad, Iraq, and Anak Street, Qatif, Saudi Arabia 61177;

Bahar Safwa General Trading, P.O. Box 113212, Citadel Tower, Floor-5, Office #504, Business Bay, Dubai, United Arab Emirates, and P.O. Box 8709, Citadel Tower, Business Bay, Dubai, United Arab Emirates;

Sky Blue Bird Group, a/k/a Sky Blue Bird Aviation, a/k/a Sky Blue Bird Ltd., a/k/a Sky Blue Bird FZC, P.O. Box 16111, Ras Al Khaimah Trade Zone, United Arab Emirates;

Issam Shammout, a/k/a Muhammad Isam Muhammad, Anwar Nur Shammout, a/k/a Issam Anwar, Philips Building, 4th Floor, Al Fardous Street, Damascus, Syria, and Al Kolaa, Beirut, Lebanon 151515, and 17–18 Margaret Street, 4th Floor, London, W1W 8RP, United Kingdom, and Cumhuriyet Mah. Kavakli San St. Fulya, Cad. Hazar Sok. No.14/A Silivri, Istanbul, Turkey.

Pursuant to Section 766.24 of the Export Administration Regulations, 15 CFR parts 730–774 (2021) (“EAR” or “the Regulations”), I hereby grant the request of the Office of Export Enforcement (“OEE”) to renew the temporary denial order issued in this matter on May 5, 2023. I find that

renewal of this order, as modified, is necessary in the public interest to prevent an imminent violation of the Regulations and that renewal for an extended period is appropriate because Mahan Airways has engaged in a pattern of repeated, ongoing and/or continuous apparent violations of the EAR.¹

I. Procedural History

On March 17, 2008, Darryl W. Jackson, the then-Assistant Secretary of Commerce for Export Enforcement (“Assistant Secretary”), signed an order denying Mahan Airways’ export privileges for a period of 180 days on the ground that issuance of the order was necessary in the public interest to prevent an imminent violation of the Regulations. The order also named as denied persons Blue Airways, of Yerevan, Armenia (“Blue Airways of Armenia”), as well as the “Balli Group Respondents,” namely, Balli Group PLC, Balli Aviation, Balli Holdings, Vahid Alaghand, Hassan Alaghand, Blue Sky One Ltd., Blue Sky Two Ltd., Blue Sky Three Ltd., Blue Sky Four Ltd., Blue Sky Five Ltd., and Blue Sky Six Ltd., all of the United Kingdom. The order was issued *ex parte* pursuant to Section 766.24(a) of the Regulations, and went into effect on March 21, 2008, the date it was published in the **Federal Register**.

This temporary denial order (“TDO”) was renewed in accordance with Section 766.24(d) of the Regulations.²

¹ The Regulations, currently codified at 15 CFR parts 730–774 (2023), originally issued pursuant to the Export Administration Act (50 U.S.C. 4601–4623 (Supp. III 2015)) (“EAA”), which lapsed on August 21, 2001. The President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), as extended by successive Presidential Notices, continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)) (“IEEPA”). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (“ECRA”). While section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), section 1768 of ECRA provides, in pertinent part, that all orders, rules, regulations, and other forms of administrative action that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA’s date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. Moreover, section 1761(a)(5) of ECRA authorizes the issuance of temporary denial orders.

² Section 766.24(d) provides that BIS may seek renewal of a temporary denial order for additional 180-day renewal periods, if it believes that renewal is necessary in the public interest to prevent an imminent violation. Renewal requests are to be made in writing no later than 20 days before the scheduled expiration date of a temporary denial order. Renewal requests may include discussion of

Subsequent renewals also have issued pursuant to Section 766.24(d), including most recently on May 5, 2023.³ Some of the renewal orders and the modification orders that have issued between renewals have added certain parties as respondents or as related persons, or effected the removal of certain parties.⁴

The September 11, 2009 renewal order continued the denial order as to Mahan Airways, but not as to the Balli Group Respondents or Blue Airways of Armenia.⁵ As part of the February 25, 2011 renewal order, Pejman Mahmood Kosarayanifard (a/k/a Kosarian Fard), Mahmoud Amini, and Gatewick LLC (a/k/a Gatewick Freight and Cargo Services, a/k/a Gatewick Aviation

any additional or changed circumstances, and may seek appropriate modifications to the order, including the addition of parties as respondents or related persons, or the removal of parties previously added as respondents or related persons. BIS is not required to seek renewal as to all parties, and a removal of a party can be effected if, without more, BIS does not seek renewal as to that party. Any party included or added to a temporary denial order as a respondent may oppose a renewal request as set forth in section 766.24(d). Parties included or added as related persons can at any time appeal their inclusion as a related person, but cannot challenge the underlying temporary denial order, either as initially issued or subsequently renewed, and cannot oppose a renewal request. *See also* note 4, *infra*.

³ The May 5, 2023 renewal order was effective upon issuance and published in the **Federal Register** on May 10, 2023 (88 FR 30,078). Prior renewal orders issued on September 17, 2008, March 16, 2009, September 11, 2009, March 9, 2010, September 3, 2010, February 25, 2011, August 24, 2011, February 15, 2012, August 9, 2012, February 4, 2013, July 31, 2013, January 24, 2014, July 22, 2014, January 16, 2015, July 13, 2015, January 7, 2016, July 7, 2016, December 30, 2016, June 27, 2017, December 20, 2017, June 14, 2018, December 11, 2018, June 5, 2019, May 29, 2020, November 24, 2020, May 21, 2021, November 17, 2021, May 13, 2022, November 8, 2022, and May 5, 2023, respectively. The August 24, 2011 renewal followed the issuance of a modification order that issued on July 1, 2011, to add Zarand Aviation as a respondent. The July 13, 2015 renewal followed a modification order that issued May 21, 2015, and added Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading as respondents. Each of the renewal orders and each of the modification orders referenced in this footnote or elsewhere in this order has been published in the **Federal Register**.

⁴ Pursuant to sections 766.23 and 766.24(c) of the Regulations, any person, firm, corporation, or business organization related to a denied person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may be added as a “related person” to a temporary denial order to prevent evasion of the order.

⁵ Balli Group PLC and Balli Aviation settled proposed BIS administrative charges as part of a settlement agreement that was approved by a settlement order issued on February 5, 2010. The sanctions imposed pursuant to that settlement and order included, *inter alia*, a \$15 million civil penalty and a requirement to conduct five external audits and submit related audit reports. The Balli Group Respondents also settled related charges with the Department of Justice and the Treasury Department’s Office of Foreign Assets Control.

Services) were added as related persons to prevent evasion of the TDO.⁶ A modification order issued on July 1, 2011, adding Zarand Aviation as a respondent in order to prevent an imminent violation.⁷

As part of the August 24, 2011 renewal, Kerman Aviation, Sirjanco Trading LLC, and Ali Eslamian were added as related persons. Mahan Air General Trading LLC, Equipco (UK) Ltd., and Skyco (UK) Ltd. were added as related persons by a modification order issued on April 9, 2012. Mehdi Bahrami was added as a related person as part of the February 4, 2013 renewal order.

On May 21, 2015, a modification order was issued adding Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading as respondents. As detailed in that order and discussed further *infra*, these respondents were added to the TDO based upon evidence that they were acting together to, *inter alia*, obtain aircraft subject to the Regulations for export or reexport to Mahan in violation of the Regulations and the TDO. Sky Blue Bird Group and its chief executive officer, Issam Shammout, were added as related persons as part of the July 13, 2015 renewal order.⁸ On November 16, 2017, a modification order issued to remove Ali Eslamian, Equipco (UK) Ltd., and Skyco (UK) Ltd. as related persons following a request by OEE for their removal.⁹

⁶ *See* note 4, *supra*, concerning the addition of related persons to a temporary denial order. Kosarian Fard and Mahmoud Amini remain parties to the TDO. On August 13, 2014, BIS and Gatewick resolved administrative charges against Gatewick, including a charge for acting contrary to the terms of a BIS denial order (15 CFR 764.2(k)). In addition to the payment of a civil penalty, the settlement includes a seven-year denial order. The first two years of the denial period were active, with the remaining five years suspended conditioned upon Gatewick’s full and timely payment of the civil penalty and its compliance with the Regulations during the seven-year denial order period. This denial order, in effect, superseded the TDO as to Gatewick, which was not included as part of the January 16, 2015 renewal order. The Gatewick LLC Final Order was published in the **Federal Register** on August 20, 2014. *See* 79 FR 49,283 (Aug. 20, 2014).

⁷ Zarand Aviation’s export privileges remained denied until July 22, 2014, when it was not included as part of the renewal order issued on that date.

⁸ The U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) designated Sky Blue Bird and Issam Shammout as Specially Designated Global Terrorists (“SDGTs”) on May 21, 2015, pursuant to Executive Order 13224, for “providing support to Iran’s Mahan Air.” *See* 80 FR 30,762 (May 29, 2015).

⁹ The November 16, 2017 modification was published in the **Federal Register** on December 4, 2017. *See* 82 FR 57,203 (Dec. 4, 2017). On September 28, 2017, BIS and Ali Eslamian resolved an administrative charge for acting contrary to the terms of the denial order (15 CFR 764.2(k)) that was based upon Eslamian’s violation of the TDO after

The December 11, 2018 renewal order continued the denial of the export privileges of Mahan Airways, Pejman Mahmood Kosarayanifard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Mahan Air General Trading LLC, Mehdi Bahrami, Al Naser Airlines, Ali Abdullah Alhay, Bahar Safwa General Trading, Sky Blue Bird Group, and Issam Shammout.

On April 6, 2023, BIS, through OEE, submitted a written request for renewal of the TDO that issued on November 8, 2022. The written request was made more than 20 days before the TDO's scheduled expiration. Notice of the renewal request was provided to Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading in accordance with Sections 766.5 and 766.24(d) of the Regulations. No opposition to the renewal of the TDO has been received. Furthermore, no appeal of the related person determinations made as part of the September 3, 2010, February 25, 2011, August 24, 2011, April 9, 2012, February 4, 2013, and July 13, 2015 renewal or modification orders has been made by Kosarian Fard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Mahan Air General Trading LLC, Mehdi Bahrami, Sky Blue Bird Group, or Issam Shammout.¹⁰

II. Renewal of the TDO

A. Legal Standard

Pursuant to Section 766.24, BIS may issue or renew an order temporarily denying a respondent's export privileges upon a showing that the order is necessary in the public interest to prevent an "imminent violation" of the Regulations. 15 CFR 766.24(b)(1) and 766.24(d). "A violation may be 'imminent' either in time or degree of likelihood." 15 CFR 766.24(b)(3). BIS may show "either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations." *Id.* As to the likelihood of future violations,

BIS may show that the violation under investigation or charge "is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent [.]". *Id.* A "lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation." *Id.*

If BIS believes that renewal of a denial order is necessary in the public interest to prevent an imminent violation, it may file a written request for renewal, with any modifications if appropriate. 15 CFR 766.24(d)(1). The written request, which must be filed no later than 20 days prior to the TDO's expiration, should set forth the basis for BIS's belief that renewal is necessary, including any additional or changed circumstances. *Id.* "In cases demonstrating a pattern of repeated, ongoing and/or continuous apparent violations, BIS may request the renewal of a temporary denial order for an additional period not exceeding one year." ¹¹ *Id.*

B. The TDO and BIS's Requests for Renewal

OEE's request for renewal is based upon the facts underlying the issuance of the initial TDO, and the renewal and modification orders subsequently issued in this matter, including the May 21, 2015 modification order and the renewal order issued on November 8, 2022, and the evidence developed over the course of this investigation, which indicate a blatant disregard of U.S. export controls and the TDO. The initial TDO was issued as a result of evidence that showed that Mahan Airways and other parties engaged in conduct prohibited by the EAR by knowingly re-exporting to Iran three U.S.-origin aircraft, specifically Boeing 747s ("Aircraft 1–3"), items subject to the EAR and classified under Export Control Classification Number ("ECCN") 9A991.b, without the required U.S. Government authorization. Further evidence submitted by BIS indicated that Mahan Airways was involved in the attempted re-export of three additional U.S.-origin Boeing 747s ("Aircraft 4–6") to Iran.

As discussed in the September 17, 2008 renewal order, evidence presented by BIS indicated that Aircraft 1–3 continued to be flown on Mahan Airways' routes after issuance of the TDO, in violation of the Regulations and the TDO itself.¹² It also showed that

Aircraft 1–3 had been flown in further violation of the Regulations and the TDO on the routes of Iran Air, an Iranian Government airline. Moreover, as discussed in the March 16, 2009, September 11, 2009 and March 9, 2010 renewal orders, Mahan Airways registered Aircraft 1–3 in Iran, obtained Iranian tail numbers for them (EP–MNA, EP–MNB, and EP–MNE, respectively), and continued to operate at least two of them in violation of the Regulations and the TDO,¹³ while also committing an additional knowing and willful violation when it negotiated for and acquired an additional U.S.-origin aircraft. The additional acquired aircraft was an MD–82 aircraft, which subsequently was painted in Mahan Airways' livery and flown on multiple Mahan Airways' routes under tail number TC–TUA.

The March 9, 2010 renewal order also noted that a court in the United Kingdom ("U.K.") had found Mahan Airways in contempt of court on February 1, 2010, for failing to comply with that court's December 21, 2009 and January 12, 2010 orders compelling Mahan Airways to remove the Boeing 747s from Iran and ground them in the Netherlands. Mahan Airways and the Balli Group Respondents had been litigating before the U.K. court concerning ownership and control of Aircraft 1–3. In a letter to the U.K. court dated January 12, 2010, Mahan Airways' Chairman indicated, *inter alia*, that Mahan Airways opposes U.S. Government actions against Iran, that it continued to operate the aircraft on its routes in and out of Tehran (and had 158,000 "forward bookings" for these aircraft), and that it wished to continue to do so and would pay damages if required by that court, rather than ground the aircraft.

The September 3, 2010 renewal order discussed the fact that Mahan Airways' violations of the TDO extended beyond operating U.S.-origin aircraft and attempting to acquire additional U.S.-origin aircraft. In February 2009, while subject to the TDO, Mahan Airways participated in the export of computer motherboards, items subject to the Regulations and designated as EAR99, from the United States to Iran, via the United Arab Emirates ("UAE"), in violation of both the TDO and the Regulations, by transporting and/or forwarding the computer motherboards from the UAE to Iran. Mahan Airways' violations were facilitated by Gatewick

his addition to the TDO on August 24, 2011. Equipco (UK) Ltd. and Skyco (UK) Ltd., two companies owned and operated by Eslamian, also were parties to the settlement agreement and were added to the settlement order as related persons. In addition to other sanctions, the settlement provides that Eslamian, Equipco, and Skyco shall be subject to a conditionally suspended denial order for a period of four years from the date of the settlement order.

¹⁰ A party named or added as a related person may not oppose the issuance or renewal of the underlying temporary denial order, but may file an appeal of the related person determination in accordance with section 766.23(c). See also note 2, *supra*.

¹¹ 88 FR 59791 (Aug. 30, 2023).

¹² Engaging in conduct prohibited by a denial order violates the Regulations. 15 CFR 764.2(a) and (k).

¹³ The third Boeing 747 appeared to have undergone significant service maintenance and may not have been operational at the time of the March 9, 2010 renewal order.

LLC, which not only participated in the transaction, but also has stated to BIS that it acted as Mahan Airways' sole booking agent for cargo and freight forwarding services in the UAE.

Moreover, in a January 24, 2011 filing in the U.K. court, Mahan Airways asserted that Aircraft 1–3 were not being used, but stated in pertinent part that the aircraft were being maintained in Iran “in an airworthy condition” and that, depending on the outcome of its U.K. court appeal, the aircraft “could immediately go back into service . . . on international routes into and out of Iran.” Mahan Airways' January 24, 2011 submission to U.K. Court of Appeal, at p. 25, ¶¶ 108, 110. This clearly stated intent, both on its own and in conjunction with Mahan Airways' prior misconduct and statements, demonstrated the need to renew the TDO in order to prevent imminent future violations. Two of these three 747s subsequently were removed from Iran and are no longer in Mahan Airways' possession. The third of these 747s remained in Iran under Mahan's control. Pursuant to Executive Order 13224, this 747 was designated a Specially Designated Global Terrorist (“SDGT”) by the U.S. Department of the Treasury's Office of Foreign Assets Control (“OFAC”) on September 19, 2012.¹⁴ Furthermore, as discussed in the February 4, 2013 Order, open source information indicated that this 747, painted in the livery and logo of Mahan Airways, had been flown between Iran and Syria, and was suspected of ferrying weapons and/or other equipment to the Syrian Government from Iran's Islamic Revolutionary Guard Corps.

In addition, as first detailed in the July 1, 2011 and August 24, 2011 orders, and discussed in subsequent renewal orders in this matter, Mahan Airways also continued to evade U.S. export control laws by operating two Airbus A310 aircraft, bearing Mahan Airways' livery and logo, on flights into and out of Iran.¹⁵ At the time of the July 1, 2011 and August 24, 2011 orders, these Airbus A310s were registered in France, with tail numbers F–OJHH and F–OJHI,

respectively.¹⁶ The August 2012 renewal order also found that Mahan Airways had acquired another Airbus A310 aircraft subject to the Regulations, with MSN 499 and Iranian tail number EP–VIP, in violation of the Regulations.¹⁷ On September 19, 2012, all three Airbus A310 aircraft (tail numbers F–OJHH, F–OJHI, and EP–VIP) were designated as SDGTs.¹⁸

The February 4, 2013 renewal order laid out further evidence of continued and additional efforts by Mahan Airways and other persons acting in concert with Mahan, including Kral Aviation and another Turkish company, to procure U.S.-origin engines—two GE CF6–50C2 engines, with MSNs 517621 and 517738, respectively—and other aircraft parts in violation of the TDO and the Regulations.¹⁹ The February 4, 2013 order also added Mehdi Bahrami as a related person in accordance with Section 766.23 of the Regulations. Bahrami, a Mahan Vice-President and the head of Mahan's Istanbul Office, also was involved in Mahan's acquisition of the original three Boeing 747s (Aircraft 1–3) that resulted in the original TDO, and has had a business

¹⁶ OEE subsequently presented evidence that after the August 24, 2011 renewal, Mahan Airways worked along with Kerman Aviation and others to de-register the two Airbus A310 aircraft in France and to register both aircraft in Iran (with, respectively, Iranian tail numbers EP–MHH and EP–MHI). It was determined subsequent to the February 15, 2012 renewal order that the registration switch for these A310s was cancelled, and that Mahan Airways then continued to fly the aircraft under the original French tail numbers (F–OJHH and F–OJHI, respectively). Both aircraft apparently remain in Mahan Airways' possession.

¹⁷ See note 14, *supra*.

¹⁸ See <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20120919.aspx>. Mahan Airways was previously designated by OFAC as a SDGT on October 18, 2011. 77 FR 64427 (October 18, 2011).

¹⁹ Kral Aviation was referenced in the February 4, 2013 renewal order as “Turkish Company No. 1.” Kral Aviation purchased a GE CF6–50C2 aircraft engine (MSN 517621) from the United States in July 2012, on behalf of Mahan Airways. OEE was able to prevent this engine from reaching Mahan by issuing a redelivery order to the freight forwarder in accordance with Section 758.8 of the Regulations. OEE also issued Kral Aviation a redelivery order for the second CF6–50C2 engine (MSN 517738) on July 30, 2012. The owner of the second engine subsequently cancelled the item's sale to Kral Aviation. In September 2012, OEE was alerted by a U.S. exporter that another Turkish company (“Turkish Company No. 2”) was attempting to purchase aircraft spare parts intended for re-export by Turkish Company No. 2 to Mahan Airways. See February 4, 2013 renewal order.

On December 31, 2013, Kral Aviation was added to BIS's Entity List, Supplement No. 4 to Part 744 of the Regulations. See 78 FR 75458 (Dec. 12, 2013). Companies and individuals are added to the Entity List for engaging in activities contrary to the national security or foreign policy interests of the United States. See 15 CFR 744.11.

relationship with Mahan dating back to 1997.

The July 31, 2013 renewal order detailed additional evidence obtained by OEE showing efforts by Mahan Airways to obtain another GE CF6–50C2 aircraft engine (MSN 528350) from the United States via Turkey. Multiple Mahan employees, including Mehdi Bahrami, were involved in or aware of matters related to the engine's arrival in Turkey from the United States, plans to visually inspect the engine, and prepare it for shipment from Turkey.

Mahan Airways sought to obtain this U.S.-origin engine through Pioneer Logistics Havacilik Turizm Yonetim Danismanlik (“Pioneer Logistics”), an aircraft parts supplier located in Turkey, and its director/operator, Gulnihal Yegane, a Turkish national who previously had conducted Mahan related business with Mehdi Bahrami and Ali Eslamian. Moreover, as referenced in the July 31, 2013 renewal order, a sworn affidavit by Kosol Surinanda, also known as Kosol Surinandha, Managing Director of Mahan's General Sales Agent in Thailand, stated that the shares of Pioneer Logistics for which he was the listed owner were “actually the property of and owned by Mahan.” He further stated that he held “legal title to the shares until otherwise required by Mahan” but would “exercise the rights granted to [him] exactly and only as instructed by Mahan and [his] vote and/or decisions [would] only and exclusively reflect the wills and demands of Mahan[.]”²⁰

The January 24, 2014 renewal order outlined OEE's continued investigation of Mahan Airways' activities and detailed an attempt by Mahan, which OEE thwarted, to obtain, via an Indonesian aircraft parts supplier, two U.S.-origin Honeywell ALF–502R–5 aircraft engines (MSNs LF5660 and LF5325), items subject to the Regulations, from a U.S. company located in Texas. An invoice of the Indonesian aircraft parts supplier dated March 27, 2013, listed Mahan Airways as the purchaser of the engines and included a Mahan ship-to address. OEE also obtained a Mahan air waybill dated March 12, 2013, listing numerous U.S.-origin aircraft parts subject to the Regulations—including, among other items, a vertical navigation gyroscope, a transmitter, and a power control unit—being transported by Mahan from Turkey to Iran in violation of the TDO.

²⁰ Pioneer Logistics, Gulnihal Yegane, and Kosol Surinanda also were added to the Entity List on December 12, 2013. See 78 FR 75,458 (Dec. 12, 2013).

¹⁴ See <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20120919.aspx>.

¹⁵ The Airbus A310s are powered with U.S.-origin engines. The engines are subject to the Regulations and classified under Export Control Classification (“ECCN”) 9A991.d. The Airbus A310s contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the Regulations. They are classified under ECCN 9A991.b. The export or reexport of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

The July 22, 2014 renewal order discussed open source evidence from the March–June 2014 time period regarding two BAE regional jets, items subject to the Regulations, that were painted in the livery and logo of Mahan Airways and operating under Iranian tail numbers EP–MOI and EP–MOK, respectively.²¹ In addition, aviation industry resources indicated that these aircraft were obtained by Mahan Airways in late November 2013 and June 2014, from Ukrainian Mediterranean Airline, a Ukrainian airline that was added to BIS's Entity List (Supplement No. 4 to Part 744 of the Regulations) on August 15, 2011, for acting contrary to the national security and foreign policy interests of the United States.²² Open source information indicated that at least EP–MOI remained active in Mahan's fleet, and that the aircraft was being operated on multiple flights in July 2014.

The January 16, 2015 renewal order detailed evidence of additional attempts by Mahan Airways to acquire items subject to the Regulations in further violation of the TDO. Specifically, in March 2014, OEE became aware of an inertial reference unit bearing serial number 1231 (“the IRU”) that had been sent to the United States for repair. The IRU is a U.S.-origin item, subject to the Regulations, classified under ECCN 7A103, and controlled for missile technology reasons. Upon closer inspection, it was determined that IRU came from or had been installed on an Airbus A340 aircraft bearing MSN 056. Further investigation revealed that as of approximately February 2014, this aircraft was registered under Iranian tail number EP–MMB and had been painted in the livery and logo of Mahan Airways.

The January 16, 2015 renewal order also described related efforts by the

Departments of Justice and Treasury to further thwart Mahan's illicit procurement efforts. Specifically, on August 14, 2014, the United States Attorney's Office for the District of Maryland filed a civil forfeiture complaint for the IRU pursuant to 22 U.S.C. 401(b) that resulted in the court issuing an Order of Forfeiture on December 2, 2014. EP–MMB remains listed as active in Mahan Airways' fleet and has been used on flights into and out of Iran as recently as December 19, 2017.

Additionally, on August 29, 2014, OFAC blocked the property and interests in property of Asian Aviation Logistics of Thailand, a Mahan Airways affiliate or front company, pursuant to Executive Order 13224. In doing so, OFAC described Mahan Airways' use of Asian Aviation Logistics to evade sanctions by making payments on behalf of Mahan for the purchase of engines and other equipment.²³

The May 21, 2015 modification order detailed the acquisition of two aircraft, specifically an Airbus A340 bearing MSN 164 and an Airbus A321 bearing MSN 550, that were purchased by Al Naser Airlines in late 2014/early 2015 and were under the possession, control, and/or ownership of Mahan Airways.²⁴ The sales agreements for these two aircraft were signed by Ali Abdullah Alhay for Al Naser Airlines.²⁵ Payment information reveals that multiple electronic funds transfers (“EFT”) were made by Ali Abdullah Alhay and Bahar Safwa General Trading in order to acquire MSNs 164 and 550. The May 21, 2015 modification order also laid out evidence showing the respondents' attempts to obtain other controlled aircraft, including aircraft physically located in the United States in similarly-patterned transactions during the same

recent time period. Transactional documents involving two Airbus A320s bearing MSNs 82 and 99, respectively, again showed Ali Abdullah Alhay signing sales agreements for Al Naser Airlines.²⁶ A review of the payment information for these aircraft similarly revealed EFTs from Ali Abdullah Alhay and Bahar Safwa General Trading that follow the pattern described for MSNs 164 and 550, *supra*. MSNs 82 and 99 were detained by OEE Special Agents prior to their planned export from the United States.

The July 13, 2015 renewal order outlined evidence showing that Al Naser Airlines' attempts to acquire aircraft on behalf of Mahan Airways extended beyond MSNs 164 and 550 to include a total of nine aircraft.²⁷ Four of the aircraft, all of which are subject to the Regulations and were obtained by Mahan from Al Naser Airlines, had been issued the following Iranian tail numbers: EP–MMD (MSN 164), EP–MMG (MSN 383), EP–MMH (MSN 391) and EP–MMR (MSN 416), respectively.²⁸ Publicly available flight tracking information provided evidence that at the time of the July 13, 2015 renewal, both EP–MMH and EP–MMR were being actively flown on routes into

²⁶ Both aircraft were physically located in the United States and therefore are subject to the Regulations pursuant to Section 734.3(a)(1). Moreover, these Airbus A320s are powered by U.S.-origin engines that are subject to the Regulations and classified under Export Control Classification Number ECCN 9A991.d. The Airbus A320s contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR regardless of their location. The aircraft are classified under ECCN 9A991.b. The export or re-export of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

²⁷ This evidence included a press release dated May 9, 2015, that appeared on Mahan Airways' website and stated that Mahan “added 9 modern aircraft to its air fleet [.]” and that the newly acquired aircraft included eight Airbus A340s and one Airbus A321. See <http://www.mahan.aero/en/mahan-air/press-room/44>. The press release was subsequently removed from Mahan Airways' website. Publicly available aviation databases similarly showed that Mahan had obtained nine additional aircraft from Al Naser Airlines in May 2015, including MSNs 164 and 550. As also discussed in the July 13, 2015 renewal order, Sky Blue Bird Group, via Issam Shammout, was actively involved in Al Naser Airlines' acquisition of MSNs 164 and 550, and the attempted acquisition of MSNs 82 and 99 (which were detained by OEE).

²⁸ The Airbus A340s are powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. The Airbus A340s contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR regardless of their location. The aircraft are classified under ECCN 9A991.b. The export or re-export of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

²¹ The BAE regional jets are powered with U.S.-origin engines. The engines are subject to the EAR and classified under ECCN 9A991.d. These aircraft contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR. They are classified under ECCN 9A991.b. The export or reexport of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

²² See 76 FR 50,407 (Aug. 15, 2011). The July 22, 2014 renewal order also referenced two Airbus A320 aircraft painted in the livery and logo of Mahan Airways and operating under Iranian tail numbers EP–MMK and EP–MML, respectively. OEE's investigation also showed that Mahan obtained these aircraft in November 2013, from Khors Air Company, another Ukrainian airline that, like Ukrainian Mediterranean Airlines, was added to BIS's Entity List on August 15, 2011. Open source evidence indicates the two Airbus A320 aircraft may have been transferred by Mahan Airways to another Iranian airline in October 2014, and issued Iranian tail numbers EP–APE and EP–APF, respectively.

²³ See <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140829.aspx>. See 79 FR 55,073 (Sep. 15, 2014). OFAC also blocked the property and property interests of Pioneer Logistics of Turkey on August 29, 2014. *Id.* Mahan Airways' use of Pioneer Logistics in an effort to evade the TDO and the Regulations was discussed in a prior renewal order, as summarized, *supra*, at 14. BIS added both Asian Aviation Logistics and Pioneer Logistics to the Entity List on December 12, 2013. See 78 FR 75458 (Dec. 12, 2013).

²⁴ Both of these aircraft are powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. Both aircraft contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR regardless of their location. The aircraft are classified under ECCN 9A991.b. The export or re-export of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

²⁵ The evidence obtained by OEE showed Ali Abdullah Alhay as a 25% owner of Al Naser Airlines.

and out of Iran in violation of the Regulations.²⁹

The January 7, 2016 renewal order discussed evidence that Mahan Airways had begun actively flying EP-MMD on international routes into and out of Iran. Additionally, the January 7, 2016 order described publicly available aviation database and flight tracking information indicating that Mahan Airways continued efforts to acquire Iranian tail numbers and press into active service under Mahan's livery and logo at least two more of the Airbus A340 aircraft it had obtained from or through Al Naser Airlines: EP-MME (MSN 371) and EP-MMF (MSN 376), respectively.

The July 7, 2016 renewal order described Mahan Airways' acquisition of a BAE Avro RJ-85 aircraft (MSN 2392) in violation of the Regulations and its subsequent registration under Iranian tail number EP-MOR.³⁰ This information was corroborated by publicly available information on the website of Iran's civil aviation authority. The July 7, 2016 order also outlined Mahan's continued operation of EP-MMF in violation of the Regulations on routes from Tehran, Iran to Beijing, China and Shanghai, China, respectively.

The December 30, 2016 renewal order outlined Mahan's continued operation of multiple Airbus aircraft, including EP-MMD (MSN 164), EP-MMF (MSN 376), and EP-MMH (MSN 391), which were acquired from or through Al Naser Airlines, as previously detailed in pertinent part in the July 13, 2015 and January 7, 2016 renewal orders. Publicly available flight tracking information showed that the aircraft were operated on flights into and out of Iran, including from/to Beijing, China, Kuala Lumpur, Malaysia, and Istanbul, Turkey.³¹

²⁹ There is some publicly available information indicating that the aircraft Mahan Airways is flying under Iranian tail number EP-MMR is now MSN 615, rather than MSN 416. Both aircraft are Airbus A340 aircraft that Mahan acquired from Al Naser Airlines in violation of the Regulations. Moreover, both aircraft were designated as SDGTs by OFAC on May 21, 2015, pursuant to Executive Order 13224. See 80 FR 30762 (May 29, 2015).

³⁰ The BAE Avro RJ-85 is powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. The BAE Avro RJ-85 contains controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result is subject to the EAR regardless of its location. The aircraft is classified under ECCN 9A991.b, and its export or re-export to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

³¹ Specifically, on December 22, 2016, EP-MMD (MSN 164) flew from Dubai, UAE to Tehran, Iran. Between December 20 and December 22, 2016, EP-MMF (MSN 376) flew on routes from Tehran, Iran to Beijing, China and Istanbul, Turkey, respectively. Between December 26 and December 28, 2016, EP-

The June 27, 2017 renewal order included similar evidence regarding Mahan Airways' operation of multiple Airbus aircraft subject to the Regulations, including, but not limited to, aircraft procured from or through Al Naser Airlines, on flights into and out of Iran, including from/to Moscow, Russia, Shanghai, China and Kabul, Afghanistan. The June 27, 2017 order also detailed evidence concerning a suspected planned or attempted diversion to Mahan of an Airbus A340 subject to the Regulations that had first been mentioned in OEE's December 13, 2016 renewal request.

The December 20, 2017 renewal order presented evidence that a Mahan employee attempted to initiate negotiations with a U.S. company for the purchase of an aircraft subject to the Regulations and classified under ECCN 9A610. Moreover, the order highlighted Al Naser Airlines' acquisition, via lease, of at least possession and/or control of a Boeing 737 (MSN 25361), bearing tail number YR-SEB, and an Airbus A320 (MSN 357), bearing tail number YR-SEA, from a Romanian company in violation of the TDO and the Regulations.³² Open source information indicates that after the December 20, 2017 renewal order publicly exposed Al Naser's acquisition of these two aircraft (MSNs 25361 and 357), the leases were subsequently cancelled and the aircraft returned to their owner.

The December 20, 2017 renewal order also included evidence indicating that Mahan Airways was continuing to operate a number of aircraft subject to the Regulations, including aircraft originally procured from or through Al Naser Airlines, on flights into and out of Iran, including from/to Lahore, Pakistan, Shanghai, China, Ankara, Turkey, Kabul, Afghanistan, and Baghdad, Iraq.

The June 14, 2018 renewal order outlined evidence that Mahan began actively operating EP-MMT, an Airbus A340 aircraft (MSN 292) acquired in 2017 and previously registered in Kazakhstan under tail number UP-A4003, on international flights into and out of Iran.³³ It also discussed evidence

MMH (MSN 391) flew on routes from Tehran, Iran to Kuala Lumpur, Malaysia.

³² The Airbus A320 is powered with U.S.-origin engines, which are subject to the EAR and classified under Export Control Classification ("ECCN") 9A991.d. The engines are valued at more than 10 percent of the total value of the aircraft, which consequently is subject to the EAR. The aircraft is classified under ECCN 9A991.b, and its export or reexport to Iran would require U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

³³ The Airbus A340 is powered by U.S.-origin engines that are subject to the Regulations and

that Mahan continued to operate a number of aircraft subject to the Regulations, including, but not limited to, EP-MME, EP-MMF, and EP-MMH, on international flights into and out of Iran, including from/to Beijing, China.

The June 14, 2018 renewal order also noted OFAC's May 24, 2018 designation of Otik Aviation, a/k/a Otik Havacilik Sanayi Ve Ticaret Limited Sirketi, of Turkey, as an SDGT pursuant to Executive Order 13224, for providing material support to Mahan, as well as OFAC's designation as SDGTs of an additional twelve aircraft in which Mahan has an interest.³⁴ The June 14, 2018 order also cited the April 2018 arrest and arraignment of a U.S. citizen on a three-count criminal information filed in the United States District Court for the District of New Jersey involving the unlicensed exports of U.S.-origin aircraft parts valued at over \$2 million to Iran, including to Mahan Airways.

The December 11, 2018 renewal order detailed publicly available information showing that Mahan Airways had continued operating a number of aircraft subject to the EAR, including, but not limited to, EP-MMB, EP-MME, EP-MMF, and EP-MMQ, on international flights into and out of Iran from/to Istanbul, Turkey, Guangzhou, China, Bangkok, Thailand, and Dubai, UAE.³⁵ It also discussed that OEE's continued

classified under ECCN 9A991.d. The Airbus A340 contains controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result is subject to the Regulations regardless of its location. The aircraft is classified under ECCN 9A991.b. The export or re-export of this aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations. On June 4, 2018, EP-MMT (MSN 292) flew from Bangkok, Thailand to Tehran, Iran.

³⁴ See 83 FR 27828 (June 14, 2018). OFAC's related press release stated in part that "[o]ver the last several years, Otik Aviation has procured and delivered millions of dollars in aviation-related spare and replacement parts for Mahan Air, some of which are procured from the United States and the European Union. As recently as 2017, Otik Aviation continued to provide Mahan Air with replacement parts worth well over \$100,000 per shipment, such as aircraft brakes." The twelve additional Mahan-related aircraft that were designated are: EP-MMA (MSN 20), EP-MMB (MSN 56), EP-MMC (MSN 282), EP-MMJ (MSN 526), EP-MMV (MSN 2079), EP-MNF (MSN 547), EP-MOD (MSN 3162), EP-MOM (MSN 3165), EP-MOP (MSN 2257), EP-MOQ (MSN 2261), EP-MOR (MSN 2392), and EP-MOS (MSN 2347). See <https://home.treasury.gov/news/press-releases/sm0395>. See also <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180524.aspx>.

³⁵ Flight tracking information showed that on December 10, 2018, EP-MMB (MSN 56) flew from Istanbul, Turkey to Tehran, Iran, and EP-MME (MSN 371) flew from Guangzhou, China to Tehran, Iran. Additionally, on December 6, 2018, EP-MMF (MSN 376) flew from Bangkok, Thailand to Tehran, Iran, and on December 9, 2018, EP-MMQ (MSN 449) flew on routes between Dubai, United Arab Emirates and Tehran, Iran.

investigation of Mahan Airways and its affiliates and agents had resulted in an October 2018 guilty plea by Arzu Sagsoz, a Turkish national, in the U.S. District Court for the District of Columbia, stemming from her involvement in a conspiracy to export a U.S.-origin aircraft engine, valued at approximately \$810,000, to Mahan.

The December 11, 2018 order also noted OFAC's September 14, 2018 designation of Mahan-related entities as SDGTs pursuant to Executive Order 13224, namely, My Aviation Company Limited, of Thailand, and Mahan Travel and Tourism SDN BHD, a/k/a Mahan Travel a/k/a Mihan Travel & Tourism SDN BHD, of Malaysia.³⁶ As general sales agents for Mahan Airways, these companies sold cargo space aboard Mahan Airways' flights, including on flights to Iran, and provided other services to or for the benefit of Mahan Airways and its operations.³⁷

The June 5, 2019 renewal order highlighted Mahan's continued violation of the TDO and the Regulations. An end-use check conducted by BIS in Malaysia in March 2019 uncovered evidence that, on approximately ten occasions, Mahan had caused, aided and/or abetted the unlicensed export of U.S.-origin items subject to the Regulations from the United States to Iran via Malaysia. The items included helicopter shafts, transmitters, and other aircraft parts, some of which are listed on the Commerce Control List and controlled on anti-terrorism grounds. The June 5, 2019 order also detailed publicly available flight tracking information showing that Mahan continued to unlawfully operate a number of aircraft subject to the EAR on flights into and out of Iran, including on routes to and from Damascus, Syria.³⁸

The June 5, 2019 order also described actions taken by both BIS and OFAC to thwart efforts by entities connected to or acting on behalf of Mahan Airways to violate U.S. export controls and sanctions related to Iran. On May 14, 2019, BIS added Manohar Nair, Basha Asmath Shaikh, and two co-located companies that they operate, Emirates Hermes General Trading and Presto Freight International, LLC, to the Entity List pursuant to Section 744.11 of the Regulations, including for engaging in activities to procure U.S.-origin items on Mahan's behalf.³⁹ On January 24, 2019, OFAC designated as SDGTs Flight Travel LLC, which is Mahan's general service agent in Yerevan, Armenia, and Qeshm Fars Air, an Iranian airline which operates two U.S.-origin Boeing 747s⁴⁰ and is owned or controlled by Mahan, and also linked to the Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF).⁴¹

The December 2, 2019 renewal order noted that OEE's on-going investigation revealed that U.S.-origin passenger flight and database management software subject to the Regulations was provided to a company in Turkey and subsequently used to facilitate and service Mahan's operations into and out of Turkey in further violation of the Regulations.

Additionally, open source information, including flight tracking data and news articles published in October 2019, showed that Mahan Airways was now operating a U.S.-origin Boeing 747 on routes between Iranian airports in Tehran, Kish Island, and Mashhad. This aircraft, bearing Iranian tail number EP-MNB, appears to be one of the three aircraft that Mahan illegally acquired via Blue Airways of Armenia and U.K.-based Balli Group that resulted in the issuance of the original TDO.⁴² See *supra* at 10–12.

Evidence was also described in the December 2, 2019 renewal order showing that on or about November 11, 2019, Mahan caused, aided and/or abetted the unlicensed export of a U.S.-origin atomic absorption spectrometer, an item subject to the Regulations, from the United States to Iran via the UAE. Finally, publicly available flight tracking information showed that Mahan continued to unlawfully operate a number of aircraft subject to the EAR on flights into and out of Iran, including on routes to and from Guangzhou, China, Istanbul, Turkey, and Kuala Lumpur, Malaysia.⁴³

The May 29, 2020 renewal order cited Mahan's operation of EP-MMD, EP-MMF, and EP-MMI, aircraft originally acquired from Al Naser Airlines, on international flights into and out of Iran from/to Bangkok, Thailand, Dubai, UAE, and Shanghai, China in violation of the TDO and EAR.⁴⁴ The May 29, 2020 renewal order also detailed the indictment of Ali Abdullah Alhay and Issam Shammout, parties added to the TDO in May and July 2015, respectively, in the United States District Court for the District of Columbia. Alhay and Shammout were charged with, among other violations, conspiring to export aircraft and parts to Mahan in violation of export control laws and the embargo on Iran beginning around August 2012 through May 2015.

In addition to detailing the operation of multiple aircraft in violation of the Regulations,⁴⁵ the November 24, 2020 renewal order discussed a related TDO issued on August 19, 2020, denying for 180 days the export privileges of Indonesia-based PT MS Aero Support ("PTMS Aero"), PT Antasena Kreasi ("PTAK"), PT Kandiyasa Energi Utama ("PTKEU"), Sunarko Kuntjoro, Triadi Senna Kuntjoro, and Satrio Wiharjo Sasmito based on their involvement in the unlicensed export of aircraft parts to Mahan Airways—often in coordination

³⁶ See 83 FR 34301 (July 19, 2018) (designation of Mahan Travel and Tourism SDN BHD on July 9, 2018), and 83 FR 53359 (Oct. 22, 2018) (designation of My Aviation Company Limited and updating of entry for Mahan Travel and Tourism SDN BHD on September 14, 2018).

³⁷ OFAC's press release concerning its designation of My Aviation Company Limited on September 14, 2018, states in part that "[t]his Thailand-based company has disregarded numerous U.S. warnings, issued publicly and delivered bilaterally to the Thai government, to sever ties with Mahan Air." My Aviation provides cargo services to Mahan Airways, including freight booking, and works with local freight forwarding entities to ship cargo on regularly scheduled Mahan Airways' flights to Tehran, Iran. My Aviation has also provided Mahan Airways with passenger booking services. See <https://home.treasury.gov/news/press-releases/sm484>.

³⁸ Specifically, on May 26, 2019, EP-MMJ (MSN 526) flew from Damascus, Syria to Tehran, Iran. In addition, on May 24, 2019, EP-MNF (MSN 547) flew on routes between Moscow, Russia and Tehran, and on May 23, 2019, EP-MMF (MSN 376) flew from Dubai, UAE to Tehran.

³⁹ See 84 FR 21233 (May 14, 2019).

⁴⁰ These 747s are registered in Iran with tail numbers EP-FAA and EP-FAB, respectively.

⁴¹ OFAC's press release concerning these designations states that Qeshm Fars Air was being designated for "being owned or controlled by Mahan Air, as well as for assisting in, sponsoring, or providing financial, material or technological support for, or financial or other services to or in support of, the IRGC-QF," and that Flight Travel LLC was being designated for "acting for or on behalf of Mahan Air." It further states, *inter alia*, that "Mahan Air employees fill Qeshm Fars Air management positions, and Mahan Air provides technical and operational support for Qeshm Fars Air, facilitating the airline's illicit operations." See <https://home.treasury.gov/news/press-releases/sm590>. See also <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190124.aspx>.

⁴² The same open sources indicated this aircraft continued to operate on flights within Iran to include a May 11, 2020 flight from Tehran, Iran to Kerman, Iran.

⁴³ Publicly available flight tracking information shows that on November 23, 2019, EP-MME (MSN 371) flew from Guangzhou, China to Tehran, Iran, and on November 21, 2019, EP-MMF (MSN 376) flew on routes between Istanbul, Turkey and Tehran, Iran. Additionally, on November 20, 2019, EP-MMQ (MSN 449) flew from Kuala Lumpur, Malaysia, to Tehran, Iran.

⁴⁴ Publicly available flight tracking information shows that on May 8, 2020, EP-MMD (MSN 164) flew on routes between Bangkok, Thailand and Tehran, Iran, and on May 10, 2020, EP-MMF (MSN 376) flew on routes between Dubai, UAE and Tehran. In addition, on May 9, 2020, EP-MMI (MSN 416) flew on routes between Shanghai, China and Tehran.

⁴⁵ Publicly available flight tracking information shows that on November 13, 2020, EP-MMQ (MSN 449) flew on routes between Istanbul, Turkey and Tehran, Iran, and on November 15, 2020, EP-MMI (MSN 416) flew on routes between Shenzhen, China and Tehran.

with Mustafa Ovieci, a Mahan executive.⁴⁶ These parties also facilitated the shipment of damaged Mahan parts to the United States for repair and subsequent export back to Iran in further violation of U.S. laws. In both instances, the fact that the items were destined to Iran/Mahan was concealed from U.S. companies, shippers, and freight forwarders.⁴⁷

The November 24, 2020 renewal order also includes actions taken by other U.S. government agencies such as OFAC's August 19, 2020 designation of UAE-based Parthia Cargo, its CEO Amin Mahdavi, and Delta Parts Supply FZC as SDGTs pursuant to Executive Order 13224 for providing "key parts and logistics services for Mahan Air. . . ." The OFAC press release further states, in part, that Mahdavi "has directly coordinated the shipment of parts on behalf of Mahan Air."⁴⁸ In addition, Mahdavi and Parthia Cargo were indicted in the United States District Court for the District of Columbia for violating sanctions on Iran.⁴⁹

Moreover, in October 2020, the U.S. District Court for the District of New Jersey sentenced Joyce Eliasbachus to 18 months of confinement based on her role in a conspiracy to export \$2 million dollars' worth of aircraft parts from the United States to Iran, including to Mahan Airways.⁵⁰

The May 21, 2021 renewal order outlined Mahan's continued operation of a number of aircraft subject to the EAR, including, but not limited to, EP-MMH, EP-MMI, and EP-MMQ, on international flights into and out of Iran from/to Shanghai, China, and Dubai, United Arab Emirates, and Guangzhou, China, respectively.⁵¹

Open source news reporting also indicated that after five years of maintenance, Mahan Air is now operating EP-MNE, a Boeing 747 on

domestic flights within Iran.⁵² In addition to this aircraft being one of the original three Boeing aircraft Mahan obtained in violation of the Regulations, any service or maintenance involving parts subject to the EAR would further violate the TDO.

The November 17, 2021 order details Mahan's continued operation of a number of aircraft subject to the EAR, including, but not limited to EP-MME, EP-MMJ, EP-MMQ, on flights into and out of Iran from/to Istanbul, Turkey, and Dubai, United Arab Emirates, and Shenzhen, China, respectively.⁵³ Additionally, publicly available industry sources showed that EP-MMG (MSN 383), an aircraft that Mahan acquired from Al Naser Air in violation of both the TDO and Regulations, was in a maintenance, repair, overhaul ("MRO") status at Iran's Imam Khomeini International Airport in Tehran, Iran.

The May 13, 2022 renewal order outlines Mahan's continuing violation of the TDO and/or Regulations including, but not limited to the operation of EP-MME, EP-MNO, and EP-MMB on flights into and out of Iran from/to Moscow, Russia, Damascus, Syria, and Guangzhou, China, respectively.⁵⁴ Open source press reports also indicates that as of April 2022, Mahan Air increased its service into Moscow, Russia by adding two weekly flights to Moscow's Sheremetyevo Airport ("SVO") to its current service into Moscow's Vnukovo Airport ("VKO").⁵⁵ Mahan flights into Russia after February 24, 2022 violated the stringent export controls imposed on aviation-related (e.g., Commerce Control List Categories 7 and 9) items to Russia in response to Russia's further invasion of Ukraine. These controls include a license requirement for the export, reexport or transfer (in-country) to Russia of any aircraft or aircraft parts specified in Export Control

Classification Number (ECCN) 9A991 (Section 746.8(a)(1) of the EAR).⁵⁶

The May 13, 2022 renewal order also cited OFAC's recent administrative enforcement action with an Australian freight forwarder resulting in a \$6,131,855 civil penalty, which resolved, in part, allegations of receiving 327 payments from Mahan that were processed through U.S. financial institutions or foreign branches of U.S. financial institutions in apparent violation of OFAC sanctions.⁵⁷

The November 8, 2022 order detailed Mahan Air's continued violation of the TDO and Regulations, including the Russia-related export controls set out in Section 746.8 of the Regulations. On September 19, 2022, BIS publicly identified Mahan's EP-MEE aircraft for its unlicensed reexport to Russia in apparent violation of Section 746.8 of the Regulations.⁵⁸ Additionally, open source evidence showed that Mahan continues to operate EP-MME, EP-MMJ, and EP-MMQ on flights into and out of Iran from/to Moscow, Russia, and Dubai, United Arab Emirates, respectively, without the requisite authorization.⁵⁹

Further, on August 2, 2022, BIS took a related enforcement action against Venezuela-based cargo airline Empresa de Transporte Aéreo cargo del Sur, S.A., a/k/a Aerocargo del Sur Transportation Company, a/k/a EMTRASUR ("EMTRASUR"), for acquiring custody and/or control from Mahan Air of a U.S.-origin Boeing 747 aircraft bearing manufacturer's serial number 23413 ("MSN 23413") in violation of the TDO.⁶⁰ In or around October 2021, Mahan Air transferred custody and control of MSN 23413 to EMTRASUR's parent company, CONVIASA,⁶¹ through an intermediary.

⁵⁶ The TDO prohibits Mahan from being eligible to use license exception Aircraft, Vessels, and Spacecraft (AVS) (Section 740.15 of the EAR).

⁵⁷ https://home.treasury.gov/system/files/126/20220425_toll.pdf.

⁵⁸ <https://bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3138-bis-press-release-gp10-iranian-craft-additions/file>.

⁵⁹ Publicly available flight tracking information shows that on October 9, 2022, EP-MME (MSN 376) flew on routes between Tehran, Iran and Moscow, Russia's VTO airport, and on October 26, 2022, EP-MMJ (MSN 526) flew on routes between Tehran, Iran and Moscow, Russia's SVO airport. On October 28, 2022, EP-MMQ (MSN 346) flew on routes between Dubai, United Arab Emirates and Tehran, Iran.

⁶⁰ BIS issued a separate TDO denying the export privileges of EMTRASUR for a period of 180 days. See 87 FR 47,964 (Aug. 5, 2022).

⁶¹ On or about February 7, 2020, U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") added CONVIASA, a Venezuelan state-owned airline, to the list of Specially Designated Nationals ("SDN") pursuant to Executive Order (E.O.) 13884. See <https://home.treasury.gov/news/press-releases/sm903>.

⁴⁶ See 85 FR 52321 (Aug. 25, 2020).

⁴⁷ PTMS Aero, PTAK, PTKEU, and Sunarko Kuntjoro were each indicted in December 2019 on multiple counts related to this conspiracy in the United States District Court for the District of Columbia.

⁴⁸ <https://home.treasury.gov/news/press-releases/sm1098>.

⁴⁹ <https://www.justice.gov/opa/pr/iranian-national-and-uae-business-organization-charged-criminal-conspiracy-violate-iranian>.

⁵⁰ Eliasbachus' arrest and arraignment were detailed in the June 14, 2018 renewal order, as described *supra* at 21.

⁵¹ Publicly available flight tracking information shows that on May 14, 2021, EP-MMH (MSN 391) flew on routes between Shanghai, China and Tehran, Iran, and on May 13, 2021, EP-MMI (MSN 416) flew on routes between Dubai, United Arab Emirates and Tehran. In addition, on May 20, 2021, EP-MMQ (MSN 346) flew on routes between Guangzhou, China and Tehran.

⁵² <https://simpleflying.com/mahan-air-747-300-flies-again/>.

⁵³ Publicly available flight tracking information shows that on November 7, 2021, EP-MME (MSN 376) flew on routes between Istanbul, Turkey and Tehran, Iran, and on November 9, 2021, EP-MMJ (MSN 526) flew on routes between Dubai, United Arab Emirates and Tehran, Iran. In addition, on November 8, 2021, EP-MMQ (MSN 346) flew on routes between Shenzhen, China and Tehran, Iran.

⁵⁴ Publicly available flight tracking information shows that on May 2, 2022, EP-MME (MSN 376) flew on routes between Moscow, Russia and Tehran, Iran, and on May 5, 2022, EP-MNO (MSN 595) flew on routes between Damascus, Syria and Tehran, Iran. In addition, on May 6, 2022, EP-MMB (MSN 56) flew on routes between Guangzhou, China and Tehran, Iran.

⁵⁵ <https://centreforaviation.com/news/mahan-air-launches-moscow-sheremetyevo-service-1131185>.

The May 5, 2023 renewal order outlined open source evidence showing Mahan continuing to operate EP-MNF, EP-MMQ, and EP-MME on flights into and out of Iran from/to Guangzhou, China, Kabul, Afghanistan, and Moscow, Russia, respectively, without the requisite authorization.⁶² The renewal order also noted the national security and foreign policy concerns raised by Mahan's intention to start direct flights from Iran to Minsk, Belarus.⁶³ Lastly, the May 3, 2023 renewal order cited publicly available information showing that Russian airline Aeroflot, which is currently subject to its own TDO,⁶⁴ has begun sending its aircraft to Mahan for repairs and/or maintenance.⁶⁵

OEE's October 11, 2023 renewal request and on-going investigation outlines Mahan's continued violation of the TDO by operating aircraft including EP-MME, EP-MMQ, and EP-MMB on flights into and out of Iran from/to Erbil, Iraq, Shanghai, China, Lahore, Pakistan, and Moscow, Russia.⁶⁶ OEE also highlighted its continued investigation into Mahan's recent acquisition of an Airbus A340 (MSN 75) bearing Iranian tail number EP-MJA, which has flown to/from Tehran, Iran and Moscow, Russia as recently as October 25, 2023.

Lastly, public reporting details the on-going national security and foreign policy threats and concerns raised by Mahan's destabilizing activities. Specifically, open source reporting details October 12, 2023 airstrikes at Syria's Damascus and Aleppo airports made in an effort to divert a Mahan A340 (MSN 282 and bearing tail number EP-MMC)⁶⁷ which was in route at the time from Tehran, Iran to Syria and suspected of carrying weapons.⁶⁸

⁶² Publicly available flight tracking information shows that on April 24, 2023, EP-MMQ (MSN 346) flew on routes between Guangzhou, China, and Tehran, Iran, and on April 27, 2023, EP-MNF (MSN 547) flew on routes between Kabul, Afghanistan and Tehran, Iran. On April 28, 2023, EP-MME (MSN 371) flew on routes between Moscow, Russia and Tehran, Iran.

⁶³ <https://iranpress.com/content/76332/mahan-air-launches-direct-flight-from-tehran-minsk>.

⁶⁴ See 88 FR 66807 (Sep. 28, 2023).

⁶⁵ <https://simpleflying.com/aeroflot-airbus-a330-maintenance-iran-mahan-air/>.

⁶⁶ Publicly available flight tracking information shows that on October 24, 2023, EP-MME (MSN 371) flew on routes between Erbil, Iraq and Tehran, Iran, and on October 23, 2023, EP-MMB (MSN 56) flew on routes between Moscow, Russia and Tehran, Iran. On October 21–22, 2023, EP-MMQ (MSN 346) flew on routes between Lahore, Pakistan and Tehran, Iran.

⁶⁷ See *supra* at footnote 34.

⁶⁸ <https://www.jns.org/syria-airport-strikes-said-to-stop-iranian-missile-shipment/>; <https://www.reuters.com/world/middle-east/syria-state-tv-says-israeli-attack-targets-aleppo-damascus-airports-2023-10-12/>; <https://www.israelhayom.com/2023/10/17/revealed-this-could-be-why-israel-allegedly-bombed-2-airports-simultaneously/>.

C. Findings

Under the applicable standard set forth in Section 766.24 of the Regulations and my review of the entire record, I find that the evidence presented by BIS convincingly demonstrates that the denied persons have acted in violation of the Regulations and the TDO; that such violations have been significant, deliberate and covert; and that given the foregoing and the nature of the matters under investigation, there is a likelihood of imminent violations. Moreover, I find that renewal for an extended period is appropriate given the pattern of repeated, ongoing and/or continuous apparent violations of the EAR. Therefore, renewal of the TDO is necessary in the public interest to prevent imminent violation of the Regulations and to give notice to companies and individuals in the United States and abroad that they should continue to avoid dealing with Mahan Airways and Al Naser Airlines and the other denied persons, in connection with export and reexport transactions involving items subject to the Regulations and in connection with any other activity subject to the Regulations.

III. Order

It is therefore ordered:

First, that MAHAN AIRWAYS, Mahan Tower, No. 21, Azadegan St., M.A. Jenah Exp. Way, Tehran, Iran; PEJMAN MAHMOOD KOSARAYANIFARD A/K/A KOSARIAN FARD, P.O. Box 52404, Dubai, United Arab Emirates; MAHMOUD AMINI, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404, Dubai, United Arab Emirates, and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates; KERMANS AVIATION A/K/A GIE KERMANS AVIATION, 42 Avenue Montaigne 75008, Paris, France; SIRJANCO TRADING LLC, P.O. Box 8709, Dubai, United Arab Emirates; MAHAN AIR GENERAL TRADING LLC, 19th Floor Al Moosa Tower One, Sheik Zayed Road, Dubai 40594, United Arab Emirates; MEHDI BAHRAMI, Mahan Airways-Istanbul Office, Cumhuriye Cad. Sibil Apt No: 101 D:6, 34374 Emadad, Sisli Istanbul, Turkey; AL NASER AIRLINES A/K/A AL-NASER AIRLINES A/K/A AL NASER WINGS AIRLINE A/K/A ALNASER AIRLINES AND AIR FREIGHT LTD., Home 46, Al-Karrada, Babil Region, District 929, St 21, Beside Al Jadiry Private Hospital, Baghdad,

Iraq, and Al Amirat Street, Section 309, St. 3/H.20, Al Mansour, Baghdad, Iraq, and P.O. Box 28360, Dubai, United Arab Emirates, and P.O. Box 911399, Amman 11191, Jordan; ALI ABDULLAH ALHAY A/K/A ALI ALHAY A/K/A ALI ABDULLAH AHMED ALHAY, Home 46, Al-Karrada, Babil Region, District 929, St 21, Beside Al Jadiry Private Hospital, Baghdad, Iraq, and Anak Street, Qatif, Saudi Arabia 61177; BAHAR SAFWA GENERAL TRADING, P.O. Box 113212, Citadel Tower, Floor-5, Office #504, Business Bay, Dubai, United Arab Emirates, and P.O. Box 8709, Citadel Tower, Business Bay, Dubai, United Arab Emirates; SKY BLUE BIRD GROUP A/K/A SKY BLUE BIRD AVIATION A/K/A SKY BLUE BIRD LTD A/K/A SKY BLUE BIRD FZC, P.O. Box 16111, Ras Al Khaimah Trade Zone, United Arab Emirates; and ISSAM SHAMMOUT A/K/A MUHAMMAD ISAM MUHAMMAD ANWAR NUR SHAMMOUT A/K/A ISSAM ANWAR, Philips Building, 4th Floor, Al Fardous Street, Damascus, Syria, and Al Kolaa, Beirut, Lebanon 151515, and 17-18 Margaret Street, 4th Floor, London, W1W 8RP, United Kingdom, and Cumhuriyet Mah. Kavakli San St. Fulya, Cad. Hazar Sok. No.14/A Silivri, Istanbul, Turkey, and when acting for or on their behalf, any successors or assigns, agents, or employees (each a "Denied Person" and collectively the "Denied Persons") may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or engaging in any other activity subject to the EAR; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or from any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of a Denied Person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the EAR that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to a Denied Person by ownership, control, position of responsibility, affiliation or other connection in the conduct of trade or business may also be made subject to the provisions of this Order.

Fourth, that this Order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.

In accordance with the provisions of sections 766.24(e) of the EAR, Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and/or Bahar Safwa General Trading may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202-4022. In accordance with the provisions of Sections 766.23(c)(2) and 766.24(e)(3) of the EAR, Pejman Mahmood Kosarayanifard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Mahan Air General Trading LLC, Mehdi Bahrami, Sky Blue Bird Group, and/or Issam

Shammout may, at any time, appeal their inclusion as a related person by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202-4022.

In accordance with the provisions of section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. A renewal request may be opposed by Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and/or Bahar Safwa General Trading as provided in section 766.24(d), by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be provided to Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading and each related person, and shall be published in the **Federal Register**.

This Order is effective immediately and shall remain in effect for one year.

Kevin J. Kurland,

Deputy Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2023-24310 Filed 11-2-23; 8:45 am]

BILLING CODE 3510-DT-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-552-802]

Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Preliminary Determination of No Shipments of Antidumping Duty Administrative Review; 2022-2023

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that no companies under review qualify for a separate rate and that these companies are, therefore, considered part of the Socialist Republic of Vietnam (Vietnam)-wide entity. Additionally, Commerce is partially rescinding this review with respect to companies for which all review requests were timely withdrawn. Further, Commerce preliminarily determines that certain companies had no shipments of subject merchandise during the period

of review (POR), February 1, 2022, through January 31, 2023. Interested parties are invited to comment on these preliminary results.

DATES: Applicable November 3, 2023.

FOR FURTHER INFORMATION CONTACT: Jonathan Schueler, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-9175.

SUPPLEMENTARY INFORMATION:

Background

On February 2, 2023, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Vietnam.¹ Commerce received timely requests for an administrative review from AHSTAC (the petitioner),² ASPA (domestic processors),³ and numerous Vietnamese companies. On April 11, 2023, Commerce published in the **Federal Register** a notice of initiation of an administrative review of the Order for the period February 1, 2022, through January 31, 2023, covering 187 companies including multiple companies with name variations/abbreviations in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.221(c)(1)(i).⁴

On May 16 and 17, 2023, the petitioner filed timely withdrawals of its review requests of 41 companies.⁵ On May 17, 2023, ASPA filed timely withdrawals of its review requests of 35 companies.⁶ On May 16, 2023, Ngoc Tri Seafood Joint Stock Company, Tai Kim Anh Seafood Joint Stock Corporation, and 49 other Vietnamese producers and

¹ See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 88 FR 7071 (February 2, 2023); see also *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 70 FR 5152 (February 1, 2005) (Order).

² The petitioner, AHSTAC, is the Ad Hoc Shrimp Trade Action Committee.

³ The domestic processors, ASPA, are the American Shrimp Processors Association.

⁴ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 FR 21609 (April 11, 2023) (Initiation Notice).

⁵ See Petitioner's Letters, "Domestic Producers' Partial Withdrawal of Review Requests," dated May 16, 2023; and "Domestic Producers' Partial Withdrawal of Review Requests," dated May 17, 2023.

⁶ See ASPA's Letters, "American Shrimp Processors Association's Partial Withdrawal of Review Requests," dated May 17, 2023; and "American Shrimp Processors Association's Partial Withdrawal of Review Requests," dated May 17, 2023.

or exporters, including Viet I-Mei Frozen Foods Co., Ltd. (Viet I-Mei), withdrew their review requests of themselves.⁷ On May 25, 2023, Kim Anh Company and QNL One Member Company timely withdrew their review requests of themselves.⁸ Therefore, Commerce is rescinding its review with respect to the 66 companies for which all review requests were withdrawn, listed in Appendix II of this notice, as discussed below.

Respondent Selection

On April 27, 2023, only one company, Viet I-Mei, filed a timely separate rate certification.⁹ On May 3, 2023, Commerce released U.S. Customs and Border Protection (CBP) entry data in order to select respondents for individual examination.¹⁰ We received comments regarding respondent selection from the petitioner on May 10, 2023.¹¹ However, Commerce did not select any mandatory respondents for individual examination because the sole company which timely filed a separate rate application and/or certification and was, therefore, eligible for individual examination (*i.e.*, Viet I-Mei) had no remaining review requests on the record, as discussed below.

Scope of the Order

The merchandise subject to the *Order* is certain frozen warmwater shrimp. The product is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) item subheadings: 0306.17.0004, 0306.17.0005, 0306.17.0007, 0306.17.0008, 0306.17.0010, 0306.17.0011, 0306.17.0013, 0306.17.0014, 0306.17.0016, 0306.17.0017, 0306.17.0019, 0306.17.0020, 0306.17.0022, 0306.17.0023, 0306.17.0025, 0306.17.0026, 0306.17.0028, 0306.17.0029, 0306.17.0041, 0306.17.0042, 1605.21.10.30, and 1605.29.10.10. Although the HTSUS subheadings are provided for convenience and for customs purposes, the written product description, provided in Appendix I, remains dispositive.

⁷ See Akin Gump's Letter, "Withdrawal of Review Requests," dated May 16, 2023.

⁸ See Akin Gump's Letter, "Withdrawal of Review Requests—Kim Anh Company & QNL One Member Company," dated May 25, 2023.

⁹ See Viet I-Mei's Letter, "Separate Rate Certification of Viet I-Mei Frozen Foods Co., Ltd. ('Viet I-Mei')," dated April 27, 2023.

¹⁰ See Memorandum, "Customs Data of U.S. Imports of Certain Frozen Warmwater Shrimp for Respondent Selection," dated May 3, 2023.

¹¹ See Petitioner's Letter, "Domestic Producers' Comments Regarding Respondent Selection," dated May 10, 2023.

Partial Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party that requested the review withdraws its request within 90 days of the publication of the notice of initiation of the requested review. Because all requests for administrative review of the 66 companies listed in Appendix II were withdrawn by interested parties within 90 days of the date of publication of the *Initiation Notice*, and no other interested party requested a review of them, Commerce is rescinding this review with respect to these companies and their name variations/abbreviations, in accordance with 19 CFR 351.213(d)(1). Commerce will instruct CBP to assess antidumping duties on all appropriate entries at a rate equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period February 1, 2022, through January 31, 2023, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 35 days after the publication of this notice in the **Federal Register**. The administrative review remains active with respect to 121 companies.

Preliminary Determination of No Shipments

Commerce received timely no-shipment certifications from four companies: Bien Dong Seafood Co., Ltd.; Vinh Hoan Corp.; Seavina Joint Stock Company; and BIM Foods Joint Stock Company.¹² To confirm these companies' no-shipment claims, Commerce issued a no-shipment inquiry to CBP and received no contradictory information.¹³ Therefore, we preliminarily determine that these four companies did not have any shipments of subject merchandise during the POR.

¹² See BIM Foods Joint Stock Company's Letter, "No Shipments Certification," dated April 11, 2023; see also Vinh Hoan Corp. and Van Duc Food Export Joint Stock Company's Letter, "No Shipment Certification," dated April 28, 2023; Bien Dong Seafood Co., Ltd.'s Letter, "Notice of No Sales," dated May 9, 2023; and Seavina Joint Stock Company's Letter, "Notice of No Sales," dated May 9, 2023. We omitted Van Duc Export Joint Stock Company from this list because although it timely filed a no-shipment certification, the company is not under review. See *Initiation Notice*, 88 FR at 21617.

¹³ See Memorandum, "No Shipment Inquiry for Multiple Companies During the Period 02/01/2022 through 01/31/2023," dated July 11, 2023 (where CBP confirmed that it found no entries of subject merchandise by Bien Dong Seafood Co., Ltd., Vinh Hoan Corp., Van Duc Food Export Joint Stock Company, Seavina, and Seavina Joint Stock Company, and BIM Foods Joint Stock Company, or BIM Seafood Joint Stock Company).

Consistent with Commerce's practice, we will not rescind the review with respect to these companies, but, rather, will complete the review and issue instructions based on the final results.¹⁴

Vietnam-Wide Entity

Commerce finds that 117 companies (*see* Appendix III) under review have not established eligibility for a separate rate and are considered to be part of the Vietnam-wide entity for these preliminary results. Commerce's policy regarding conditional review of the Vietnam-wide entity applies to this administrative review.¹⁵ Under this policy, the Vietnam-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity. Because no party requested a review of the Vietnam-wide entity, the entity is not under review and the entity's rate of 25.76 percent is not subject to change.

Preliminary Results of Review

Commerce finds that because no company still under review submitted a timely separate rate application or separate rate certification, no company still under review has established eligibility for a separate rate. Based on the above information, Commerce has not calculated any dumping margins for any companies under review, nor has Commerce granted separate rates to any companies under review. Additionally, as discussed above, Commerce has preliminarily determined that the 117 companies that remain under review but which did not submit no-shipment certifications are subject to the Vietnam-wide entity rate of 25.76 percent (*see* Appendix III).

Disclosure and Public Comment

Normally, Commerce will disclose the calculations used in its analysis to parties in this review within five days of the date of publication of the notice of preliminary results in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, here Commerce only applied the Vietnam-wide rate, which was established in the underlying investigation,¹⁶ to the 117 companies

¹⁴ See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011) (NME AD Assessment); see also "Assessment Rates" section, *infra*.

¹⁵ See *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963 (November 4, 2013).

¹⁶ See *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69

identified in Appendix III. Thus, there are no calculations to disclose.

Interested parties may submit case briefs no later than 30 days after the date of publication of this notice.¹⁷ Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days from the deadline date for the submission of case briefs.¹⁸ Parties who submit case or rebuttal briefs in this proceeding are requested to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.¹⁹ Case and rebuttal briefs should be filed electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).²⁰

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically-filed document must be received successfully in its entirety by ACCESS by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.²¹ Hearing requests should contain the following information: (1) the party's name, address, and telephone number; (2) the number of participants; (3) whether any participant is a foreign national; and (4) a list of issues to be discussed. Issues raised in the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined.²²

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b)(1), Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject

merchandise covered by this review. For the companies in which Commerce is rescinding this administrative review, Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of this notice in the **Federal Register**. For the remaining companies under review, Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

If we continue to find in the final results no shipments for the companies identified in the "Preliminary Determination of No Shipments" section above, Commerce will instruct CBP to liquidate any suspended entries of subject merchandise that entered under those companies' case numbers at the Vietnam-wide rate.²³

For the final results, if we continue to treat the 117 companies identified in Appendix III as part of the Vietnam-wide entity, we will instruct CBP to apply an *ad valorem* assessment rate of 25.76 percent to all entries of subject merchandise during the POR which were produced and/or exported by those companies. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from Vietnam entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) for all Vietnam exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the existing rate for the Vietnam-wide entity of 25.76 percent; and (2) for all non-Vietnam exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Vietnam exporter that supplied that non-Vietnam exporter. These cash deposit requirements, when

imposed, shall remain in effect until further notice.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised by the parties in the written comments, within 120 days of publication of these preliminary results in the *Federal Register*, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties. This determination is issued and published in accordance with sections 751(a)(1)(B) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Notification to Interested Parties

These preliminary results are issued and published in accordance with sections 751(a)(1)(B) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: October 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I—Scope of the Order

The scope of the *Order* includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,²⁴ deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of the *Order*, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count-size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not

FR 71005, 71008 (December 8, 2004), and accompanying Issues and Decision Memorandum at Comments 6 and 10C ("we have applied a rate of 25.76 percent, a rate calculated in the initiation stage of the investigation from information provided in the petition . . .").

¹⁷ See 19 CFR 351.309(c)(1)(iii).

¹⁸ See 19 CFR 351.309(d)(1) and (2); see also *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069 (September 29, 2023) (*APO and Service Final Rule*).

¹⁹ See 19 CFR 351.309(c)(2) and (d)(2).

²⁰ See *APO and Service Final Rule*.

²¹ See 19 CFR 351.310(c).

²² See 19 CFR 351.310(d).

²³ See *NME AD Assessment*.

²⁴ "Tails" in this context means the tail fan, which includes the telson and the uropods.

limited to, white-leg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of the *Order*. In addition, food preparations, which are not “prepared meals,” that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of the *Order*.

Excluded from the scope are: (1) breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); and (7) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) that is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a “dusting” layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product’s total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (IQF) freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this *Order* are currently classified under the following HTSUS subheadings: 0306.17.0004, 0306.17.0005, 0306.17.0007, 0306.17.0008, 0306.17.0010, 0306.17.0011, 0306.17.0013, 0306.17.0014, 0306.17.0016, 0306.17.0017, 0306.17.0019, 0306.17.0020, 0306.17.0022, 0306.17.0023, 0306.17.0025, 0306.17.0026, 0306.17.0028, 0306.17.0029, 0306.17.0041, 0306.17.0042, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this *Order* is dispositive.²⁵

²⁵ On April 26, 2011, Commerce amended the antidumping duty order to include dusted shrimp, pursuant to the U.S. Court of International Trade decision in *Ad Hoc Shrimp Trade Action Committee v. United States*, 703 F. Supp. 2d 1330 (CIT 2010) and the U.S. International Trade Commission determination, which found the domestic like product to include dusted shrimp.

Appendix II—Companies With Respect to Which Commerce Is Rescinding Its Review

1. Bac Lieu Fis
2. Bac Lieu Fisheries Joint Stock Company
3. C.P. Vietnam Corporation
4. Ca Mau Seafood Joint Stock Company
5. Cafatex Fishery Joint Stock Corporation
6. CAFISH
7. Camau Seafood Processing and Service Joint Stock Corporation
8. Camimex
9. Camimex Foods Joint Stock Company
10. Camimex Group
11. Camimex Group Joint Stock Company²⁶
12. Cantho Import Export Fishery Limited Company
13. CASES
14. Cuu Long Seapro
15. Cuulong Seapro
16. Cuulong Seaproducts Company
17. FIMEX VN; Sao Ta Seafood Factory
18. Frozen Seafoods Factory No. 32
19. Hai Viet Corporation
20. HAVICO
21. Khanh Sung Co., Ltd.
22. Kim Anh
23. Kim Anh Company Limited
24. Minh Hai Export Frozen Seafood Processing Joint-Stock Company
25. Minh Hai Joint-Stock Seafoods Processing Company
26. Minh Hai Jostoco
27. Nam Hai Foodstuff and Export Company Ltd.
28. Ngoc Tri
29. Ngoc Tri Seafood Joint Stock Company
30. Nha Trang Seafoods—F.89 Joint Stock Company
31. Nha Trang Seaproduct Company
32. NT Seafoods Corporation
33. NTSF Seafoods Joint Stock Company
34. QNL Company Limited
35. QNL One Member Company
36. Quoc Viet Seaproducts Processing Trade and Import-Export Co., Ltd.
37. Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd.
38. Sao Ta Foods Joint Stock Company
39. Saota Seafood Factory
40. Sea Minh Hai

See *Certain Frozen Warmwater Shrimp from Brazil, India, the People’s Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision*, 76 FR 23277 (April 26, 2011); see also *Ad Hoc Shrimp Trade Action Committee v. United States*, 703 F. Supp. 2d 1330 (CIT 2010); and *Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam*, Investigation Nos. 731–TA–1063, 1064, 1066–1068 (Review), USITC Pub. 4221 (March 2011).

²⁶ Because Commerce has previously determined that Camimex Group Joint Stock Company is the successor-in-interest to Camau Frozen Seafood Processing Import Export Corporation, it has treated review requests for Camau Frozen Seafood Processing Import Export Corporation as review requests for Camimex Group Joint Stock Company and only listed Camimex Group Joint Stock Company in the *Initiation Notice* and in this notice. See *Initiation Notice*, 88 FR 21626 (footnote 9); see also *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Final Results of Antidumping Duty Changed Circumstances Review*, 86 FR 47617 (August 26, 2021).

41. Seafoods and Foodstuff Factory
42. Seaprimexco Vietnam
43. Seaprodex Minh Hai
44. Seaprodex Minh Hai Factory No. 69
45. Seaprodex Minh Hai Workshop 1
46. Seaprodex Minh Hai-Factory No. 78
47. Soc Trang Seafood Joint Stock Company
48. STAPIMEX
49. T&T Cam Ranh
50. Tacvan Frozen Seafood Processing Export Company
51. Tacvan Seafoods Company
52. Tai Kim Anh Seafood Joint Stock Corporation
53. TAIKA Seafood Corporation
54. Tay Do Seafood Enterprise
55. Thong Thuan Cam Ranh Seafood Joint Stock Company
56. Thong Thuan Company Limited
57. Thuan Phuoc Seafoods and Trading Corporation
58. Trang Khanh Seafood Co., Ltd.
59. Trong Nhan Seafood Co., Ltd.
60. UTXI Aquatic Products Processing Corporation
61. UTXICO
62. Viet Foods Co. Ltd.
63. Viet I-Mei Frozen Foods Co., Ltd.
64. Vietnam Clean Seafood Corporation
65. Vietnam Fish One Co., Ltd.
66. Vina Cleanfood

Appendix III—Companies Under Review Determined To Be Part of the Vietnam-Wide Entity

1. AFoods
2. Amanda Seafood Co., Ltd.
3. An Nguyen Investment Production and Group
4. Anh Khoa Seafood
5. Anh Minh Quan Corp.
6. APT Co.
7. Au Vung One Seafood
8. Bentre Forestry and Aquaproduct Import-Export Joint Stock Company
9. Bentre Seafood Joint Stock Company
10. Beseaco
11. Binh Dong Fisheries Joint Stock Company
12. Binh Thuan Import-Export Joint Stock Company
13. Blue Bay Seafood Co., Ltd.
14. Cadovimex
15. Cadovimex II Seafood Import Export and Processing Joint Stock Company
16. Cadovimex Seafood Import-Export and Processing Joint Stock Company
17. Cantho Import Export Seafood Joint Stock Company
18. Caseamex
19. CJ Cau Tre Foods Joint Stock Company
20. Coastal Fisheries Development Corporation
21. COFIDEC
22. Dai Phat Tien Seafood Co., Ltd.
23. Danang Seafood Import Export
24. Danang Seaproducts Import-Export Corporation
25. Dong Hai Seafood Limited Company
26. Dong Phuong Seafood Co., Ltd.
27. Duc Cuong Seafood Trading Co., Ltd.
28. Duong Hung Seafood
29. FAQUIMEX
30. FFC
31. Fine Foods Company
32. Gallant Dachan Seafood Co., Ltd.
33. Gallant Ocean (Vietnam) Co. Ltd.

34. Gallant Ocean (Vietnam) Joint Stock Company
35. Go Dang Joint Stock Company
36. GODACO Seafood
37. Green Farms Seafood Joint Stock Company
38. Hanh An Trading Service Co., Ltd.
39. Hoang Anh Fisheries Trading Company Limited
40. Hong Ngoc Seafood Co., Ltd.
41. Hung Bang Company Limited
42. Hung Dong Investment Service Trading Co., Ltd.
43. HungHau Agricultural Joint Stock Company
44. INCOMFISH
45. Investment Commerce Fisheries Corporation
46. JK Fish Co., Ltd.
47. Khang An Foods Joint Stock Company
48. Khanh Hoa Seafoods Exporting Company
49. KHASPEXCO
50. Long Toan Frozen Aquatic Products Joint Stock Company
51. MC Seafood
52. Minh Bach Seafood Company Limited
53. Minh Cuong Seafood Import Export Processing Joint Stock Company
54. Minh Phat Seafood Company Limited ²⁷
55. Minh Phu Hau Giang Seafood ²⁸
56. Minh Phu Seafood Corporation ²⁹
57. Minh Qui Seafood Company Limited ³⁰

²⁷ As stated in the *Initiation Notice*, shrimp produced and exported by Minh Phat Seafood Company Limited were excluded from the *Order* effective July 18, 2016. See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order*, 81 FR 47756, 47757–58 (July 22, 2016). Accordingly, this review was initiated for this exporter only with respect to subject merchandise produced by another entity. See *Initiation Notice*, 88 FR at 21616 (footnote 10).

²⁸ As stated in the *Initiation Notice*, shrimp produced and exported by Minh Phu Hau Giang Seafood were excluded from the *Order* effective July 18, 2016. See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order*, 81 FR 47756, 47757–58 (July 22, 2016). Accordingly, this review was initiated for this exporter only with respect to subject merchandise produced by another entity. See *Initiation Notice*, 88 FR at 21616 (footnote 11).

²⁹ As stated in the *Initiation Notice*, shrimp produced and exported by Minh Phu Seafood Corporation were excluded from the *Order* effective July 18, 2016. See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order*, 81 FR 47756, 47757–58 (July 22, 2016). Accordingly, this review was initiated for this exporter only with respect to subject merchandise produced by another entity. See *Initiation Notice*, 88 FR at 21616 (footnote 12).

³⁰ As stated in the *Initiation Notice*, shrimp produced and exported by Minh Qui Seafood Company Limited were excluded from the *Order* effective July 18, 2016. See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order*, 81 FR 47756, 47757–

58. Nam Phuong Foods Import Export Company Limited
59. Nam Viet Seafood Import Export Joint Stock Company
60. Namcan Seaproducts Import Export Joint Stock Company
61. NAVIMEXCO
62. New Generation Seafood Joint Stock Company
63. New Wind Seafood Company Limited
64. Ngoc Trinh Bac Lieu Seafood Co., Ltd.
65. Nguyen Chi Aquatic Product Trading Company Limited
66. Nhat Duc Co., Ltd.
67. Nigico Co., Ltd.
68. Phuong Nam Foodstuff Corp.
69. QAIMEXCO
70. Quang Minh Seafood Co., Ltd.
71. Quoc Ai Seafood Processing Import Export Co., Ltd.
72. Quoc Toan PTE
73. Quoc Toan Seafood Processing Factory
74. Quy Nhon Frozen Seafoods Joint Stock Company
75. Safe And Fresh Aquatic Products Joint Stock Company
76. Saigon Aquatic Product Trading Joint Stock Company
77. Saigon Food Joint Stock Company
78. SEADANANG
79. Seafood Direct 2012 One Member Limited
80. Seafood Joint Stock Company No. 4
81. Seafood Travel Construction Import-Export Joint Stock Company
82. Seanamico
83. Seaproducts Joint Stock Company
84. Seaspimex Vietnam
85. Simmy Seafood Company Limited
86. South Ha Tinh Seaproducts Import-Export Joint Stock Company
87. South Vina Shrimp—SVS
88. Southern Shrimp Joint Stock Company
89. Special Aquatic Products Joint Stock Company
90. T & P Seafood Company Limited
91. Tai Nguyen Seafood Co., Ltd.
92. Tan Phong Phu Seafood Co., Ltd.
93. Tan Thanh Loi Frozen Food Co., Ltd.
94. THADIMEXCO
95. Thai Hoa Foods Joint Stock Company
96. Thai Minh Long Seafood Company Limited
97. Thaimex
98. Thanh Doan Fisheries Import-Export Joint Stock Company
99. Thanh Doan Sea Products Import & Export Processing Joint-Stock Company
100. Thanh Doan Seafood Import Export Trading Joint-Stock Company
101. The Light Seafood Company Limited
102. Thien Phu Export Seafood
103. Tinh Hung Co., Ltd.
104. Tinh Phu Aquatic Products Trading Co., Ltd.
105. Thuan Thien Producing Trading Ltd. Co.
106. TPP Co. Ltd.
107. Trang Corporation (Vietnam)
108. Trung Son Corp.
109. Trung Son Seafood Processing Joint Stock Company
110. Van Duc Food Company Limited

58 (July 22, 2016). Accordingly, this review was initiated for this exporter only with respect to subject merchandise produced by another entity. See *Initiation Notice*, 88 FR at 21616 (footnote 13).

111. Viet Asia Foods Company Limited
112. Viet Hai Seafood Co., Ltd.
113. Viet Phu Foods and Fish Corp.
114. Viet Shrimp Corporation
115. VIFAFOOD
116. Vinh Phat Food Joint Stock Company
117. XNK Tinh Phat Processing Company

[FR Doc. 2023–24365 Filed 11–2–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–469–818]

Ripe Olives From Spain: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) finds that revocation of the countervailing duty (CVD) order on ripe olives from Spain would be likely to lead to continuation or recurrence of countervailable subsidies at the levels indicated in the “Final Results of Sunset Review” section of this notice.

DATES: Applicable November 3, 2023.

FOR FURTHER INFORMATION CONTACT: Bryan Hansen, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3683.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2018, Commerce published in the **Federal Register** the CVD order on ripe olives from Spain.¹ On July 3, 2023, Commerce published in the **Federal Register** the *Initiation Notice* of the first five-year sunset review of the *Order* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).² In accordance with 19 CFR 351.218(d)(1)(i) and (ii), Commerce received a timely notice of intent to participate in this sunset review from Musco Family Olive Company (Musco), a domestic interested party, within 15 days after the date of publication of the *Initiation Notice*.³ Musco claimed interested party status under section 771(9)(C) of the Act

¹ See *Ripe Olives from Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 FR 37469 (August 1, 2018) (*Order*).

² See *Initiation of Five-Year (Sunset) Reviews*, 88 FR 42688 (July 3, 2023) (*Initiation Notice*).

³ See Musco’s Letter, “Notice of Intent to Participate,” dated July 5, 2023.

as a producer of a domestic like product in the United States.⁴

Commerce received a timely and adequate substantive response to the *Initiation Notice* from Musco within the 30-day period specified in 19 CFR 351.218(d)(3)(i).⁵ Commerce received no substantive responses from any other interested parties, including the Government of Spain, nor was a hearing requested. On August 22, 2023, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from other interested parties.⁶ As a result, in accordance with section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited, *i.e.*, 120-day, sunset review of the *Order*.

Scope of the Order

The products covered by the *Order* are certain processed olives, usually referred to as “ripe olives.” The subject merchandise includes all colors of olives; all shapes and sizes of olives, whether pitted or not pitted, and whether whole, sliced, chopped, minced, wedged, broken, or otherwise reduced in size; all types of packaging, whether for consumer (retail) or institutional (food service) sale, and whether canned or packaged in glass, metal, plastic, multi-layered airtight containers (including pouches), or otherwise; and all manners of preparation and preservation, whether low acid or acidified, stuffed or not stuffed, with or without flavoring and/or saline solution, and including in ambient, refrigerated, or frozen conditions.

For a full description of the scope of the *Order*, see the Issues and Decision Memorandum.⁷

Analysis of Comments Received

All issues raised in this sunset review are addressed in the Issues and Decision Memorandum. A list of topics discussed in the Issues and Decision Memorandum is included as Appendix I to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance’s Antidumping and Countervailing Duty Centralized

Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(b) of the Act, Commerce determines that revocation of the *Order* would be likely to lead to continuation or recurrence of a countervailable subsidy at the following net countervailable subsidy rates:

Exporter/producer	Subsidy rate (percent <i>ad valorem</i>)
Aceitunas Guadalquivir S.L.U. ⁸	11.87
Agro Sevilla Aceitunas S.Coop.And	7.64
Angel Camacho Alimentación, S.L. ⁹	13.90
All Others	11.32

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results and notice in accordance with sections 751(c), 752(b), and 777(i)(1) of the Act, and 19 CFR 351.218.

⁸ See *Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination*, 83 FR 28186 (June 18, 2018) (*Final Determination*). Commerce found the following companies to be cross-owned with Aceitunas Guadalquivir S.L.U.: Coromar Inv., S.L., AG Explotaciones Agrícolas, S.L.U., and Grupo Aceitunas Guadalquivir, S.L. See *Ripe Olives from Spain: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With Final Antidumping Duty Determination*, 82 FR 56218 (November 28, 2017) (*Investigation Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM) at 9, unchanged in *Final Determination*.

⁹ Commerce found the following companies to be cross-owned with Angel Camacho Alimentación, S.L.: Grupo Angel Camacho Alimentación, Cuarterola S.L., and Cucancho S.L. See *Investigation Preliminary Determination PDM* at 11, unchanged in *Final Determination*.

Dated: October 30, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the *Order*
- IV. History of the *Order*
- V. Legal Framework
- VI. Discussion of the Issues
 1. Likelihood of Continuation or Recurrence of a Countervailable Subsidy
 2. Net Countervailable Subsidy Likely To Prevail
 3. Nature of the Subsidy
- VII. Final Results of Sunset Review
- VIII. Recommendation

[FR Doc. 2023–24355 Filed 11–2–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–127]

Certain Non-Refillable Steel Cylinders From the People’s Republic of China: Rescission of Countervailing Duty Administrative Review; 2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is rescinding the administrative review of the countervailing duty order on certain non-refillable steel cylinders (non-refillable cylinders) from the People’s Republic of China (China), covering the period of review (POR) January 1, 2022, though December 31, 2022, because, as explained below, there are no reviewable suspended entries for the two companies subject to this review.

DATES: Applicable November 3, 2023.

FOR FURTHER INFORMATION CONTACT: Kristen Johnson, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4793.

SUPPLEMENTARY INFORMATION:

Background

On May 2, 2023, Commerce published in the *Federal Register* a notice of opportunity to request an administrative review of the countervailing duty order on non-refillable cylinders from China, covering the period January 1, 2022,

⁴ *Id.*

⁵ See Musco’s Letter, “Response to Notice of Initiation,” dated August 2, 2023 (Substantive Response).

⁶ See Commerce’s Letter, “Sunset Reviews for July 2023,” dated August 22, 2023.

⁷ See Memorandum, “Issues and Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Countervailing Duty Order on Ripe Olives from Spain,” dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

though December 31, 2022.¹ On May 31, 2023, Ningbo Eagle Machinery & Technology Co., Ltd. (Ningbo Eagle) and Zhejiang KIN-SHINE Technology Co., Ltd. (Zhejiang KIN-SHINE) timely requested that Commerce conduct an administrative review.² We received no other requests for review.

On July 12, 2023, Commerce published in the **Federal Register** a notice of initiation of an administrative review with respect to Ningbo Eagle and Zhejiang KIN-SHINE, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).³ On July 13, 2023, Commerce released a memorandum indicating that there were no entries of subject merchandise during the POR based on a U.S. Customs and Border Protection (CBP) entry data query.⁴ Commerce provided parties an opportunity to submit comments on the data query results.⁵ No party submitted comments to Commerce.

On October 17, 2023, Commerce issued a notice of intent to rescind the 2022 administrative review and provided parties with an opportunity to comment.⁶ No party submitted comments to Commerce.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(3), it is Commerce's practice to rescind an administrative review of a countervailing duty order where it concludes that there were no reviewable entries of subject merchandise during the POR for an exporter or producer.⁷ Normally, upon completion of an administrative review, the suspended entries are liquidated at the countervailing duty assessment rate for the review period.⁸ Therefore, for an administrative review to be conducted, there must be a reviewable, suspended

entry that Commerce can instruct CBP to liquidate at the calculated countervailing duty assessment rate for the review period.⁹ As noted above, there were no entries of subject merchandise from either Ningbo Eagle or Zhejiang KIN-SHINE during the POR. Accordingly, in the absence of reviewable, suspended entries of subject merchandise during the POR, we are rescinding this administrative review, in its entirety, in accordance with 19 CFR 351.213(d)(3).

Cash Deposit Requirements

As Commerce has proceeded to a final rescission of this administrative review, no cash deposit rates will change. Accordingly, the current cash deposit requirements shall remain in effect until further notice.

Assessment Rates

Commerce will instruct CBP to assess countervailing duties on all appropriate entries. Countervailing duties shall be assessed at rates equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of this rescission notice in the **Federal Register**.

Administrative Protective Order

This notice serves as a final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of the APO materials, or conversion to judicial protective order is hereby requested. Failure to comply with regulations and terms of an APO is a violation, which is subject to sanction.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: October 30, 2023.

Scot Fullerton,

Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2023-24284 Filed 11-2-23; 8:45 am]

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⁹ See 19 CFR 351.213(d)(3).

DEPARTMENT OF COMMERCE

International Trade Administration

[A-427-830]

Strontium Chromate From France: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that Société Nouvelle des Couleurs Zinciques (SNCZ) did not make sales of subject merchandise in the United States at less than normal value during the period of review (POR) November 1, 2021, through October 31, 2022.

DATES: Applicable November 3, 2023.

FOR FURTHER INFORMATION CONTACT: Jonathan Schueler, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-9175.

SUPPLEMENTARY INFORMATION:

Background

In accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act), Commerce is conducting an administrative review of the antidumping duty order on strontium chromate from France.¹ On January 3, 2023, in accordance with 19 CFR 251.221(c)(1)(i), we initiated the administrative review of the *Order* on SNCZ.² For a complete description of the events between the initiation of this review and these preliminary results, see the Preliminary Decision Memorandum.³

Scope of the Order

The product covered by the *Order* is strontium chromate from France. The merchandise subject to review is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 2841.50.9100. Subject merchandise may also enter under HTSUS subheading

¹ See *Strontium Chromate from Austria and France: Antidumping Duty Orders*, 84 FR 65349 (November 27, 2019) (*Order*).

² See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 FR 50 (January 3, 2023).

³ See Memorandum, “Strontium Chromate from France: Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,” dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

¹ See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List*, 88 FR 27445, 27447 (May 2, 2023).

² See Ningbo Eagle and Zhejiang KIN-SHINE's Letter, “Request for Administrative Review,” dated May 31, 2023.

³ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 FR 44262, 44273 (July 12, 2023).

⁴ See Memorandum, “Release of U.S. Customs and Border Protection Query,” dated July 13, 2023.

⁵ *Id.*

⁶ See Memorandum, “Notice of Intent to Rescind the 2022 Administrative Review,” dated October 17, 2023.

⁷ See, e.g., *Certain Softwood Lumber Products from Canada: Final Results and Final Rescission, in Part, of the Countervailing Duty Administrative Review*, 2020, 87 FR 48455 (August 9, 2022); see also *Certain Non-Refillable Steel Cylinders from the People's Republic of China: Rescission of Countervailing Duty Administrative Review; 2020–2021*, 87 FR 64008 (October 21, 2022).

⁸ See 19 CFR 351.212(b)(2).

3212.90.0050. For a full description of the scope of this *Order*, see the Preliminary Decision Memorandum.⁴

Methodology

Commerce is conducting this review in accordance with section 751(a)(2) of the Act. The export price and constructed export price are calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying these preliminary results, see the Preliminary Decision Memorandum. A list of topics discussed in the Preliminary Decision Memorandum is attached in the appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the internet at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Preliminary Results of Review

We preliminarily determine the following weighted-average dumping margin exists for the period November 1, 2021, through October 31, 2022:

Producer and/or exporter	Weighted-average dumping margin (percent)
Société Nouvelle des Couleurs Zincoques	0.00

Assessment Rates

Upon completion of this administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. As there are no entered values on the record for SNCZ's sales, pursuant to 19 CFR 351.212(b)(1), we calculated importer-specific per-unit duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total quantity of those sales. If either SNCZ's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c), or an importer-specific assessment rate is zero or *de minimis*, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

To determine whether an importer-specific per-unit duty assessment rate is *de minimis*, we calculated an estimated entered value.

Commerce clarified its "automatic assessment" regulation on May 6, 2003.⁵ This clarification applies to entries of subject merchandise during the POR produced by SNCZ for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

We intend to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for SNCZ will be equal to the weighted-average dumping margin established in the final results of this review (except, if that rate is *de minimis*, then the cash deposit rate will be zero); (2) for previously reviewed or investigated companies not listed in the final results of this review, including those for which Commerce may determine had no shipments during the POR, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review or another completed segment of this proceeding, but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; and (4) if neither the exporter nor the producer is a firm covered in this or any previously completed segment of this proceeding, then the cash deposit rate will be the

all-others rate of 32.16 percent that was established in the less-than-fair-value investigation.⁶ These deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results of review to interested parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Interested parties may submit case briefs no later than 30 days after the date of publication of this notice.⁷ Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days from the deadline date for the submission of case briefs.⁸ Parties who submit case or rebuttal briefs in this proceeding are requested to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.⁹ Case and rebuttal briefs should be filed electronically via ACCESS. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).¹⁰

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically-filed document must be received successfully in its entirety by ACCESS by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.¹¹ Hearing requests should contain information regarding: (1) the party's name, address, and telephone number; (2) the number of participants; (3) whether any participant is a foreign national; and (4) a list of issues to be discussed. Issues raised in the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined.¹²

Commerce intends to issue the final results of this administrative review, including the results of its analysis raised in any written briefs, no later than 120 days after the publication of these preliminary results in the **Federal**

⁶ See *Order*, 84 FR at 65350.

⁷ See 19 CFR 351.309(c)(1)(ii).

⁸ See 19 CFR 351.309(d)(1) and (2); see also *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069 (September 29, 2023) (*APO and Service Final Rule*).

⁹ See 19 CFR 351.309(c)(2) and (d)(2).

¹⁰ See *APO and Service Final Rule*.

¹¹ See 19 CFR 351.310(c).

¹² *Id.*

⁵ For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

⁴ *Id.* at "Scope of the *Order*."

Register, unless this deadline otherwise extended.¹³

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213(h) and 351.221(b)(4).

Dated: October 30, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the *Order*
- IV. Discussion of the Methodology
- V. Currency Conversion
- VI. Recommendation

[FR Doc. 2023-24366 Filed 11-2-23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A-580-895]

Low Melt Polyester Staple Fiber From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that Toray Advanced Materials Korea, Inc. (TAK) made sales of subject merchandise at less than normal value during the period of review (POR), August 1, 2021, through July 31, 2022.

DATES: Applicable November 3, 2023.

FOR FURTHER INFORMATION CONTACT: Andrew Hart, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration,

U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-1058.

SUPPLEMENTARY INFORMATION:

Background

On June 30, 2023, Commerce published in the **Federal Register** the *Preliminary Results* of the 2021–2022 administrative review of the antidumping duty order on low melt polyester staple fiber (low melt PSF) from the Republic of Korea and invited interested parties to comment.¹ For a complete description of the events that occurred since the *Preliminary Results*, see the Issues and Decision Memorandum.² Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order³

The merchandise subject to the *Order* is synthetic staple fibers, not carded or combed, specifically bi-component polyester fibers having a polyester fiber component that melts at a lower temperature than the other polyester fiber component (low melt PSF). A complete description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by parties in this administrative review are addressed in the Issues and Decision Memorandum and are listed in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

¹ See *Low Melt Polyester Staple Fiber from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022*, 88 FR 42300 (June 30, 2022) (*Preliminary Results*).

² See Memorandum, “Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review; 2021–2022: Low Melt Polyester Staple Fiber from the Republic of Korea,” dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

³ See *Low Melt Polyester Staple Fiber from the Republic of Korea and Taiwan: Antidumping Duty Orders*, 83 FR 40752 (August 16, 2018) (*Order*).

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding the *Preliminary Results*, and for the reasons explained in the Issues and Decision Memorandum, Commerce made certain changes to the weighted-average dumping margin calculations for TAK for the final results or review.⁴

Final Results of the Administrative Review

As a result of this review, we determine that the following weighted-average dumping margin exists for the period August 1, 2021, through July 31, 2022.

Producer/exporter	Weighted-average dumping margin (percent)
Toray Advanced Materials Korea, Inc	3.59

Disclosure

Commerce intends to disclose the calculations performed in connection with these final results of review to interested parties within five days after public announcement of the final results or, if there is no public announcement, within five days of the date of publication of the notice of final results in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b)(1), Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

Pursuant to 19 CFR 351.212(b)(1), we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of those sales. Where either the respondent's weighted-average dumping margin is zero or *de minimis*, within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis*, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For entries of subject merchandise during the POR produced by TAK for which it did not know that its merchandise was destined for the

⁴ See Issues and Decision Memorandum.

¹³ See section 751(a)(3)(A) of the Act; see also 19 CFR 351.213(h).

United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate established in the less-than-fair-value (LTFV) of 16.27 percent *ad valorem*,⁵ if there is no rate for the intermediate company(ies) involved in the transaction.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

Cash Deposit Requirements

Upon publication of this notice in the **Federal Register**, the following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the company subject to this review will be equal to the weighted-average dumping margin established in the final results of the review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the producer has been covered in a prior completed segment of this proceeding, then the cash deposit rate will be the rate established in the completed segment for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 16.27 percent, the all-others rate established in the LTFV investigation for this proceeding.⁶ These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to

comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

Dated: October 30, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the *Order*
- IV. Changes Since the *Preliminary Results*
- V. Discussion of the Issues
 - Comment 1: Classification of Grade AM Merchandise
 - Comment 2: Clerical Errors
 - Comment 3: Customer Name in Liquidation Instructions
- VI. Recommendation

[FR Doc. 2023-24354 Filed 11-2-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-469-817]

Ripe Olives From Spain: Final Results of the Expedited First Sunset Review of the Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) finds that revocation of the antidumping duty order on ripe olives from Spain would be likely to lead to continuation or recurrence of dumping at the levels

indicated in the "Final Results of Expedited Sunset Review" section of this notice.

DATES: Applicable November 3, 2023.

FOR FURTHER INFORMATION CONTACT:

Mary Kolberg, AD/AD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-1785.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2023, Commerce published in the **Federal Register** the *Order* on ripe olives from Spain.¹ On July 3, 2023, Commerce published in the **Federal Register** the *Initiation Notice* of the first sunset review of *Order* on ripe olives from Spain pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).²

On July 10, 2023, we received a timely notice to participate in this sunset review from Musco Family Olive Company (Musco), a domestic interested party, pursuant to 19 CFR 351.218(d)(1)(i).³ Musco claimed interested party status under section 771(9)(C) of the Act as a manufacturer of a domestic like product in the United States. On August 2, 2023, Musco provided a complete substantive response for this review within the 30-day deadline specified in 19 CFR 351.2218(d)(3)(i).⁴ Commerce did not receive substantive responses from any other interested parties, and no party requested a hearing.

On August 22, 2023, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from other interested parties.⁵ As a result, in accordance with section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited, *i.e.*, 120-day, sunset review of the *Order*.

Scope of the Order

The products covered by the *Order* are certain processed olives, usually referred to as "ripe olives." The subject merchandise includes all colors of

¹ See *Ripe Olives from Spain: Antidumping Duty Order*, 83 FR 37465 (August 1, 2018), as corrected in *Ripe Olives from Spain: Notice of Correction to Antidumping Duty Order*, 83 FR 39691 (August 10, 2018) (collectively, *Order*).

² See *Initiation of Five-Year (Sunset) Reviews*, 88 FR 42688 (July 3, 2023) (*Initiation Notice*).

³ See Musco's Letter, "Notice of Intent to Participate," dated July 10, 2023.

⁴ See Musco's Letter, "Response to Notice of Initiation," dated August 2, 2023.

⁵ See Commerce's Letter, "Sunset Reviews for July 2023," dated August 22, 2023.

⁵ See *Order*.

⁶ See *Order*, 83 FR at 40753.

olives; all shapes and sizes of olives, whether pitted or not pitted, and whether whole, sliced, chopped, minced, wedged, broken, or otherwise reduced in size; all types of packaging, whether for consumer (retail) or institutional (food service) sale, and whether canned or packaged in glass, metal, plastic, multilayered airtight containers (including pouches), or otherwise; and all manners of preparation and preservation, whether low acid or acidified, stuffed or not stuffed, with or without flavoring and/or saline solution, and including in ambient, refrigerated, or frozen conditions. For a full description of the scope of the *Order*, see the Issues and Decision Memorandum.⁶

Analysis of the Comments Received

All issues raised in this sunset review are addressed in the Issues and Decision Memorandum. A list of topics discussed in the Issues and Decision Memorandum is included as the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Final Results of Expedited Sunset Review

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Order* would be likely to lead to continuation or recurrence of dumping and that the magnitude of the margins of dumping likely to prevail would be at rates up to 25.50 percent.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the

regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act, and 19 CFR 351.218.

Dated: October 30, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the *Order*
- IV. History of the *Order*
- V. Legal Framework
- VI. Discussion of the Issues
 1. Likelihood of Continuation or Recurrence of Dumping
 2. Magnitude of the Dumping Margins Likely To Prevail
- VII. Final Results of Expedited Sunset Review
- VIII. Recommendation

[FR Doc. 2023–24356 Filed 11–2–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; West Coast Region Highly Migratory Species Vessel Identification Requirements

The Department of Commerce 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. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on July 3, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration (NOAA), Commerce.

Title: West Coast Region Highly Migratory Species Vessel Identification Requirements.

OMB Control Number: 0648–0361.

Form Number(s): None.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: Non-purse seine respondents: 1,230; Purse seine respondents: 19.

Average Hours per Response: All but purse seine vessels: 45 minutes; purse seine fishing vessels of 400 short tons (362.8 metric tons (mt)) or greater carrying capacity: 1 hour and 30 minutes.

Total Annual Burden Hours: 947 hours.

Needs and Uses: This request is for extension of a current information collection. Regulations at 50 CFR 660.704 require that all commercial fishing vessels with permits issued under authority of the National Marine Fishery Service's (NMFS) Fishery Management Plan for United States (U.S.) West Coast Highly Migratory Species Fisheries display the vessel's official number (U.S. Coast Guard documentation number or state registration number). The numbers must be of a specific size and format and located at specified locations. The official number must be affixed to each vessel subject to this section in block Arabic numerals at least 10 inches (25.40 centimeters in height for vessels more than 25 feet (7.62 meters) but equal to or less than 65 feet (19.81 meters) in length; and 18 inches (45.72 centimeters) in height for vessels longer than 65 feet (19.81 meters) in length. Markings must be legible and of a color that contrasts with the background. The display of the identifying number aids in fishery law enforcement. This requirement does not apply to recreational charter vessels.

Affected Public: Business or other for-profit organizations.

Frequency: Identification markings are required for each vessel.

Respondent's Obligation: Required to obtain or retain benefits, and mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act.

This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the

⁶ See Memorandum, "Issues and Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Antidumping Duty Order on Ripe Olives from Spain," dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

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 collection or the OMB Control Number 0648–0361.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–24367 Filed 11–2–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Northeast Region Dealer Purchase Reports

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public’s reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before January 2, 2024.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at Adrienne.thomas@noaa.gov. Please reference OMB Control Number 0648–0229 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to David Ulmer, Fishery Reporting Specialist, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930, (757–563–3621/978–559–1552), David.Ulmer@noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request to extend a currently approved information collection.

The National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NMFS) is responsible for the stewardship of the Nation’s living marine resources and their habitats within the United States Exclusive Economic Zone (EEZ). The mandates and authorities are derived from numerous statutes, most significantly the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA).

Under the MSA, the Secretary of Commerce has the responsibility for conservation and management of the nation’s marine fishery resources. Much of this responsibility has been delegated to NMFS. In an effort to achieve the goals of the MSA, several fisheries are now being managed by harvest limits including quotas, annual target total allowable catches (TAC) and domestic annual harvest (DAH) limits. These fisheries often have short fishing seasons and require in-season management measures, such as closures and trip limits, to ensure that harvest levels established in each Fishery Management Plan (FMP) are not exceeded. Therefore, as more fisheries are being managed by harvest limits, the timely collection of data from dealers and vessel owners and operators is and will continue to be a necessary component of most management regimes, as evidenced in several FMPs.

All federal permitted dealers of Atlantic mackerel, squid, butterfish, Atlantic sea scallop, Atlantic surfclam, ocean quahog, Northeast (NE) multispecies, monkfish, summer flounder, scup, black sea bass, Atlantic bluefish, spiny dogfish, Atlantic herring, skates, tilefish, hagfish, American lobster must have been issued and have in their possession a federal dealer permit in order to purchase such species from fishing vessels. Federal permitted dealers in the above fisheries are required to submit certain information regarding their fish purchases to NMFS. Trip-level (trip by trip) reports provide the comprehensive data that are necessary for successful long-term management of each fishery.

In all fisheries requiring mandatory reporting, ‘negative reporting’ by dealers is required if no fish was purchased during the reporting period. Negative reports are necessary in order to accurately identify dealers who have not

purchased fish as opposed to those who have failed to report their purchases.

All large vessel at-sea processors of Atlantic mackerel that have been issued and have in their possession a federal at-sea processor permit may purchase mackerel from fishing vessels at sea for processing provided the large vessel did not harvest the mackerel. These Federal permitted vessels are also required to submit certain information regarding their fish purchases to NMFS.

The information collected is used by several offices of NMFS, the Northeast Fishery Management Council, the Mid-Atlantic Fishery Management Council, and the Atlantic States Marine Fisheries Commission (ASMFC) to monitor quota-managed species, ensuring that conservation and management actions may be taken in a timely manner.

Accurate and timely landings reports are especially important for monitoring commercial landings by species and evaluating the effectiveness of each FMP in achieving its fishing mortality targets.

In addition to the uses specifically relating to management of individual species, the statistics collected through these reports will be incorporated into the NMFS databases which are used in many analyses by various offices of NMFS, the Regional Fishery Management Councils, the United States Coast Guard (USCG), state fishery enforcement agencies, the Departments of State and Commerce, Office of Management and Budget (OMB), the Corps of Engineers, Congressional staffs, the fishing industry, and the public. The data also serve as inputs to a variety of uses such as biological analyses and stock assessments, and in support of Executive Order (E.O.) 12866 “Regulatory Planning and Review”, quota and allocation selections and monitoring, economic profitability profiles, trade and import tariff decisions, allocation of grant funds among states, and identification of ecological interactions among species. Data used are also utilized for monitoring and evaluating ESA and MMPA actions.

II. Method of Collection

Dealers submit purchase information through an electronic process by one of the following: the web-based system as administered by the Atlantic Coast Cooperative Statistics Program, a computer-based trip ticket program approved by the NMFS or through a NMFS approved proprietary mechanism.

III. Data

OMB Control Number: 0648–0229.
Form Number(s): None.

Type of Review: Regular submission, extension of a current information collection.

Affected Public: Individuals or households; Business or other for-profit organizations; Not-for-profit institutions; State, Local, or Tribal government; Federal government.

Estimated Number of Respondents: 878.

Estimated Time per Response: 4 minutes per trip.

Estimated Total Annual Burden Hours: 28,390

Estimated Total Annual Cost to Public: 536,003.

Respondent's Obligation: Mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act, Code of Federal Regulations Title 50 Part 648.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) 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; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023-24378 Filed 11-2-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Application for State Digital Equity Capacity Grant Program and Tribal Digital Equity Planning and Capacity Programs

AGENCY: National Telecommunications and Information Administration (NTIA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed and continuing information collections, which help us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before January 2, 2024.

ADDRESSES: Interested persons are invited to submit written comments by mail to Arica Cox, Telecommunications Policy Analyst, Grants Management and Compliance, Office of Internet Connectivity and Growth, National Telecommunication and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4826, Washington, DC 20230, or by email to broadbandusa@ntia.gov. Please reference "Digital Equity Application Forms Comment" in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or specific questions related to collection activities should be directed to Arica Cox, Telecommunications Policy Analyst, Grants Management and Compliance, via email at acox@ntia.gov; broadbandusa@ntia.gov; or via telephone at (202) 482-2048.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Infrastructure Investment and Jobs Act, 2021 (Infrastructure Act or Act), Public Law 117-58, 135 Stat. 429

(November 15, 2021) (Infrastructure Act or Act), also known as the Bipartisan Infrastructure Law, provided \$65 billion of funding for programs to close the digital divide and ensure that all Americans have access to affordable, reliable, high-speed internet. NTIA administers six broadband connectivity grant programs funded by the Act, including the State Digital Equity Planning Grant (SDEPG) and the State Digital Equity Capacity Grant Program (SDECG). The SDEPG provides federal funding for grants to eligible applicants for the purpose of developing Digital Equity Plans. Through these Plans, entities will, among other things, identify barriers to digital equity in the State and strategies for overcoming those barriers. The purpose of SDECG is to promote the achievement of digital equity, support digital inclusion activities, and build capacity for efforts by States, U.S. territories and possessions, Indian Tribes, Alaska Native entities, and Native Hawaiian organizations relating to the adoption of broadband. The SDECG provides new federal funding for grants to eligible applicants for the purpose of implementing the State Digital Equity Plan and pursuing digital inclusion activities consistent with the State Digital Equity Plan. Further, the Tribal Digital Equity Planning and Capacity Program will provide funding for grants to Indian Tribes, Alaska Native entities, and Native Hawaiian organizations to develop their own digital equity plans and pursue digital inclusion activities, consistent with the SDEPG and the SDECG.

NTIA will use the information collected from each applicant to effectively review the proposed applications and budgets from States and U.S. Territories and Possessions for the State Digital Equity Capacity Program, and from Indian Tribes, Alaska Native entities, and Native Hawaiian organizations for the Tribal Digital Equity Planning and Capacity Program.

II. Method of Collection

NTIA will collect data through both electronic and mail submission.

III. Data

OMB Control Number: 0660-XXXX.

Form Number(s): TBD.

Type of Review: Regular submission for a new information collection.

Affected Public: States, territories or possessions of the United States, Indian Tribes, Alaska Native entities, and Native Hawaiian organizations applying for Infrastructure Act Broadband Grant Program funding.

Estimated Number of Respondents: 56 for State Digital Equity Capacity Grant application, 494 for Tribal Digital Equity Planning & Capacity Grant application.

Estimated Time per Response: 8 hours for State Digital Equity Capacity Grant application, 18 hours for Tribal Digital Equity Planning & Capacity Grant application.

Estimated Total Annual Burden Hours: 7,424.

Estimated Total Annual Cost to Public: \$354,347.52.

Respondent's Obligation: Mandatory.

Legal Authority: Sections 60304(c) and 60304(d) of the Infrastructure Investment and Jobs Act of 2021, Public Law 117–58, 135 Stat. 429 (November 15, 2021).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) 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; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–24374 Filed 11–2–23; 8:45 am]

BILLING CODE 3510–60–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Performance Review Board (PRB)

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Notice.

SUMMARY: Appointment of individuals to serve as members of the Performance Review Board.

DATES: *Applicable Date:* These appointments are effective on November 15, 2023.

FOR FURTHER INFORMATION CONTACT: Kelvin R. Wood, Chief of Staff, U.S. AbilityOne Commission; kwood@abilityone.gov; 202–809–3967.

SUPPLEMENTARY INFORMATION: The Chairperson of the Committee for Purchase From People Who Are Blind or Severely Disabled, operating as the U.S. AbilityOne Commission, has appointed the following individuals to serve on the Commission's Performance Review Board (PRB):

Chairperson of the PRB: Jeffrey A. Koses
Member—Jennifer Sheehy
Member—Robert Hogue
Member—Malcom Shorter

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

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

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

Authority: This notice is published in the **Federal Register** pursuant to the requirement of 5 U.S.C. 4314(c)(4).

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–24297 Filed 11–2–23; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Deletions from the Procurement List.

SUMMARY: The Committee is proposing to delete product(s) from the Procurement List that were previously furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Comments must be received on or before:* December 3, 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: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 785–6404, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

The following product(s) are proposed for deletion from the Procurement List:

Product(s)

NSN(s)—Product Name(s):

7930–01–619–1848—Protectant, Liquid, Water-Based, Vehicle Interior Surface, (4) 1–GL Container/BX

7930–01–619–1849—Protectant, Liquid, Water-Based, Vehicle Interior Surface, 5 GL

7930–01–619–1852—Detergent, Oil and Water Separating, Heavy Duty, Biodegradable, Trucks and Trailers, 5 GL

7930–01–619–1853—Detergent, Liquid, High-foaming, Car and Truck Washing, (4) 1–GL Container/BX

7930–01–619–1854—Detergent, Liquid, High-foaming, Car and Truck Washing, 5 GL

7930–01–619–1855—Liquid Solution, Truck and Trailer Wash, 5 GL

7930–01–619–1856—Detergent, Oil and Water Separating, Heavy Duty,

Biodegradable, Trucks and Trailers, 55 GL
 7930-01-619-1857—Cleaner/Degreaser, Heavy Duty, Biodegradable, Car and Trucks, 5 GL
 7930-01-619-1858—Liquid Solution, Truck and Trailer Wash, 55 GL
 7930-01-619-1859—Cleaner/Degreaser, Heavy Duty, Biodegradable, Car and Trucks, 55 GL
 7930-01-619-1860—Liquid Solution, Concentrated, Vehicle, Wash and Shine, With Wax polymer, (4) 1-GL Container/BX
 7930-01-619-2631—Liquid Solution, Concentrated, Vehicle, Wash and Shine, W/Wax polymer, 5 GL
Mandatory Source of Supply: Central Association for the Blind and Visually Impaired, Utica, NY.
Contracting Activity: GSA/FSS GREATER SOUTHWEST ACQUISITI, FORT WORTH, TX.
NSN(s)—Product Name(s): 7520-01-441-9130—Kit, Fingerprint
Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY.

Michael R. Jurkowski,
Deputy Director, Business & PL Operations.
 [FR Doc. 2023-24296 Filed 11-2-23; 8:45 am]
BILLING CODE 6353-01-P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 88 FR 74156, October 30, 2023.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 9:30 a.m. EDT, Wednesday, November 1, 2023.

CHANGES IN THE MEETING: The meeting has been canceled.

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, Secretary of the Commission, 202-418-5964.
Authority: 5 U.S.C. 552b.

Dated: November 1, 2023.

Christopher Kirkpatrick,
Secretary of the Commission.

[FR Doc. 2023-24442 Filed 11-1-23; 11:15 am]
BILLING CODE 6351-01-P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Comment Request; AmeriCorps External Reviewer Survey

AGENCY: Corporation for National and Community Service.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Corporation for National and Community Service (operating as AmeriCorps) is proposing to revise an information collection.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by January 2, 2024.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) Electronically through www.regulations.gov (preferred method).
 (2) By mail sent to: AmeriCorps, Attention Patti Stengel, 250 E Street SW, Washington, DC 20525.

(3) By hand delivery or by courier to the AmeriCorps mailroom at the mail address given in paragraph (2) above, between 9 a.m. and 4 p.m. Eastern Time, Monday through Friday, except Federal holidays.

Comments submitted in response to this notice may be made available to the public through regulations.gov. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comment that may be made available to the public, notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Patti Stengel, (202) 815-5791, or by email at pstengel@americorps.gov.

SUPPLEMENTARY INFORMATION: *Title of Collection:* AmeriCorps External Reviewer Survey.

OMB Control Number: 3045-0192.

Type of Review: Revision.

Respondents/Affected Public: Organizations and State Governments.
Total Estimated Number of Annual Responses: 300.

Total Estimated Number of Annual Burden Hours: 75.

Abstract: The External Reviewer Survey is used by individuals who have served as External Reviewers or External Panel Coordinators for AmeriCorps to review grant applications. AmeriCorps uses the collected information to assess and make improvements to grant competitions. The information is

collected electronically. The currently approved information collection is due to expire on March 31, 2024.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. 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. All written comments will be available for public inspection on regulations.gov.

Amy Hetrick,
Acting Director, Office of Grant Administration.

[FR Doc. 2023-24350 Filed 11-2-23; 8:45 am]
BILLING CODE 6050-28-P

DEPARTMENT OF DEFENSE

Department of the Army

Arlington National Cemetery, Withdrawal of Notice of Intent To Prepare an Environmental Impact Statement Regarding Removal of the Confederate Memorial

AGENCY: Department of the Army, DoD.
ACTION: Notice of intent; withdrawal.

SUMMARY: The Department of the Army is announcing withdrawal of its Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS).

The August 4, 2023, notice announced the Army's intention to prepare an EIS under the National Environmental Policy Act (NEPA). The EIS would have addressed potential environmental effects associated with the congressionally-mandated removal of the Confederate Memorial from Arlington National Cemetery (ANC). The Army determined the congressionally-mandated removal action is a non-discretionary action. There would be no reasonably foreseeable significant impacts from any discretionary elements of the proposed action. An EIS is therefore not needed to inform any decision-making for this action. The Army will prepare an Environmental Assessment (EA) to analyze and disclose any effects of the discretionary elements of the proposed action, including how to disassemble the Confederate Memorial.

FOR FURTHER INFORMATION CONTACT: Ms. Renea Yates, Director, Office of Army Cemeteries, 1 Memorial Avenue, Arlington, VA 22211; email: anc-commemorative-works@army.mil (Note: This email is for administrative inquiries only. Any comments regarding the proposed action should not be sent to this email address, but should instead be submitted via comment form located at: <https://www.arlingtoncemetery.mil/About/Confederate-Memorial-Removal>); (877) 907-8585.

SUPPLEMENTARY INFORMATION: The NOI was published in the **Federal Register** on August 4, 2023 (88 FR 149).

Congress directed the establishment of the Commission on the Naming of Items of the DoD that Commemorate the Confederate States of America or Any Person Who Served Voluntarily with the Confederate States of America (the Naming Commission) in section 370 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (FY21 NDAA). Regarding the Confederate Memorial, the Naming Commission recommended the following:

- “The statue atop . . . the monument should be removed. All bronze elements on the monument should be deconstructed, and removed, preferably leaving the granite base and foundation in place to minimize risk of inadvertent disturbance of graves.”
- “The work should be planned and coordinated with the Commission of Fine Arts and the Historical Review Commission to determine the best way to proceed with removal of the monument.”
- “The Department of [the] Army should consider the most cost-

effective method of removal and disposal of the monument's elements in their planning.”

The FY21 NDAA, section 370(a), requires that “[n]ot later than [January 1, 2024], the Secretary of Defense shall implement the plan submitted by [the Naming Commission] and remove all names, symbols, displays, monuments, and paraphernalia that honor or commemorate the Confederate States of America . . . or any person who served voluntarily with the Confederate States of America from all assets of the Department of Defense.”

The purpose of the proposed action is to remove from ANC a monument that commemorates the Confederate States of America. The need for the proposed action is to comply with non-discretionary congressional direction.

The public scoping process did not reveal evidence of any reasonably foreseeable significant impacts resulting from discretionary actions. Overwhelmingly, public comments during the scoping process focused on the non-discretionary action of removing the Confederate Memorial from ANC. Because removal of the Confederate Memorial from ANC is legally required and non-discretionary, the question of whether to remove the monument is not subject to analysis under NEPA. The Army does not have the authority to take environmental factors into consideration in determining whether to remove the monument.

The Army will prepare an EA to analyze discretionary actions (*i.e.*, how to disassemble and remove the Confederate Memorial's bronze elements). The EA and Draft Finding of No Significant Impact (Draft FONSI) will be published locally and not in the **Federal Register**. The EA and Draft FONSI will also be available online at: <https://www.arlingtoncemetery.mil/About/Confederate-Memorial-Removal>.

James W. Satterwhite Jr.,
U.S. Army Federal Register Liaison Officer.
[FR Doc. 2023-24302 Filed 11-2-23; 8:45 am]

BILLING CODE 3711-02-P

DELAWARE RIVER BASIN COMMISSION

Notice of Proposed Methodology for the 2024 Delaware River and Bay Water Quality Assessment Report

AGENCY: Delaware River Basin Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the methodology proposed to be used in the 2024 Delaware River and Bay Water Quality Assessment Report is available for review and comment.

DATES: Written comments on the assessment methodology or recommendations for the consideration of data sets will be accepted through 5 p.m. EST on February 1, 2024.

ADDRESSES: Written comments may be submitted through the Commission's web-based comment system, a link to which is provided at www.drbc.gov. All submissions should include the name and address (street address optional) of the commenter. Exceptions to use of the web-based comment system are available based on need, by writing to the attention of the Commission Secretary, DRBC, P.O. Box 7360, 25 Cosey Road, West Trenton, NJ 08628-0360. For assistance, please contact Patricia Hausler at patricia.hausler@drbc.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Jacob Bransky, Senior Aquatic Biologist, jacob.bransky@drbc.gov, 609-477-7230.

SUPPLEMENTARY INFORMATION: The Delaware River Basin Commission (“DRBC” or “Commission”) is a Federal-interstate compact agency that was created in 1961 by concurrent legislation of the States of Delaware, New Jersey, and New York, the Commonwealth of Pennsylvania and the United States Government for purpose of jointly managing the water resources of the Delaware River Basin.

DRBC currently is compiling data for the 2024 Delaware River and Bay Water Quality Assessment Report (“2024 Assessment”) required by the federal Clean Water Act (“CWA”). The 2024 Assessment will present the extent to which waters of the Delaware River and Bay are attaining designated uses in accordance with section 305(b) of the CWA and the Commission's Water Quality Regulations (incorporated by reference at 18 CFR part 410), and will identify impaired waters, which consist of waters in which surface water quality standards are not being met.

The proposed assessment methodology to be used in the 2024 Assessment is available for review at the following URL: <https://www.nj.gov/drbc/library/documents/WQAssessment2024MethodologyDRAFTOct2023.pdf>.

Authority: Delaware River Basin Compact, Public Law 87-328, Approved September 27, 1961, 75 Statutes at Large, 688, sec's 3.6(c), 3.6(h), 3.9, 3.9(a), 3.9(d), and 5.1.

Dated: October 18, 2023.

Pamela M. Bush,

Commission Secretary.

[FR Doc. 2023–24279 Filed 11–2–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Notice of Availability for the Final Site-Wide Environmental Impact Statement for Continued Operation of the Lawrence Livermore National Laboratory

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Notice of availability.

SUMMARY: The National Nuclear Security Administration (NNSA), a semi-autonomous agency within the United States (U.S.) Department of Energy (DOE), announces the availability of a Final Site-Wide Environmental Impact Statement for Continued Operation of the Lawrence Livermore National Laboratory (Final LLNL SWEIS) (DOE/EIS–0547) in compliance with the National Environmental Policy Act of 1969 (NEPA). NNSA prepared the Final LLNL SWEIS to analyze the potential environmental impacts associated with continuing LLNL operations and foreseeable new and/or modified operations and facilities for approximately the next 15 years. Volume 3 of the Final LLNL SWEIS is a comment response document (CRD), which includes all comments received during the public comment period on the Draft LLNL SWEIS, as well as NNSA's responses to those comments.

DATES: NNSA will not issue any Record of Decision (ROD) on the proposal for a minimum of 30 days after the date that the U.S. Environmental Protection Agency (EPA) publishes its Notice of Availability (NOA) in the **Federal Register**.

ADDRESSES: Requests for additional information related to the Final LLNL SWEIS should be sent to Mr. Tom Grim, NEPA Document Manager, National Nuclear Security Administration, 1000 Independence Ave. SW, Washington, DC 20585; or sent by email to: LLNLSWEIS@nnsa.doe.gov.

The Final LLNL SWEIS is available for viewing and downloading on the NNSA NEPA Reading Room website (www.energy.gov/nnsa/nnsa-nepa-reading-room) and the DOE NEPA website (<https://energy.gov/nepa/nepa-reading-room>).

documents). Copies of the Final LLNL SWEIS will also be available at the Livermore Public Library, 1188 South Livermore Avenue, Livermore, California, and the Tracy Public Library, 20 East Eaton Avenue, Tracy, California.

FOR FURTHER INFORMATION CONTACT: For further information about this notice, please contact Mr. Tom Grim, NEPA Document Manager, National Nuclear Security Administration, 1000 Independence Ave. SW, Washington, DC 20585; call 833–778–0508 to leave a message; or email at: LLNLSWEIS@nnsa.doe.gov.

SUPPLEMENTARY INFORMATION: NNSA is responsible for meeting the national security requirements established by the President and Congress to maintain and enhance the safety, reliability, and performance of the U.S. nuclear weapons stockpile. The continued operation of LLNL is critical to NNSA's Stockpile Stewardship and Management Program, preventing the spread and use of nuclear weapons worldwide, and many other areas that may impact national security and global stability. The Final LLNL SWEIS analyzes two alternatives: (1) the No-Action Alternative and (2) the Proposed Action. The Final LLNL SWEIS also analyzes the new hybrid work environment under both alternatives due to increases in remote work at LLNL. Under the No-Action Alternative, NNSA would continue current facility operations throughout LLNL in support of assigned missions. The No-Action Alternative includes previously approved construction of new facilities; modernization, upgrade, and utility projects; and decontamination, decommissioning, and demolition of excess and aging facilities through 2022.

The Proposed Action includes the scope of the No-Action Alternative and an increase in current facility operations or enhanced operations that may require new or modified facilities and that are reasonably foreseeable over the next 15 years. Continued re-investment in site infrastructure would allow LLNL to meet mission deliverables and sustain science, technology, and engineering excellence to respond to future national security challenges. The Proposed Action includes 75 new projects, totaling 3.3 million square feet, between 2023 and 2035. This comprises 61 proposed projects, totaling 2.9 million square feet, at LLNL's main site in Livermore, California and 14 proposed projects, totaling 385,000 square feet, at LLNL's remote testing site, Site 300, near Tracy, California. In addition, NNSA proposes 20 types of modernization, upgrade, and utility

projects, each involving several facilities. Under the Proposed Action, NNSA would also decontaminate, decommission, and demolish 150 facilities, totaling 1,170,000 square feet. NNSA is also proposing operational changes that would increase the tritium emissions limits in the National Ignition Facility (Building 581) and the Tritium Facility (Building 331), decrease the administrative limit for fuels-grade-equivalent plutonium in the Superblock (Building 332), increase the administrative limits for plutonium-239 at Building 235, and revise the National Ignition Facility radioactive materials administrative limits to be consistent with DOE's Facility Hazard Categorization Standard. The Proposed Action also includes several projects to enhance the resilience of the energy infrastructure and demonstrate renewable power solutions.

This Final LLNL SWEIS contains revisions and new information based in part on comments received on the Draft LLNL SWEIS. These revisions and new information are indicated by sidebars in the margins. Volume 3 of the Final LLNL SWEIS contains summaries of the comments received, images of the comment documents, and NNSA's responses to the comments. NNSA considered all comments received on the Draft LLNL SWEIS in preparing the Final LLNL SWEIS.

NNSA will consider the environmental impact analysis presented in the Final LLNL SWEIS, along with other information, in making decisions regarding how operations will be conducted at LLNL, including construction and operation of new facilities, modification and upgrade of existing facilities and utilities, operational changes, and/or decontamination, decommission and demolition of excess and aging facilities. NNSA will not issue any ROD on the proposal for a minimum of 30 days after the date that EPA publishes its NOA in the **Federal Register**. NNSA will publish any ROD in the **Federal Register**.

Signing Authority

This document of the Department of Energy was signed on October 13, 2023, by Jill Hruby, Under Secretary for Nuclear Security and Administrator, National Nuclear Security Administration, 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 October 27, 2023.

Treena V. Garrett,

*Federal Register Liaison Officer, U.S.
Department of Energy.*

[FR Doc. 2023–24141 Filed 11–2–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24–21–000.

Applicants: Black Walnut Energy Storage, LLC.

Description: Black Walnut Energy Storage, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 10/26/23.

Accession Number: 20231026–5150.

Comment Date: 5 p.m. ET 11/16/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER16–1946–002; ER16–1947–002; ER16–1948–002.

Applicants: Atlantic Energy MA LLC, Atlantic Energy MD, LLC, Atlantic Energy LLC.

Description: Notice of Non-Material Change in Status of Atlantic Energy LLC, et al.

Filed Date: 10/27/23.

Accession Number: 20231027–5062.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–1851–003.
Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Original & Amended ISA–CSA, SA Nos. 6917–6918; Queue No. AD1–031 (Part I of II) to be effective 7/8/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5143.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–1851–004.
Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Original & Amended ISA–CSA, SA Nos. 6917–6918; Queue No. AD1–031 (Part II of II) to be effective 10/26/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5157.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–1973–001.

Applicants: BE-Pine 1 LLC.

Description: Notice of Non-Material Change in Status of BE-Pine 1 LLC.

Filed Date: 10/25/23.

Accession Number: 20231025–5286.

Comment Date: 5 p.m. ET 11/15/23.

Docket Numbers: ER23–2520–001.

Applicants: SR Litchfield, LLC.

Description: Tariff Amendment: Response to Deficiency Notice to be effective 9/27/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5180.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–2522–001.

Applicants: SR Georgetown, LLC.

Description: Tariff Amendment: Response to Deficiency Notice to be effective 9/27/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5172.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–2523–001.

Applicants: SR Lambert I, LLC.

Description: Tariff Amendment: Response to Deficiency Notice to be effective 9/27/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5174.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–2524–001.

Applicants: SR Lambert II, LLC.

Description: Tariff Amendment: Response to Deficiency Notice to be effective 9/27/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5178.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–2582–001.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: Amended Filing in ER23–2582—Application of Emergency Limits to be effective 11/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5077.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–2657–001.

Applicants: Emera Energy LNG, LLC.

Description: Tariff Amendment: Per Deficiency Letter—Indicative Screen Studies' AA Serial No's (ER23–2657–) to be effective 10/18/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5041.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–2658–001.

Applicants: Emera Energy Services Subsidiary No. 11 LLC.

Description: Tariff Amendment: Per Deficiency Letter- Indicative Screen Studies' AA Serial No's. (ER23–2658–) to be effective 10/18/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5068.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–2659–001.

Applicants: Emera Energy Services Subsidiary No. 12 LLC.

Description: Tariff Amendment: Per Deficiency Letter—Indicative Screen Studies' AA Serial No's.s (ER23–2659–) to be effective 10/18/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5073.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–2660–001.

Applicants: Emera Energy Services Subsidiary No. 13 LLC.

Description: Tariff Amendment: Per Deficiency Letter—Indicative Screen Studies' AA Serial No's. (ER23–2660–) to be effective 10/18/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5079.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–2661–001.

Applicants: Emera Energy Services Subsidiary No. 15 LLC.

Description: Tariff Amendment: Per Deficiency Letter—Indicative Screen Studies' AA Serial No's. (ER23–2661–) to be effective 10/18/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5084.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER23–2917–000.

Applicants: California Independent System Operator Corporation.

Description: Motion for Leave to Answer and Answer of SunZia Transmission, LLC to the October 13, 2023, Limited Protest of Southern California Edison, et al.

Filed Date: 10/27/23.

Accession Number: 20231027–5221.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24–216–000.

Applicants: AEP Texas Inc.

Description: § 205(d) Rate Filing: AEPTX—AP Sunray 3rd A&R System Upgrade Agreement to be effective 10/9/2023.

Filed Date: 10/26/23.

Accession Number: 20231026–5153.

Comment Date: 5 p.m. ET 11/16/23.

Docket Numbers: ER24–217–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: RS 331 Certificate of Concurrence to PGE Dynamic Transfer BA to be effective 10/31/2023.

Filed Date: 10/26/23.

Accession Number: 20231026–5154.

Comment Date: 5 p.m. ET 11/16/23.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502-6595 or OPP@ferc.gov.

Dated: October 27, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-24257 Filed 11-2-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6951-018]

Tallassee Shoals, LLC; Notice of Revised Procedural Schedule for Environmental Assessment for the Proposed Project Relicense

On September 15, 2021, Tallassee Shoals, LLC. filed an application for a new license to continue to operate and maintain the 2.3-megawatt Tallassee Shoals Hydroelectric Project No. 6951 (Tallassee Shoals Project). On September 14, 2022, Commission staff issued a notice of intent to prepare an Environmental Assessment (EA) to evaluate the effects of relicensing the Tallassee Shoals Project. The notice of intent included a schedule for preparing a draft and final EA.

By this notice, Commission staff is updating the procedural schedule for completing a final EA. The revised

schedule is shown below. Further revisions to the schedule may be made as appropriate.

Milestone	Target date
Issue EA	January 2024.

Any questions regarding this notice may be directed to Michael Spencer at (202) 502-6093, or by email at michael.spencer@ferc.gov.

Dated: October 27, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-24256 Filed 11-2-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23-214-000]

Columbia Gas Transmission, L.L.C.; Notice of Availability of the Environmental Assessment for the Proposed Greenwood and North Greenwood Storage Fields Abandonment Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Greenwood and North Greenwood Storage Fields Abandonment Project (Project), proposed by Columbia Gas Transmission, L.L.C. (Columbia) in the above-referenced docket. Columbia requests authorization to abandon its Greenwood and North Greenwood Storage fields, including nine wells, 3 miles of storage lines, one compressor station, and associated appurtenances in Steuben County, New York.

The EA assesses the potential environmental effects of the Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

The proposed Project includes the following activities:

- abandoning four injection/withdrawal wells by permanently plugging and abandoning;
- abandoning four observation wells and one disposal well by permanently plugging and abandoning;
- abandoning approximately 3 miles of associated storage lines, consisting of three 8-inch-diameter laterals, and five 4-inch-diameter laterals. About 0.1 mile

would be abandoned by removal and about 2.9 miles would be abandoned in place;

- abandoning by removal the North Greenwood Compressor Station, including all below- and above-ground structures;
- abandoning by removal all above-ground appurtenances; and
- abandoning in place the remaining below-ground brine lines and miscellaneous appurtenances.

The Commission mailed a copy of the *Notice of Availability* to Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the project area. The EA is only available in electronic format. It may be viewed and downloaded from the FERC's website (www.ferc.gov), on the natural gas environmental documents page (<https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents>). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (<https://elibrary.ferc.gov/eLibrary/search>), select "General Search" and enter the docket number in the "Docket Number" field, excluding the last three digits (*i.e.*, CP23-214). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnlineSupport@ferc.gov or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659.

The EA is not a decision document. It presents Commission staff's independent analysis of the environmental issues for the Commission to consider when addressing the merits of all issues in this proceeding. Any person wishing to comment on the EA may do so. Your comments should focus on the EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before 5 p.m. eastern time on November 27, 2023.

For your convenience, there are three methods you can use to file your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to

assist you at (866) 208–3676 or FercOnlineSupport@ferc.gov. Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature on the Commission's website (www.ferc.gov) under the link to FERC Online. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's website (www.ferc.gov) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "eRegister." You must select the type of filing you are making. If you are filing a comment on a particular project, please select "Comment on a Filing"; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP23–214–000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered. Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. At this point in this proceeding, the timeframe for filing timely intervention requests has expired. Any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedures (18 CFR 385.214(b)(3) and (d)) and show good cause why the time limitation should be waived. Motions to intervene are more fully described at <https://www.ferc.gov/how-intervene>.

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (www.ferc.gov) using the eLibrary link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to <https://www.ferc.gov/ferc-online/overview> to register for eSubscription.

Dated: October 27, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24260 Filed 11–2–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas and Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP24–60–000.

Applicants: Pembina Midstream (U.S.A.) Inc., Crescent Point Energy U.S. Corp.

Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et al. of Pembina Midstream (U.S.A.) Inc., et al.

Filed Date: 10/26/23.

Accession Number: 20231026–5097.

Comment Date: 5 p.m. ET 11/7/23.

Docket Numbers: RP24–61–000.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: § 4(d) Rate Filing: Rate Schedule GSS LSS SS–2 Tracker Filing Effective 11/1/23 to be effective 11/1/2023.

Filed Date: 10/26/23.

Accession Number: 20231026–5138.

Comment Date: 5 p.m. ET 11/7/23.

Docket Numbers: RP24–62–000.

Applicants: Midwestern Gas Transmission Company.

Description: Compliance filing: 2022–2023 Cashout Report to be effective N/A.

Filed Date: 10/27/23.

Accession Number: 20231027–5038.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24–63–000.

Applicants: ETC Tiger Pipeline, LLC.

Description: § 4(d) Rate Filing:

Amended NRA #3—BP Energy Co to be effective 11/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5042.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24–64–000.

Applicants: Transwestern Pipeline Company, LLC.

Description: § 4(d) Rate Filing: Negotiated Rate Filing—Targa to be effective 11/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5043.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24–65–000.

Applicants: Midwestern Gas Transmission Company.

Description: Compliance filing: 2022–2023 Gas Sales and Purchases Report to be effective N/A.

Filed Date: 10/27/23.

Accession Number: 20231027–5044.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24–66–000.

Applicants: Rover Pipeline LLC.

Description: § 4(d) Rate Filing: Housekeeping Filing on 10–27–23 to be effective 11/27/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5053.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24–67–000.

Applicants: Rover Pipeline LLC.

Description: § 4(d) Rate Filing: Vol 1–A Housekeeping Filing on 10–27–23 to be effective 11/27/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5058.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24–68–000.

Applicants: Texas Eastern Transmission, LP.

Description: Compliance filing: TETLP October 2023 Penalty Disbursement Report to be effective N/A.

Filed Date: 10/27/23.

Accession Number: 20231027–5067.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24–69–000.

Applicants: Viking Gas Transmission Company.

Description: Compliance filing: 2022–2023 Gas Sales and Purchases Report to be effective N/A.

Filed Date: 10/27/23.

Accession Number: 20231027–5072.
Comment Date: 5 p.m. ET 11/8/23.
Docket Numbers: RP24–70–000.
Applicants: Guardian Pipeline, L.L.C.
Description: Compliance filing: 2022–2023 Gas Sales and Purchases Report to be effective N/A.

Filed Date: 10/27/23.

Accession Number: 20231027–5076.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24–71–000.

Applicants: OkTex Pipeline Company, L.L.C.

Description: Compliance filing: 2022–2023 Gas Sales and Purchases Report to be effective N/A.

Filed Date: 10/27/23.

Accession Number: 20231027–5080.

Comment Date: 5 p.m. ET 11/8/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP23–724–001.

Applicants: MountainWest Overthrust Pipeline, LLC.

Description: Compliance filing: Statement of Rates—Settlement Compliance to be effective 12/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5029.

Comment Date: 5 p.m. ET 11/8/23.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available

information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: October 27, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24261 Filed 11–2–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24–10–000]

Cheniere Creole Trail Pipeline, L.P.; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on October 20, 2023, Cheniere Creole Trail Pipeline, L.P. (CTPL), 700 Milam Street, Suite 1900, Houston, TX 77002, filed in the above referenced docket, a prior notice request pursuant to sections 157.205, 157.208, 157.210 of the Commission's regulations under the Natural Gas Act (NGA), and CTPL's blanket certificate issued in Docket No. CP05–358–000, for authorization to construct, own, operate and maintain facilities related to its proposed extension of the existing 42-inch suction headers and addition of two new 775 million cubic feet per day gas filter separators, and other ancillary facilities located at CTPL's existing Gillis Compressor Station. All of the above facilities are located in Beauregard Parish, Louisiana (Gillis Header Project or Project). The Project will allow CTPL to increase operational efficiencies, (including reduced downtime) at the Gillis Compressor Station. The estimated cost for the Project is \$17.9 million, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

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 (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. For assistance,

contact the Federal Energy Regulatory Commission at FercOnlineSupport@ferc.gov or call toll-free, (866) 208–3676 or TTY (202) 502–8659.

Any questions concerning this request should be directed to: Joseph Moake, Cheniere Energy, Inc., 700 Milam Street, Suite 1900, Houston, TX 77002, (713) 375–5000, Joseph.Moake@cheniere.com; or Chris Williams, Cheniere Energy, Inc., 700 Milam Street, Suite 1900, Houston, TX 77002, (713) 375–5000, Chris.Williams@cheniere.com.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5:00 p.m. Eastern Time on December 29, 2023. How to file protests, motions to intervene, and comments is explained below.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,¹ any person² or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section

¹ 18 CFR 157.205.

² Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

157.205(e) of the Commission's regulations,³ and must be submitted by the protest deadline, which is December 29, 2023. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure⁴ and the regulations under the NGA⁵ by the intervention deadline for the project, which is December 29, 2023. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at <https://www.ferc.gov/resources/guides/how-to-intervene.asp>.

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely

and properly recorded, please submit your comments on or before December 29, 2023. The filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP24–10–000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to Documents and Filings. New eFiling users must first create an account by clicking on "eRegister." You will be asked to select the type of filing you are making; first select "General" and then select "Protest", "Intervention", or "Comment on a Filing"; or⁶

(2) You can file a paper copy of your submission by mailing it to the address below. Your submission must reference the Project docket number CP24–10–000.

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

To file via any other method: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or FercOnlineSupport@ferc.gov.

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: Joseph Moake, Cheniere Energy, Inc., 700 Milam Street, Suite 1900, Houston, TX 77002, or email, Joseph.Moake@cheniere.com; or Chris Williams, Cheniere Energy, Inc., 700 Milam Street, Suite 1900, Houston, TX 77002, email, Chris.Williams@cheniere.com. Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

⁶ Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at www.ferc.gov under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at www.ferc.gov using the "eLibrary" link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to www.ferc.gov/docs-filing/esubscription.asp.

Dated: October 30, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023–24318 Filed 11–2–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–228–000]

South Cheyenne 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 South Cheyenne 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

³ 18 CFR 157.205(e).

⁴ 18 CFR 385.214.

⁵ 18 CFR 157.10.

assumptions of liability, is November 20, 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 TTY, (202) 502-8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502-6595 or OPP@ferc.gov.

Dated: October 30, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-24323 Filed 11-2-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23-544-000]

Northern Border Pipeline Company; Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Bison XPress Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental document, that will discuss the environmental impacts of the Bison XPress Project involving construction and operation of facilities by Northern Border Pipeline Company (Northern Border) in McKenzie, Dunn, and Morton Counties, North Dakota. The Commission will use this environmental document in its decision-making process to determine whether the project is in the public convenience and necessity. Applications by Bison Pipeline, LLC (Docket No. CP23-543-000) and Wyoming Interstate Company, LLC and Fort Union Gas Gathering, LLC (Docket No. CP23-545-000) are associated projects being evaluated under the applicable Commission regulations.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies regarding the project. As part of the National Environmental Policy Act (NEPA) review process, the Commission takes into account concerns the public may have about proposals and the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. This gathering of public input is referred to as "scoping." The main goal of the scoping process is to focus the analysis in the environmental document on the important environmental issues. Additional information about the Commission's NEPA process is described below in the *NEPA Process and Environmental Document* section of this notice.

By this notice, the Commission requests public comments on the scope of issues to address in the environmental document. To ensure that your comments are timely and properly recorded, please submit your comments so that the Commission receives them in Washington, DC on or before 5:00 p.m. Eastern Time on November 29, 2023. Comments may be submitted in written form. Further details on how to submit comments are

provided in the *Public Participation* section of this notice.

Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the environmental document. Commission staff will consider all written comments during the preparation of the environmental document.

If you submitted comments on this project to the Commission before the opening of this docket on September 15, 2023, you will need to file those comments in Docket No. CP23-544-000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable easement agreement. You are not required to enter into an agreement. However, if the Commission approves the project, the Natural Gas Act conveys the right of eminent domain to the company. Therefore, if you and the company do not reach an easement agreement, the pipeline company could initiate condemnation proceedings in court. In such instances, compensation would be determined by a judge in accordance with state law. The Commission does not subsequently grant, exercise, or oversee the exercise of that eminent domain authority. The courts have exclusive authority to handle eminent domain cases; the Commission has no jurisdiction over these matters.

Northern Border provided landowners with a fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?" which addresses typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. This fact sheet along with other landowner topics of interest are available for viewing on the FERC website (www.ferc.gov) under the Natural Gas, Landowner Topics link.

Public Participation

There are three methods you can use to submit your comments to the Commission. Please carefully follow these instructions so that your comments are properly recorded. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208-3676 or FercOnlineSupport@ferc.gov.

(1) You can file your comments electronically using the eComment feature, which is located on the Commission's website (www.ferc.gov) under the link to FERC Online. Using eComment is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "eRegister." You will be asked to select the type of filing you are making; a comment on a particular project is considered a "Comment on a Filing"; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP23-544-000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Additionally, the Commission offers a free service called eSubscription which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. Go to <https://www.ferc.gov/ferc-online/overview> to register for eSubscription.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available

information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502-6595 or OPP@ferc.gov.

Summary of the Proposed Project

Northern Border's proposed Bison XPress Project consists of the replacement and expansion of compression facilities at Northern Border's existing compressor stations including Arnegard (No. 4) in McKenzie County, North Dakota, Manning (No. 5) in Dunn County North Dakota, and Glen Ullin (No. 6) in Morton County, North Dakota (Appendix 1). Upon completion, the Bison XPress Project would (a) replace and expand existing compressor facilities with new, more modern and efficient compression facilities; (b) create 300,000 dekatherms per day of incremental mainline natural gas capacity from receipt points between Northern Border's Culbertson (No. 3) Compressor Station and Glen Ullin (No. 6) Compressor Station ("Bakken Receipt Points") to its interconnection with Bison in Morton County, North Dakota (Kurtz Delivery Point); and (c) introduce standby horsepower for the first time on Northern Border's system, as opposed to the previous single compressor unit design at each station.

Land Requirements for Construction

All facility modifications and additions proposed as part of the Bison XPress Project would be entirely on property owned by Northern Border, within Northern Border easements, or on leased space. The Bison XPress Project would require the use of a total of 102.70 acres of land during construction, including 26.86 acres at the Arnegard Compressor Station, 33.15 acres at the Manning Compressor Station, and 42.69 acres at the Glen Ullin Compressor Station. Permanent impacts (a total of 4.11 acres) would only occur at the Manning Compressor Station and would be associated with the expansion of the existing facility fence line and grading to level the land surface. Construction activities at all three of the compressor stations would require temporary workspace both within and directly adjacent to the existing facility fence lines.

Temporary workspace outside of the existing facility fence lines at the compressor stations would be used primarily for the staging, parking, and storage of construction equipment and materials. Temporary workspace at all three of the compressor stations that extends beyond Northern Border's

property would be leased from the landowner during Project construction. Following the completion of construction, temporary workspace outside of the existing facilities would be restored to pre-construction contours and allowed to revegetate.

NEPA Process and the Environmental Document

Any environmental document issued by the Commission will discuss impacts that could occur as a result of the construction and operation of the proposed Bison XPress Project under the relevant general resource areas:

- geology and soils;
- water resources and wetlands;
- vegetation and wildlife;
- threatened and endangered species;
- cultural resources;
- land use;
- environmental justice;
- air quality and noise; and
- reliability and safety.

Commission staff have already identified several issues that deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Northern Border. This preliminary list of issues may change based on your comments and our analysis:

- environmental justice;
- air quality; and
- cultural resources.

Commission staff will also evaluate reasonable alternatives to the proposed Bison XPress Project or portions of the project and make recommendations on how to lessen or avoid impacts on the various resource areas. Your comments will help Commission staff identify and focus on the issues that might have an effect on the human environment and potentially eliminate others from further study and discussion in the environmental document.

Following this scoping period, Commission staff will determine whether to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) for the Bison XPress Project. The EA or the EIS will present Commission staff's independent analysis of the issues. If Commission staff prepares an EA, a *Notice of Schedule for the Preparation of an Environmental Assessment* will be issued. The EA may be issued for an allotted public comment period. The Commission would consider timely comments on the EA before making its decision regarding the proposed Bison XPress Project. If Commission staff prepares an EIS, a *Notice of Intent to Prepare an EIS/Notice of Schedule* will be issued, which will open up an additional comment period. Staff will

then prepare a draft EIS which will be issued for public comment. Commission staff will consider all timely comments received during the comment period on the draft EIS and revise the document, as necessary, before issuing a final EIS. Any EA or draft and final EIS will be available in electronic format in the public record through eLibrary¹ and the Commission's natural gas environmental documents web page (<https://www.ferc.gov/industries-data/natural-gas/environmental-environmental-documents>). If eSubscribed, you will receive instant email notification when the environmental document is issued.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate in the preparation of the environmental document.² Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the *Public Participation* section of this notice.

Consultation Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with the applicable State Historic Preservation Office(s), and to solicit their views and those of other government agencies, interested Indian

tribes, and the public on the project's potential effects on historic properties.³ The environmental document for the project will document findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project and includes a mailing address with their comments. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed Bison XPress Project.

If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please complete one of the following steps:

(1) Send an email to GasProjectAddressChange@ferc.gov stating your request. You must include the docket number CP23-544-000 in your request. If you are requesting a change to your address, please be sure to include your name and the correct address. If you are requesting to delete your address from the mailing list, please include your name and address as it appeared on this notice. This email address is unable to accept comments.

OR

(2) Return the attached "Mailing List Update Form" (appendix 2).

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208-FERC, or on the FERC website at www.ferc.gov using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number in the "Docket Number" field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnlineSupport@ferc.gov or (866) 208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

Public sessions or site visits will be posted on the Commission's calendar located at <https://www.ferc.gov/news-events/events> along with other related information.

Dated: October 30, 2023.

Kimberly D. Bose,
Secretary.

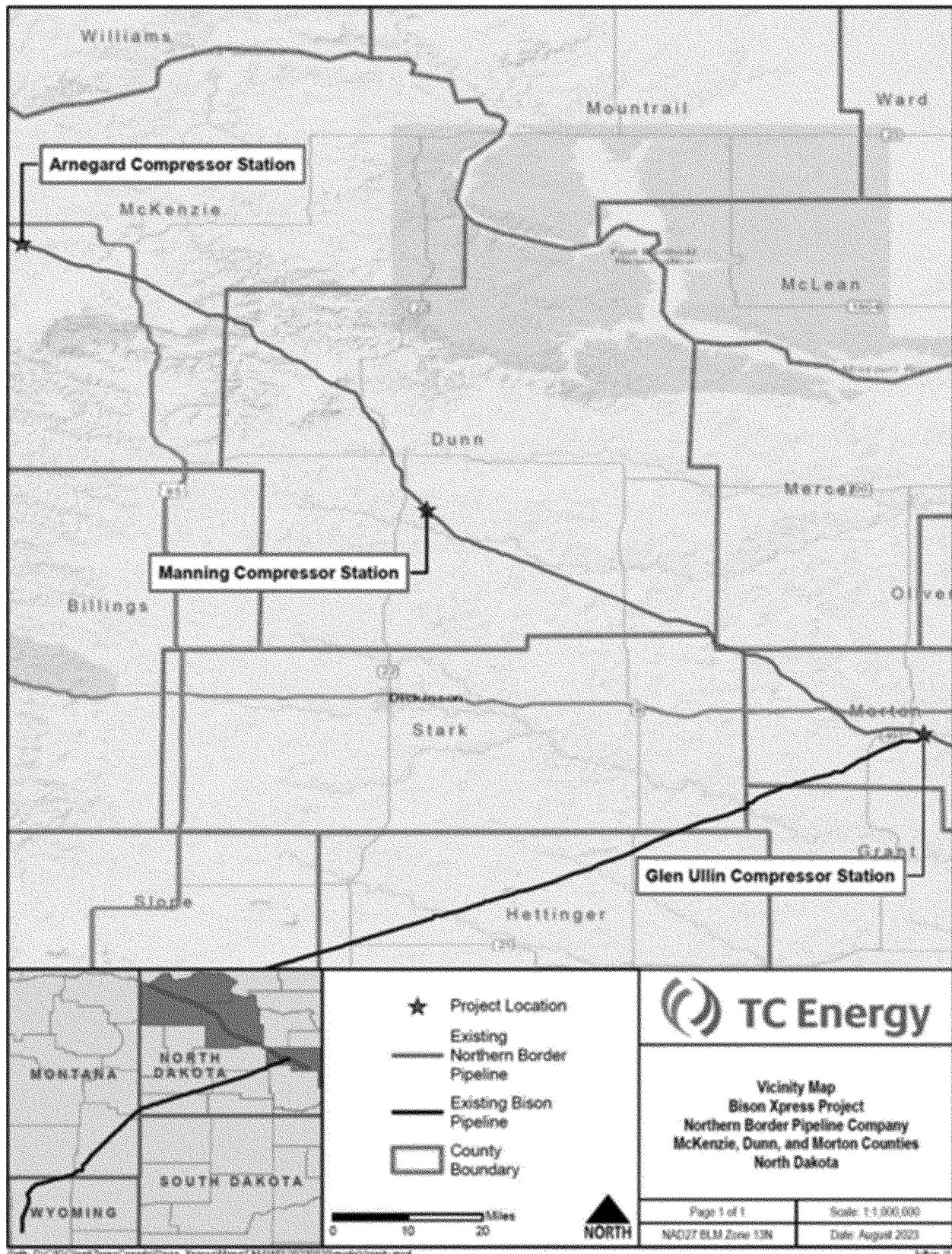
BILLING CODE 6717-01-P

Appendix 1

¹ For instructions on connecting to eLibrary, refer to the last page of this notice.

² The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at title 40, Code of Federal Regulations, section 1501.8.

³ The Advisory Council on Historic Preservation's regulations are at title 36, Code of Federal Regulations, part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.



MAILING LIST UPDATE FORM

Bison XPress Project

Name _____

Agency _____

Address _____

City _____ State _____ Zip Code _____

☐ Please update the mailing list☐ Please remove my name from the mailing list

FROM _____

ATTN: OEP - Gas 5, PJ - 11.5
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Docket No. CP23-544-000
Bison XPress Project

Staple or Tape Here

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. CP23–535–000]

WBI Energy Transmission, Inc.; Notice of Schedule for the Preparation of an Environmental Assessment for the South Spearfish Project

On August 28, 2023, WBI Energy Transmission, Inc. (WBI Energy) filed an application in Docket No. CP23–535–000 requesting a Certificate of Public Convenience and Necessity pursuant to section 7(c) and Authorization pursuant to section 7(b) of the Natural Gas Act to construct, operate, and abandon certain natural gas pipeline facilities. The proposed project is known as the South Spearfish Project (Project) and would allow for incremental firm transportation capacity from WBI Energy's existing Line Section 15 in western South Dakota to the community of Spearfish, South Dakota for Montana-Dakota Utilities, Company.

On September 11, 2023, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing Federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a Federal authorization within 90 days of the date of issuance of the Commission staff's environmental document for the Project.

This notice identifies Commission staff's intention to prepare an environmental assessment (EA) for the Project and the planned schedule for the completion of the environmental review.¹

Schedule for Environmental Review

Issuance of EA—February 26, 2024
90-day Federal Authorization Decision
Deadline²—May 26, 2024

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

WBI Energy proposes the following in Lawrence County, South Dakota:

- modify the Deadwood-Central City Lateral Takeoff Valve Setting adjacent to the Deadwood Mainline Transfer Station on WBI Energy's Line Section 15;
- increase the maximum allowable operating pressure of the 8-inch-diameter Deadwood-Central City Lateral from the Deadwood Mainline Transfer Station to the proposed South Spearfish Town Border Station;
- install two pig launcher/receivers,³ one at each end of the uprated Deadwood-Central City Lateral;
- construct the new South Spearfish Town Border Station adjacent to the existing South Spearfish Lateral Takeoff Valve Setting. The new station would contain the relocated South Spearfish Town Border Station and the new Deadwood Lateral Transfer Station;
- relocate approximately 500 feet of the South Spearfish Lateral adjacent to the South Spearfish Town Border Station and the existing South Spearfish Lateral Takeoff Valve Setting; and
- abandon by sale the existing 5.5-mile-long 4-inch-diameter South Spearfish Lateral and certain town border station equipment, at the existing South Spearfish Town Border Station to Montana-Dakota Utilities, Company upon the commissioning of the new South Spearfish Town Border Station.

Background

On October 13, 2023, the Commission issued a *Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed South Spearfish Project* (Notice of Scoping). The Notice of Scoping was sent to affected landowners; Federal, State, and local government agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries. All substantive comments will be addressed in the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This service provides automatic notification of filings made to subscribed dockets, document summaries, and direct links to the documents. Go to <https://www.ferc.gov/ferc-online/overview> to register for eSubscription.

³ A "pig" is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes. A pig launcher/receiver are facilities where pigs are inserted/retrieved from the pipeline.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC website (www.ferc.gov). Using the "eLibrary" link, select "General Search" from the eLibrary menu, enter the selected date range and "Docket Number" excluding the last three digits (*i.e.*, CP23–535), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at FERCOnlineSupport@ferc.gov. The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: October 27, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–24259 Filed 11–2–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****Change In Date for the December Commission Open Meeting**

Take notice that the Commission has changed the date for its December 2023 open meeting. The meeting will now take place on Tuesday, December 19, 2023. The open meeting had been initially scheduled for Thursday, December 21, 2023.¹

Dated: October 26, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–24274 Filed 11–2–23; 8:45 am]

BILLING CODE 6717–01–P

¹ The start time of the meeting remains 10:00 a.m. Eastern Time.

¹ 40 CFR 1501.10 (2020)

² The Commission's deadline applies to the decisions of other Federal agencies, and State agencies acting under federally delegated authority, that are responsible for Federal authorizations, permits, and other approvals necessary for proposed projects under the Natural Gas Act. Per 18 CFR 157.22(a), the Commission's deadline for other agency's decisions applies unless a schedule is otherwise established by Federal law.

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Docket No. AD23–9–000]****Reliability Technical Conference;
Second Supplemental Notice of
Technical Conference**

As announced in the Notice of Technical Conference issued in this proceeding on August 3, 2023, the Federal Energy Regulatory Commission

(Commission) will convene its annual Reliability Technical Conference in the above-referenced proceeding on Thursday, November 9, 2023, from approximately 9:00 a.m. to 5:00 p.m. Eastern time. The conference will include Commissioner-led and staff-led panels. The conference will be held in-person at the Commission's headquarters at 888 First Street NE, Washington, DC 20426 in the Commission Meeting Room.

The purpose of this conference is to discuss policy issues related to the

reliability and security of the Bulk-Power System. The conference will also discuss the impact of the Environmental Protection Agency's proposed rule under section 111 of the Clean Air Act on electric reliability.¹

While the conference is not for the purpose of discussing any specific matters before the Commission, some panel discussions may involve issues raised in proceedings that are currently pending before the Commission. These proceedings include, but are not limited to:

Complaint of Michael Mabee	Docket No. EL21–99–000.
PJM Interconnection, L.L.C.	Docket Nos. ER24–99–000, ER24–98–000.
N. Am. Electric Reliability Corp	Docket No. RR23–1–000.
Midcontinent Independent System Operator, Inc	Docket No. ER23–2977–000, ER22–1640–000.
Southwest Power Pool, Inc	Docket No. ER22–1697–000.

The conference will be open for the public to attend, and there is no fee for attendance. Information on this technical conference will also be posted on the Calendar of Events on the Commission's website, www.ferc.gov, prior to the event.

The conference will also be transcribed. Transcripts will be available for a fee from Ace Reporting, (202) 347–3700.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to accessibility@ferc.gov, call toll-free (866) 208–3372 (voice) or (202) 208–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

For more information about this technical conference, please contact Michael Gildea at Michael.Gildea@ferc.gov or (202) 502–8420. For information related to logistics, please contact Sarah McKinley at Sarah.Mckinley@ferc.gov or (202) 502–8368.

Dated: October 30, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

**2023 Reliability Technical Conference****Docket No. AD23–9–000****November 9, 2023****9:00 a.m.—5:00 p.m.****Morning Session: Bulk Power System
Reliability and the Evolving Grid**

9:00–9:15 a.m. Opening Remarks and Introductions

9:15–11:00 a.m. Morning Panel 1: State of Bulk Power System Reliability with a Focus on the Changing Resource Mix and Resource Adequacy (Commission Led)

The transformation of the Bulk-Power System is resulting in significant changes to the nation's power supply portfolio. These changes include increased penetrations of inverter-based resources, the increased use and importance of natural gas generating units for system balancing, and the participation of distributed energy resources. Ensuring the adequate supply of electric energy to service loads during

peak hours and during extreme weather conditions is also becoming more challenging in many regions of North America. This panel will explore the current state of grid reliability, and resource and energy adequacy, and efforts that can be undertaken to improve them.

The panel will begin with a presentation by NERC of the findings, conclusions, and recommendations from its annual State of Reliability report.

This panel may include a discussion of the following topics and questions:

(1) What should the Commission's top reliability priorities be for the next one to three years? What are potential actions the Commission could take to improve reliability regarding these priorities?

(2) What trends and risks identified in NERC's 2023 State of Reliability Report and the 2023 ERO Reliability Risk Priorities Report warrant the most attention and effort?

(3) Resource adequacy traditionally has been characterized in terms of planning reserve margin, which assesses the excess generating capacity required to meet peak load. NERC and industry have recently been discussing the notion of energy adequacy, which assesses whether there is sufficient energy—power over time—to meet customers' energy needs. Is energy adequacy a more appropriate metric to characterize reliability risks given the changing grid?

(4) NERC has highlighted essential reliability services (*e.g.*, frequency response, voltage control, and ramping capability) as core to maintaining

¹ New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric

Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of

the Affordable Clean Energy Rule, 88 FR 33,240 (proposed May 23, 2023) (to be codified at 40 CFR part 60).

reliable operation of the grid. How does the changing resource mix and characteristics of load affect the needed amount and provision of these essential reliability services? What actions, and by whom, are necessary to ensure adequate levels of these services?

(5) The electric grid is undergoing its most significant changes in a century. How should reliability oversight adapt to this change? Is the existing reliability oversight model flexible and agile enough to help lead the change?

(6) In recent years, reliance on natural gas as a fuel for electric generation has steadily increased. At the Commission's recommendation, the North American Energy Standards Board (NAESB) held forums between August 2022 and July 2023 to discuss the growing interdependence between the natural gas and electric sectors. NAESB issued recommendations to enhance market coordination to address challenges posed by this growing interdependence. Should the Commission prioritize pursuing any specific NAESB recommendation?

(7) Wildfires are no longer considered only a California or Western states issue for grid reliability, as drought conditions are expanding into additional regions including MISO, ERCOT and SPP creating further reliability impacts. What preparations have you taken (or are you considering) to address emerging wildfire and drought reliability risks in your region?

Panelists:

- *James Robb*, President & CEO, North American Electric Reliability Corporation
- *Nancy Bagot*, Senior Vice President, Electric Power Supply Association
- *Adrienne Collins*, Senior Vice President for Power Delivery, Southern Company, on behalf of Edison Electric Institute
- *Andrew Dressel*, Director of Risk, Compliance & Security, Guidehouse
- *Patricia Jagtiani*, Executive Vice President, National Gas Supply Association
- *Clair J. Moeller*, President & COO, Midcontinent Independent System Operator
- *Abram Klein*, Managing Partner, Appian Way Energy Partners
- *Robert W. Bradish*, Senior Vice President, Regulated Infrastructure Investment Planning, American Electric Power
- *Pam Sporborg*, Director of Transmission and Market Services, Portland General Electric

11:00–11:10 a.m. Break

11:10–12:30 p.m. Morning Panel 2: CIP Reliability Standards and the Evolving Grid (Commission Led)

Cybersecurity vulnerabilities and threats continue to evolve at a pace that tests utility cybersecurity programs. These quickly evolving threats present a challenge when assessing whether security controls, including the CIP Reliability Standards, adequately respond to the latest cyber risks. Most utilities and other electric sector stakeholders with mature cybersecurity programs implement an overarching cybersecurity program to oversee all aspects of their cybersecurity activities, including identification of the assets to be protected, staffing, technology selection and procurement, and compliance with the CIP Reliability Standards. However, ongoing and anticipated changes to the interconnected electric grid, such as the shift in the types of energy sources used to generate electricity may disrupt cyber programs. Utilities are digitizing their grids while managing an increasing number of grid-connected devices. As a consequence, utilities require more advanced tools to process and analyze large amounts of data for grid planning, operations, and security. These changes are also leaving uncertainty as to where these digital assets will fit into the cybersecurity regulatory framework and what tools can be used to effectively manage them or even what the future may bring as cyberattacks continue to grow in sophistication. This panel will discuss how the evolving grid affects cybersecurity, the CIP Reliability Standards and compliance, as well as best practices; the challenges of implementing appropriate oversight; and ways in which industry can address these challenges to improve its response to evolving vulnerabilities and threats to reduce the risk to the Bulk-Power System.

(1) Discuss the primary security issues facing electric utilities and describe the prioritization of resources and investment. What are some lessons learned and best practices?

(2) With regard to evolving cyber threats, describe how your cybersecurity program identifies and responds to such conditions. When responding, how do you assess the risk posed to your systems by the threats?

(3) Describe the benefits and challenges of implementing and maintaining a cybersecurity program as the resource mix continues to evolve. How does this program interact with actions to comply with the CIP Reliability Standards? How does such a program help to identify and prioritize

security concerns, and what actions are taken to address those concerns, including the application of best practices?

(4) Describe how supply chain security and the use of third-party systems, such as cloud services, are addressed in your risk assessments and implemented in the cybersecurity program. What concerns still exist related to supply chain and third-party systems?

(5) What additional actions can the Commission, NERC, and industry take to further protect the grid from security threats, both physical and cyber?

Panelists:

- *Scott Aaronson*, Vice President of Security and Preparedness, Edison Electric Institute
- *Jason Blake*, President & CEO, SERC
- *Manny Cancel*, Senior Vice President & CEO, Electricity Information Sharing and Analysis Center
- *Joseph Mosher*, Portfolio Manager, EDF Renewables
- *Rudolf Pawul*, Vice President of Information & Cyber Security Services, ISO New England
- *Maggy Powell*, Security Assurance for Power & Utility Sector, Amazon Web Services
- *Jonathan Tubb*, Director of Industrial Cyber Security for North America, Siemens Energy

12:30–1:15 p.m. Lunch Break

Afternoon Session: Reliability Implications of EPA's Proposed Rule on "Greenhouse Gas Standards and Guidelines for Fossil Fuel-Fired Power Plants"

On May 23, 2023 the EPA issued a notice of proposed rulemaking under section 111 of the Clean Air Act. Several comments submitted to EPA on the proposed rule indicated that implementation of the proposal would affect electric reliability. The afternoon panels will discuss the possible reliability impacts of the rule and possible mitigations.

1:15–2:15 p.m. Afternoon Panel 1: EPA Presentation of EPA Section 111 Proposed Rule (Commission Led)

Joseph Goffman, Principal Deputy Assistant Administrator for the Office of Air and Radiation (OAR), Environmental Protection Agency (EPA), accompanied by EPA staff, will provide an overview of the Section 111 Proposed Rule, and highlight specific issues relevant to the reliable operation of the electric system.

2:15–4:50 p.m. Afternoon Panels 2 and 3: Discussion of the Proposed Rule (Staff Led)

Afternoon Panels 2 and 3 will present perspectives on reliability aspects of the

proposed rule, followed by an opportunity for questions and answers. Panelists for both Panels 2 and 3 should be prepared to discuss the following topics and questions:

(1) Will the rule, if implemented as proposed, affect electric reliability? In what ways?

(2) What tools and processes should the Commission, other federal and state agencies, and industry consider in order to implement the proposed rule? What authority should the Commission and other federal and state agencies have in order to address potential reliability issues that could arise during implementation of the proposed rule?

(3) What existing processes for coordination will enable federal and state agencies, planning entities, and industry stakeholders to share ongoing developments relevant to the implementation of the proposed rule?

(4) What specific tools are currently available to agencies to consider impacts to retail consumers? Are there additional tools that should be developed to consider these issues?

2:15—3:30 p.m. Electric Industry Stakeholders Panel

Panelists:

- *Michael Bryson*, Senior Vice President of Operations, PJM Interconnection
- *Susan Tierney*, Senior Advisor, Analysis Group
- *Anthony Campbell*, President & CEO, East Kentucky Power Cooperative on behalf of NRECA and East Kentucky Power Cooperative
- *Emily Fisher*, Executive Vice President for Clean Energy & General Counsel, Edison Electric Institute
- *Ric O'Connell*, Executive Director, GridLab
- *Bobby Olsen*, Associate General Manager, SRP on behalf of Large Public Power Council
- *Michelle Bloodworth*, President & CEO, America's Power

3:30—3:40 p.m. Break

3:40—4:50 p.m. Regional, State, and Local Regulatory Entities Panel

Panelists:

- *Julie Fedorchak*, Commissioner, North Dakota Public Service Commission
- *Miles E. Keogh*, Executive Director, National Association of Clean Air Agencies
- *Mary Throne*, Chairman, Wyoming Public Service Commission and Western Interconnection Regional Advisory Board
- *Will Toor*, Executive Director, Colorado Energy Office
- *Jehmal Hudson*, Commissioner, Virginia State Corporation Commission

4:50—5:00 p.m. Closing Remarks

[FR Doc. 2023–24327 Filed 11–2–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–230–000]

New England Power and Light 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 New England Power and Light 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 November 20, 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 TTY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: October 30, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24322 Filed 11–2–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–233–000]

Progressive Light and Power LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Progressive Light and Power LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426,

in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 20, 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 TTY, (202) 502-8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as

interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502-6595 or OPP@ferc.gov.

Dated: October 30, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023-24321 Filed 11-2-23; 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 electric corporate filings:

Docket Numbers: EC24-13-000.

Applicants: High Banks Wind, LLC, Irish Creek Wind, LLC, Soldier Creek Wind, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of High Banks Wind, LLC, et al.

Filed Date: 10/27/23.

Accession Number: 20231027-5299.

Comment Date: 5 p.m. ET 11/17/23.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL24-6-000.

Applicants: Gregory and Beverly Swecker v. Federal Energy Regulatory Commission (FERC).

Description: Complaint of Gregory and Beverly Swecker v. Federal Energy Regulatory Commission.

Filed Date: 10/26/23.

Accession Number: 20231026-5200.

Comment Date: 5 p.m. ET 11/15/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10-2137-029; ER10-2131-029; ER10-2138-030; ER10-2139-030; ER10-2140-029; ER10-2141-029; ER14-2187-023; ER14-2799-020; ER15-103-014; ER18-140-013; ER21-258-006; ER22-2144-005; ER22-2474-001; ER22-2475-001.

Applicants: Top Hat Wind Energy Holdings LLC, Top Hat Wind Energy LLC, Invenergy Nelson Expansion LLC, Todd Solar LLC, Lackawanna Energy Center LLC, Invenergy Nelson LLC, Beech Ridge Energy Storage LLC, Grand Ridge Energy Storage LLC, Grand Ridge Energy V LLC, Grand Ridge Energy IV LLC, Grand Ridge Energy III LLC, Grand Ridge Energy II LLC, Grand Ridge Energy LLC, Beech Ridge Energy LLC.

Description: Notice of Change in Status of Beech Ridge Energy LLC, et al.

Filed Date: 10/30/23.

Accession Number: 20231030-5180.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER10-2529-007;

ER10-2534-008; ER22-1065-003;

ER22-2622-002; ER23-1595-002.

Applicants: LRE Energy Services, LLC, Chaparral Springs, LLC, Rabbitbrush Solar, LLC, Kumeyaay Wind LLC, Buena Vista Energy, LLC.

Description: Notice of Non-Material Change in Status of Buena Vista Energy, LLC, et al.

Filed Date: 10/27/23.

Accession Number: 20231027-5300.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER17-2088-003;

ER16-2035-003.

Applicants: Black Oak Wind, LLC, Apple Blossom Wind, LLC.

Description: Notice of Change in Status of Apple Blossom Wind, LLC, et al.

Filed Date: 10/30/23.

Accession Number: 20231030-5137.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER22-736-001.

Applicants: System Energy Resources, Inc.

Description: Refund Report: SERI Depreciation Refund Report (ER22-736) to be effective N/A.

Filed Date: 10/30/23.

Accession Number: 20231030-5097.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER22-2091-003;

ER10-2136-021; ER11-4044-031;

ER11-4046-030; ER21-2715-004;

ER21-2716-004.

Applicants: Fairbanks Solar Holdings LLC, Fairbanks Solar Energy Center LLC, Gratiot County Wind II LLC, Gratiot County Wind LLC, Invenergy Cannon Falls LLC, Calhoun Solar Energy LLC.

Description: Notice of Change in Status of Calhoun Solar Energy LLC, et al.

Filed Date: 10/30/23

Accession Number: 20231030-5171.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER23-1846-001.

Applicants: Boomtown Solar Energy LLC.

Description: Notice of Non-Material Change in Status of Boomtown Solar Energy LLC.

Filed Date: 10/30/23.

Accession Number: 20231030-5138.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER23-2541-001.

Applicants: Nevada Cogeneration Associates #2.

Description: Tariff Amendment: Supplement to MBR Application to be effective 10/1/2023.

Filed Date: 10/30/23.

Accession Number: 20231030–5000.
Comment Date: 5 p.m. ET 11/20/23.
Docket Numbers: ER23–2747–000.
Applicants: SCEF1 Fuel Cell, LLC.
Description: Supplement to August 31, 2023 SCEF1 Fuel Cell, LLC tariff filing.

Filed Date: 10/30/23.

Accession Number: 20231030–5057.

Comment Date: 5 p.m. ET 11/9/23.

Docket Numbers: ER24–37–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Annual Calculation of the Cost of New Entry value (“CONE”) for each Local Resource Zone (“LRZ”) in the MISO Region of Midcontinent Independent System Operator, Inc.

Filed Date: 10/5/23.

Accession Number: 20231005–5181.

Comment Date: 5 p.m. ET 11/6/23.

Docket Numbers: ER24–240–000.

Applicants: Southwest Power Pool, Inc.

Description: 205(d) Rate Filing: 3927R1 Diversion Wind Energy GIA to be effective 10/5/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5229.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24–241–000.

Applicants: PJM Interconnection, L.L.C.

Description: 205(d) Rate Filing: Amendment to WMPA, Service Agreement No. 5817; Queue No. AF2–085 to be effective 1/1/2024.

Filed Date: 10/30/23.

Accession Number: 20231030–5030.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER24–242–000.

Applicants: Southwest Power Pool, Inc.

Description: 205(d) Rate Filing: 3125R15 Basin Electric Power Cooperative NITSA and NOA to be effective 10/1/2023.

Filed Date: 10/30/23.

Accession Number: 20231030–5035.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER24–243–000.

Applicants: Southern California Edison Company.

Description: 205(d) Rate Filing: SCE 2024 TRBAA Update to be effective 1/1/2024.

Filed Date: 10/30/23.

Accession Number: 20231030–5084.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER24–244–000.

Applicants: Pacific Gas and Electric Company.

Description: 205(d) Rate Filing: Q3 2023 Quarterly Filing of City and County of San Francisco’s WDT SA (SA 275) to be effective 9/30/2023.

Filed Date: 10/30/23.

Accession Number: 20231030–5094.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER24–245–000.

Applicants: Duke Energy Carolinas, LLC.

Description: 205(d) Rate Filing: DEC–SEPA NITSA SA No. 127 to be effective 1/1/2024.

Filed Date: 10/30/23.

Accession Number: 20231030–5098.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER24–246–000.

Applicants: American Electric Power Service Corporation, PJM Interconnection, L.L.C.

Description: Compliance filing: American Electric Power Service Corporation submits tariff filing per 35: AEP submits Informational Filing about Att. 1 of ILDSA, SA No. 1336 to be effective N/A.

Filed Date: 10/30/23.

Accession Number: 20231030–5132.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER24–247–000.

Applicants: Midcontinent Independent System Operator, Inc., Montana-Dakota Utilities Co.

Description: 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 2023–10–30 SA 2908 MDU-Basin Electric 1st Rev FSA to be effective 1/1/2024.

Filed Date: 10/30/23.

Accession Number: 20231030–5152.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER24–248–000.

Applicants: The Potomac Edison Company, PJM Interconnection, L.L.C.

Description: 205(d) Rate Filing: The Potomac Edison Company submits tariff filing per 35.13(a)(2)(iii): Potomac Edison submits Borderline Customer Agreement, Service Agreement No. 6646 to be effective 6/1/2010.

Filed Date: 10/30/23.

Accession Number: 20231030–5170.

Comment Date: 5 pm ET 11/20/23.

Docket Numbers: ER24–249–000.

Applicants: Southwest Power Pool, Inc.

Description: Notice of Cancellation of Generator Interconnection Agreement of Southwest Power Pool, Inc.

Filed Date: 10/30/23.

Accession Number: 20231030–5181.

Comment Date: 5 p.m. ET 11/20/23.

Docket Numbers: ER24–250–000.

Applicants: PJM Interconnection, L.L.C.

Description: 205(d) Rate Filing: Original NSA, Service Agreement No. 7129; Queue No. AE2–206/AF1–078 to be effective 12/30/2023.

Filed Date: 10/30/23.

Accession Number: 20231030–5188.

Comment Date: 5 p.m. ET 11/20/23.

Take notice that the Commission received the following electric securities filings :

Docket Numbers: ES24–11–000; ES24–12–000; ES24–13–000; ES24–14–000; ES24–15–000; ES24–16–000.

Applicants: AEP Appalachian Transmission Company, Inc., AEP Indiana Michigan Transmission Company, Inc., AEP Kentucky Transmission Company, Inc., AEP Oklahoma Transmission company, Inc., AEP Southwestern Transmission Company, Inc., AEP West Virginia Transmission Company, Inc.

Description: Certificate of Notification of Issuance under Section 204(e) of Short-Term Debt of AEP Appalachian Transmission Company, Inc. et. al.

Filed Date: 10/27/23.

Accession Number: 20231027–5292.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ES24–17–000.

Applicants: Portland General Electric Company.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Portland General Electric Company.

Filed Date: 10/30/23.

Accession Number: 20231030–5142.

Comment Date: 5 p.m. ET 11/20/23.

The filings are accessible in the Commission’s eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission’s Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission’s Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as

interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502-6595 or *OPP@ferc.gov*.

Dated: October 30, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-24326 Filed 11-2-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER24-218-000.

Applicants: Calpine Bethlehem, LLC, Calpine Mid-Atlantic Generation, LLC, Calpine Mid Merit, LLC, Calpine Mid-Merit II, LLC, Calpine New Jersey Generation, LLC, Zion Energy LLC.

Description: Calpine Reactive Suppliers One-Time Limited Prospective Waiver Request of the 90-day prior notice requirement in Schedule 2 to the PJM OATT, allowing Information Filing submissions less than 90 days prior to transaction consummation.

Filed Date: 10/19/23.

Accession Number: 20231019-5197.

Comment Date: 5 p.m. ET 11/9/23.

Docket Numbers: ER24-219-000.

Applicants: Pacific Gas and Electric Company.

Description: Petition for Limited Waiver of Pacific Gas and Electric Company.

Filed Date: 10/24/23.

Accession Number: 20231024-5160.

Comment Date: 5 p.m. ET 11/14/23.

Docket Numbers: ER24-221-000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1883R13 Evergy Kansas Central, Inc. NITSA NOA to be effective 10/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5026.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-222-000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1895R13 Evergy Kansas Central, Inc. NITSA NOA to be effective 10/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5035.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-223-000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: SCE 2024 RSBA Update to be effective 1/1/2024.

Filed Date: 10/27/23.

Accession Number: 20231027-5063.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-224-000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2023-10-27 MISO TOs revisions to Attachment MM to be effective 1/1/2024.

Filed Date: 10/27/23.

Accession Number: 20231027-5071.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-225-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7123; Queue No. AF2-192 to be effective 9/27/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5083.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-226-000.

Applicants: Evergy Missouri West, Inc., Evergy Metro, Inc., Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Evergy Missouri West, Inc. submits tariff filing per 35.13(a)(2)(iii): Revisions to Formula Rate Template for the Evergy Companies to be effective 12/27/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5090.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-227-000.

Applicants: RPC Power, LLC.

Description: Baseline eTariff Filing: Market-Based Rate Tariff Application to be effective 10/28/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5099.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-228-000.

Applicants: South Cheyenne Solar, LLC.

Description: Baseline eTariff Filing: Application for MBR Authority and Initial Baseline Tariff Filing to be effective 12/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5102.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-228-001.

Applicants: South Cheyenne Solar, LLC.

Description: Tariff Amendment: Amendment to Application for MBR Authority and Initial Baseline Tariff Filing to be effective 12/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5112.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-229-000

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii): Amendment of Americus Solar (Americus Solar II) LGIA to be effective 10/13/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5103.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-230-000.

Applicants: New England Power and Light LLC.

Description: Baseline eTariff Filing: Market-Based Rate Tariff Application to be effective 10/28/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5118.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-231-000.

Applicants: West Penn Power Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: West Penn Power Company submits tariff filing per 35.13(a)(2)(iii): West Penn Power submits Revisions to OATT, Att. H-11A to be effective 10/30/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5120.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-232-000.

Applicants: New York Transco, LLC, New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: New York Transco, LLC submits tariff filing per 35.13(a)(2)(iii): NY Transco 205: Proposed Revisions re: Propel NY Cost Allocation and Containment to be effective 12/26/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5125.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-233-000.

Applicants: Progressive Light & Power LLC.

Description: Baseline eTariff Filing: Market-Based Rate Tariff Application to be effective 10/28/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5128.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-234-000.

Applicants: Black Hills Colorado Electric, LLC.

Description: Tariff Amendment: Notice of Cancellation of Rate Schedule No. 9 to be effective 1/1/2024.

Filed Date: 10/27/23.

Accession Number: 20231027-5130.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24-235-000

Applicants: Metropolitan Edison Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Metropolitan Edison Company submits

tariff filing per 35.13(a)(2)(iii): Met-Ed Amends 10 ECSAs (5435 6048 6150 6292 6297 6300 6301 6302 6336 6351) to be effective 12/31/9998.

Filed Date: 10/27/23.

Accession Number: 20231027–5136.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24–236–000.

Applicants: Midcontinent

Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2023–10–27 Att X NERC Facility Interconnection Studies to be effective 1/1/2024.

Filed Date: 10/27/23.

Accession Number: 20231027–5139

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24–237–000.

Applicants: Josco Energy Corp.

Description: Tariff Amendment: Notice of Cancellation of MBR Tariff to be effective 10/28/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5163.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24–238–000.

Applicants: Josco Energy USA, LLC.

Description: Tariff Amendment: Notice of Cancellation for MBR Tariff to be effective 10/28/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5166.

Comment Date: 5 p.m. ET 11/17/23.

Docket Numbers: ER24–239–000.

Applicants: Tyr Energy, LLC.

Description: Compliance filing: Tyr Energy Seller Category Status Change to be effective 12/27/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5220.

Comment Date: 5 p.m. ET 11/17/23.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES24–10–000.

Applicants: NorthWestern Corporation.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of NorthWestern Corporation.

Filed Date: 10/25/23.

Accession Number: 20231025–5290.

Comment Date: 5 p.m. ET 11/15/23.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be

considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502–6595 or OPP@ferc.gov.

Dated: October 27, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24262 Filed 11–2–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP22–512–001]

WBI Energy Transmission, Inc.; Notice of Request for Extension of Time

Take notice that on October 25, 2023, WBI Energy Transmission, Inc. (WBI Energy) requested that the Federal Energy Regulatory Commission (Commission) grant an extension of time (2023 Extension of Time Request), until June 1, 2024, to construct to construct and operate a new compressor station, tie-in facilities including pipeline, and associated measurement facilities on its Line Section 27 Expansion Project (Project) to provide incremental natural gas firm transportation service in McKenzie County, North Dakota authorized by the Commission in Docket Nos. CP82–487–000, et al.¹

In its 2023 Extension of Time Request, WBI Energy states that it will not complete all work associated with the project by the November 21, 2023, deadline. Accordingly, WBI Energy requests an extension of time until June 1, 2024, to complete construction of project facilities.

¹ WBI Energy Transmission et al., 30 FERC ¶ 61,143, (1985).

This notice establishes a 15-calendar day intervention and comment period deadline. Any person wishing to comment on WBI Energy's request for an extension of time may do so. No reply comments or answers will be considered. If you wish to obtain legal status by becoming a party to the proceedings for this request, you should, on or before the comment date stated below, file a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10).

As a matter of practice, the Commission itself generally acts on requests for extensions of time to complete construction for Natural Gas Act facilities when such requests are contested before order issuance. For those extension requests that are contested,² the Commission will aim to issue an order acting on the request within 45 days.³ The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension.⁴ The Commission will not consider arguments that re-litigate the issuance of the certificate order, including whether the Commission properly found the project to be in the public convenience and necessity and whether the Commission's environmental analysis for the certificate complied with the National Environmental Policy Act.⁵ At the time a pipeline requests an extension of time, orders on certificates of public convenience and necessity are final and the Commission will not re-litigate their issuance.⁶ The OEP Director, or his or her designee, will act on all of those extension requests that are uncontested.

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

² Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 CFR 385.2201(c)(1) (2022).

³ *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, at P 40 (2020).

⁴ *Id.* at P 40.

⁵ Similarly, the Commission will not re-litigate the issuance of an NGA section 3 authorization, including whether a proposed project is not inconsistent with the public interest and whether the Commission's environmental analysis for the permit order complied with NEPA.

⁶ *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, at P 40 (2020).

field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room. For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and three copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on, November 14, 2023.

Dated: October 30, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023-24317 Filed 11-2-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24-201-000]

Karbene Energy 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 Karbene Energy 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 November 16, 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 TTY, (202) 502-8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502-6595 or OPP@ferc.gov.

Dated: October 27, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-24258 Filed 11-2-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas and Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP24-72-000.

Applicants: El Paso Natural Gas Company, L.L.C.

Description: 4(d) Rate Filing: Negotiated Rate Agreements Update (Pioneer Nov 2023) to be effective 11/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5131.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24-73-000.

Applicants: Cheniere Creole Trail Pipeline, L.P.

Description: Compliance filing: CTPL Transportation Retainage Adjustment and Housekeeping Changes to be effective 12/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5149.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24-74-000.

Applicants: Cheniere Corpus Christi Pipeline, LP.

Description: Compliance filing: CCPL Address Change Filing to be effective 12/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5152.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24-75-000.

Applicants: El Paso Natural Gas Company, L.L.C.

Description: 4(d) Rate Filing: Negotiated Rate Agmts Update (Hartree Nov 23) to be effective 11/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5171.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24-76-000.

Applicants: Midship Pipeline Company, LLC.

Description: Compliance filing: Midship Pipeline Change of Address Filing to be effective 12/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027-5183.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24-77-000.

Applicants: Tennessee Gas Pipeline Company, L.L.C.

Description: 4(d) Rate Filing: Negotiated Rate Agreements—Various Shippers Nov 2023 to be effective 11/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5215.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: RP24–78–000.

Applicants: Southeast Supply Header, LLC.

Description: 4(d) Rate Filing:

Negotiated Rate—FPL 840192 to be effective 11/1/2023.

Filed Date: 10/30/23.

Accession Number: 20231030–5073.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: RP24–79–000.

Applicants: Stagecoach Pipeline & Storage Company LLC.

Description: 4(d) Rate Filing:

Negotiated Rate Agreement Filing—National Fuel to be effective 11/1/2023.

Filed Date: 10/30/23.

Accession Number: 20231030–5089.

Comment Date: 5 p.m. ET 11/13/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: PR23–40–001.

Applicants: Regency Intrastate Gas LP.

Description: 284.123 Rate Filing: Regency Intrastate Gas LP Revised Supplemental SOC to be effective 11/1/2023.

Filed Date: 10/27/23.

Accession Number: 20231027–5108.

Comment Date: 5 p.m. ET 11/9/23.

Docket Numbers: RP23–1035–000.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: Report Filing: Regional Energy Access Expansion Rates—Notification on In-Service to be effective N/A.

Filed Date: 10/27/23.

Accession Number: 20231027–5173.

Comment Date: 5 p.m. ET 11/8/23.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings

can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>.

For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: October 30, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24325 Filed 11–2–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–227–000]

RPC Power, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of RPC Power, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 20, 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, (866) 208–3676 or TTY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: October 30, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–24324 Filed 11–2–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2012-0103; FRL 10814-01-OAR]

Proposed Information Collection Request Renewal; Comment Request; Clean School Bus (CSB) Rebate Program; EPA ICR No. 2461.05, OMB Control No. 2060-0686 (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR) renewal, "Clean School Bus (CSB) Rebate Program" (EPA ICR No. 2461.05, OMB Control No. 260-0686 (Renewal)) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. An Emergency ICR No. 2780.01 was approved by OMB in September 2023 that included additional data necessary to adequately review and administer the CSB Rebate Program. This ICR renewal consolidates all components of the CSB Rebate Program collection and renews the existing ICR No. 2461.04, which is currently approved through August 31, 2025. 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.

DATES: Comments must be submitted on or before January 2, 2024.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA-HQ-OAR-2012-0103, online using www.regulations.gov (our preferred method), by email to a-and-r-docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT:

Timothy Thomas, Office of Transportation and Air Quality, (6406A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW,

Washington, DC 20460; telephone number: 734-214-4465; email address: thomas.tim.l@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents that explain in detail the information that EPA will be collecting are available in the public docket for this ICR renewal. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. The ICR renewal package will be submitted to OMB for review and approval.

Abstract:

This supporting statement is for the Information Collection Request (ICR) renewal for the Clean School Bus (CSB) Rebate Program. The CSB Rebate Program currently collects information under an existing ICR; namely the Diesel Emissions Reduction Act (DERA) and Clean School Bus Rebate Program ICR No. 2060-0686. The Environmental Protection Agency (EPA) currently uses ICR No. 2060-0686 to collect information for the CSB Rebate Program to ensure its successful administration and management. An Emergency ICR No. 2780.01 was approved by OMB in September 2023 that included additional data necessary to adequately review and administer the CSB Rebate Program. This ICR renewal consolidates all components of the CSB Rebate Program collection.

School buses collectively travel over four billion miles each year. They provide safe transportation to and from

school for more than 25 million American children every day. While new buses meet the EPA's tighter emission standards, most school buses on the road emit pollutants, including nitrogen oxides (NO_x) and particulate matter (PM), in diesel exhaust. These pollutants can contribute to poor air quality and negatively impact human health, especially for children, as well as for bus drivers, other school staff, and other community members. The CSB Rebate Program funds the replacement of existing school buses with cleaner buses, the operation of which result in better air quality throughout the communities in which they operate.

EPA uses approved procedures and forms to collect necessary information to operate the CSB Rebate Program and has been providing these rebates since 2022. For each rebate program, EPA utilizes three online forms for the three phases of the rebate lifecycle: (1) Application Form, for eligible entities to apply to a new rebate program, (2) Payment Request Form, for selectees to submit order documentation and receive funds, and (3) Close Out Form, for selectees to document completion of the rebate-eligible activity. In Fall 2023, EPA launched the 2023 CSB Rebate Application for applicants, and the 2022 CSB Rebate Close Out Form for existing 2022 program participants; EPA is currently preparing to launch the 2023 CSB Rebate Payment Request Form in early Spring of 2024. EPA will subsequently launch the 2023 CSB Rebate Close Out Form, as well as each rebate form for any future rebate programs (e.g., 2024 CSB Rebate Program). The data collected in these forms are needed to operate the rebate program as authorized by Congress under the CSB statute.

Respondents/affected entities: Entities potentially affected by this action are those interested in applying for a rebate under EPA's CSB Program and include but are not limited to the following NAICS (North American Industry Classification System) codes: 23 Construction; 482 Rail Transportation; 483 Water Transportation; 484 Truck Transportation; 485 Transit and Ground Passenger Transportation; 4854 School and Employee Bus Transportation; 61111 Elementary and Secondary Schools; 61131 Colleges, Universities, and Professional Schools; 9211 Executive, Legislative, and Other Government Support; and 9221 Justice, Public Order, and Safety Activities.

Respondent's obligation to respond: Mandatory for CSB rebate recipients.

Estimated number of respondents: 2,400 applicants annually.

Frequency of response: Once per year.

Total estimated burden: 19,763 hours for applicants annually and 59,289 hours for applicants over the ICR period. Burden is defined at 5 CFR 1320.03(b)

Changes in the estimates: There is an increase of 2,476 hours burden hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This change is due to minor decreases to the respondent count for the Payment Request Form and Close Out Form, offset by increases to the respondents' time burden for all forms to more accurately reflect the time required for program participants to complete the forms given changes in program requirements and changes to the amount of time given to selectees to edit their forms.

Karl Simon,

Director, Transportation and Climate Division, Office of Air and Radiation.

[FR Doc. 2023-24292 Filed 11-2-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-11464-01-OA]

Request for Nominations of Candidates for the Clean Air Scientific Advisory Committee (CASAC) Nitrogen Oxides (NO_x) Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office requests public nominations of scientific experts for the CASAC NO_x Panel. This panel will provide advice through the chartered CASAC on the scientific and technical bases for the agency's review of the Primary National Ambient Air Quality Standards (NAAQS) for nitrogen oxides.

DATES: Nominations should be submitted by November 24, 2023 per the instructions below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding this Notice and Request for Nominations may contact Mr. Aaron Yeow, Designated Federal Officer (DFO), SAB Staff Office, by telephone at (202) 564-2050 or via email at yeow.aaron@epa.gov. General information concerning the CASAC can be found on the CASAC website: <https://casac.epa.gov>.

SUPPLEMENTARY INFORMATION:

Background: The CASAC was established pursuant to the Clean Air Act (CAA) Amendments of 1977,

codified at 42 U.S.C. 7409(d)(2), to review air quality criteria and NAAQS and recommend to the EPA Administrator any new NAAQS and revisions of existing criteria and NAAQS as may be appropriate. The CASAC shall also: advise the EPA Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised NAAQS; describe the research efforts necessary to provide the required information; advise the EPA Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity; and advise the EPA Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such NAAQS. As amended, 5 U.S.C. app. section 109(d)(1) of the Clean Air Act (CAA) requires that EPA carry out a periodic review and revision, as appropriate, of the air quality criteria and the NAAQS for the six "criteria" air pollutants, including nitrogen oxides.

The CASAC is a Federal advisory committee chartered under the Federal Advisory Committee Act (FACA). As a Federal Advisory Committee, the CASAC conducts business in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. 10) and related regulations. The CASAC and the CASAC NO_x Panel will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Request for Nominations: The SAB Staff Office is seeking nominations of nationally and internationally recognized scientists with demonstrated expertise and research in the field of air pollution related to criteria pollutants. For the CASAC NO_x Panel, experts are being sought in the following fields, especially with respect to NO_x: atmospheric science, human exposure, dosimetry, toxicology, epidemiology, medicine, public health, biostatistics, and risk assessment.

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate qualified individuals in the areas of expertise described above. Individuals may self-nominate. Nominations should be submitted in electronic format (preferred) using the online nomination form under "Public Input on Membership" on the CASAC web page at <https://casac.epa.gov>. To be considered, all nominations should include the information requested below. EPA values and welcomes diversity. All qualified candidates are

encouraged to apply regardless of sex, race, disability or ethnicity. Nominations should be submitted by November 24, 2023.

The following information should be provided on the nomination form: contact information for the person making the nomination; contact information for the nominee; and the disciplinary and specific areas of expertise of the nominee. Nominees will be contacted by the SABSO and will be asked to provide a recent *curriculum vitae* and a narrative biographical summary that includes current position, educational background, research activities, sources of research funding for the last two years, and recent service on other national advisory committees or national professional organizations. Persons having questions about the nomination process, or the public comment process described below, or who are unable to submit nominations through the CASAC website, should contact the DFO, as identified above. The names and biosketches of qualified nominees identified by respondents to this **Federal Register** notice, and additional experts identified by the SAB Staff Office, will be posted in a List of Candidates on the CASAC website at <https://casac.epa.gov>. Public comments on each List of Candidates will be accepted for 21 days from the date the list is posted. The public will be requested to provide relevant information or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates.

For the EPA SAB Staff Office, a balanced review panel includes candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. In forming this expert panel, the SAB Staff Office will consider public comments on the List of Candidates, information provided by the candidates themselves, and background information independently gathered by the SAB Staff Office. Selection criteria to be used for panel membership include: (a) scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) absence of an appearance of a lack of impartiality; (e) skills working in committees, subcommittees and advisory panels; and (f) for the panel as a whole, diversity of expertise and viewpoints.

Candidates may be asked to submit the “Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency” (EPA Form 3110–48). This confidential form is required for Special Government Employees (SGEs) and allows EPA to determine whether there is a statutory conflict between that person’s public responsibilities (which includes membership on an EPA federal advisory committee) as an SGE and private interests and activities, or the appearance of a loss of impartiality, as defined by Federal regulation. The form may be viewed and downloaded through the “Ethics Requirements for Advisors” link on the CASAC home page at <https://casac.epa.gov>. This form should not be submitted as part of a nomination.

V. Khanna Johnston,

Deputy Director, Science Advisory Board Staff Office.

[FR Doc. 2023–24368 Filed 11–2–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–093]

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 October 23, 2023 10 a.m. EST Through October 30, 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. 20230149, Final, NNSA, CA, Final Site-Wide Environmental Impact Statement for Continued Operation of The Lawrence Livermore National Laboratory, Review Period Ends: 12/04/2023, Contact: Mr. Tom Grim, NEPA Document Manager 833–778–0508.

EIS No. 20230150, Final, BR, CA, Sites Reservoir Project Final Environmental Impact Report/Environmental Impact Statement, Review Period Ends: 12/04/2023, Contact: Allison Jacobson 916–978–5075.

EIS No. 20230151, Final, FHWA, AR, Walnut Ridge—Missouri State Line (Future I–57), Contact: Randal Looney 501–324–6430.

Under 23 U.S.C. 139(n)(2), FHWA 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. 20230152, Final, NMFS, NJ, ADOPTION—Ocean Wind 1 Offshore Wind Farm, Contact: Kelsey Potlock 301–427–8410.

The National Marine Fisheries Service (NMFS) has adopted the Bureau of Ocean Energy Management’s Final EIS No. 20230070 filed 05/22/2023 with the Environmental Protection Agency. The NMFS was a cooperating agency on this project. Therefore, republication of the document is not necessary under Section 1506.3(b)(2) of the CEQ regulations.

EIS No. 20230153, Final, USDA, WA, ADOPTION—Odessa Subarea Special Study Columbia Basin Project To Replace Groundwater Currently Used for Irrigation Grant Adams Walla Walla and Franklin Counties WA, Review Period Ends: 12/11/2023, Contact: Jules Riley 539–323–2941.

The Department of Agriculture (USDA) has adopted the Bureau of Reclamation’s Final EIS No. 20120286 filed 08/28/2012 with the Environmental Protection Agency. The USDA was not a cooperating agency on this project. Therefore, republication of the document is necessary under Section 1506.3(b)(1) of the CEQ regulations.

Amended Notice

EIS No. 20230113, Draft, USACE, ND, Dakota Access Pipeline Lake Oahe Crossing Project, Comment Period Ends: 12/13/2023, Contact: Brent Cossette 402–995–2716.

Revision to FR Notice Published 09/08/2023; Extending the Comment Period from 11/13/2023 to 12/13/2023.

Dated: October 31, 2023.

Nancy Abrams,

Associate Director, Office of Federal Activities.

[FR Doc. 2023–24320 Filed 11–2–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2013–0118; FRL–11429–01–OAR]

Proposed Information Collection Request; Comment Request; Control of Evaporative Emissions From New and In-Use Portable Gasoline Containers (Renewal), ICR 2213.07, OMB 2060–0597

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request (ICR), “Control of Evaporative Emissions from New and In-Use Portable Gasoline Containers (Renewal)”, ICR 2213.07, OMB 2060–0597 to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comment on specific aspects of the proposed information collection request as described below. This notice is a proposed extension of the Portable Fuel Container ICR, which is currently approved through January 31, 2024. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before January 2, 2024.

ADDRESSES: Submit your comments, referencing the Docket ID No. EPA–HQ–OAR–2013–0118, to the EPA: online using www.regulations.gov (our preferred method), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA’s policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Philip Carlson, Compliance Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 2000 Traverwood, Ann Arbor, Michigan 48105; telephone number: 734–214–4270; fax number 734–214–4869; email address: Carlson.Philip@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting will be available in the public docket, EPA-HQ-OAR-2013-0118, for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: EPA is required under Section 183(e) of the Clean Air Act to regulate Volatile Organic Compound (VOC) emissions from the use of consumer and commercial products. Under regulations promulgated on February 26, 2007 (72 FR 8428) manufacturers of new portable gasoline containers are required to obtain certificates of conformity with the Clean Air Act, effective January 1, 2009. This ICR covers the burdens associated with this certification process. EPA reviews information submitted in a manufacturer's application for certification to determine if the gasoline container design conforms to applicable regulatory requirements and to verify that the required testing has been performed. The certificate holder is required to keep records on the testing and collect and keep warranty and

defect information for annual reporting on in-use performance of their products. The respondent must also retain records on the units produced, apply serial numbers to individual containers, and track the serial numbers to their certificates of conformity. Any information submitted for which a claim of confidentiality is made is safeguarded according to EPA regulations at 40 CFR 2.201 *et seq.*

Form Numbers: None.

Respondents/affected entities: manufacturers of new portable gasoline containers from 0.25 to 10.0 gallons in capacity.

Respondent's obligation to respond: mandatory 40 CFR part 59, subpart F.

Estimated number of respondents: 9 (total).

Frequency of response: yearly for warranty reports; at least once every five years for certification and certificate renewals.

Total estimated burden: 240 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$29,855.51 (per year), which includes \$21,613.67 annualized capital and operation & maintenance costs.

Changes in Estimates: There is an increase of 33.1 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase of the burden and cost estimates is due to a change in the estimated cost of labor and additional testing requirements for new portable fuel container families to comply with the requirements for evaporative testing promulgated in 40 CFR part 59.

Byron Bunker,

Director, Compliance Division, Office of Transportation and Air Quality, US Environmental Protection Agency.

[FR Doc. 2023-24369 Filed 11-2-23; 8:45 am]

BILLING CODE 6560-50-P

FARM CREDIT ADMINISTRATION**Sunshine Act Meetings**

TIME AND DATE: 10 a.m., Thursday, November 9, 2023.

PLACE: You may observe this meeting in person at 1501 Farm Credit Drive, McLean, Virginia 22102-5090, or virtually. If you would like to observe, at least 24 hours in advance, visit [FCA.gov](https://www.fca.gov), select "Newsroom," then select "Events." From there, access the linked "Instructions for board meeting visitors" and complete the described registration process.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: The following matters will be considered:

- Approval of Minutes for October 12, 2023
- Office of Equal Employment Opportunity and Inclusion Report Concerning Native Americans and Veterans
- Conservators and Receivers Final Rule

CONTACT PERSON FOR MORE INFORMATION:

If you need more information or assistance for accessibility reasons, or have questions, contact Ashley Waldron, Secretary to the Board. Telephone: 703-883-4009. TTY: 703-883-4056.

Ashley Waldron,

Secretary to the Board.

[FR Doc. 2023-24421 Filed 11-1-23; 11:15 am]

BILLING CODE 6705-01-P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**Sunshine Act Meetings**

TIME AND DATE: 10 a.m., Tuesday, November 14, 2023.

PLACE: The Richard V. Backley Hearing Room, Room 511, 1331 Pennsylvania Avenue NW, Suite 504 North, Washington, DC 20004 (enter from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor on behalf of Hargis v. Vulcan Construction Materials, LLC*, Docket Nos. SE 2021-0163, et al. (Issues include whether the Judge erred in terminating economic temporary reinstatement on the date he issued the merits decision; (2) whether the Judge erred in dismissing the Complainant's discrimination case on the basis that there was no improper discriminatory motive; and (3) whether the Judge erred in finding that the operator failed to report an occupational injury, in violation of 30 CFR 50.20(a).)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO:

Emogene Johnson (202) 434-9935/(202) 708-9300 for TDD Relay/1-800-877-8339 for toll free.

PHONE NUMBER FOR LISTENING TO

MEETING: 1-(866) 236-7472; Passcode: 678-100.

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

Dated: November 1, 2023.

Michael A. McCord,

General Counsel.

[FR Doc. 2023–24512 Filed 11–1–23; 4:15 pm]

BILLING CODE 6735–01–P

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–24340 Filed 11–2–23; 8:45 am]

BILLING CODE P

Approved: October 30, 2023.

Shelley K. Finlayson,

Acting Director, U.S. Office of Government Ethics.

[FR Doc. 2023–24349 Filed 11–2–23; 8:45 am]

BILLING CODE 6345–03–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than November 20, 2023.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414. Comments can also be sent electronically to Comments.applications@chi.frb.org:

1. *The Orville A. Rehder 2nd Revocable Living Trust, Orville A. Rehder as trustee, Jeffrey A. Rehder, and Steve C. Rehder, all of Hawarden, Iowa*; as a group acting in concert to acquire voting shares of First State Associates, Inc., Hawarden, Iowa, and thereby indirectly acquire voting shares of Rivers Edge Bank, Marion, South Dakota.

OFFICE OF GOVERNMENT ETHICS

OGE Senior Executive Service; Performance Review Board

AGENCY: Office of Government Ethics (OGE).

ACTION: Notice.

SUMMARY: Notice is hereby given of the membership of the OGE Senior Executive Service (SES) Performance Review Board.

DATES: *Applicable date:* November 3, 2023.

FOR FURTHER INFORMATION CONTACT:

Sidney K. Williams, Human Resources Attorney-Advisor, Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005–3917; Telephone: 202–482–9209.

SUPPLEMENTARY INFORMATION: 5 U.S.C. 4314(c) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management at 5 CFR part 430, subpart C and § 430.310 thereof in particular, one or more Senior Executive Service performance review boards. As a small executive branch agency, OGE has just one board. In order to ensure an adequate level of staffing and to avoid a constant series of recusals, the designated members of OGE's SES Performance Review Board are being drawn, as in the past, in large measure from the ranks of other executive branch agencies. The board shall review and evaluate the initial appraisal of each OGE senior executive's performance by his or her supervisor, along with any recommendations in each instance to the appointing authority relative to the performance of the senior executive. This notice updates the membership of OGE's SES Performance Review Board as it was most recently published at 88 FR 543134 (July 6, 2023).

The SES Performance Review Board of the Office of Government Ethics is composed of the following officials: Elizabeth Fischmann, Designated Agency Ethics Official, National Credit Union Association; Sean Dent, Senior Deputy General Counsel, Federal Housing Finance Agency; and Peter J. Constantine, Associate Solicitor for Legal Counsel, Office of the Solicitor, Department of Labor.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–24–23DT]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled “Reporting of the Essentials for Childhood (EfC): Preventing Adverse Childhood Experiences through Data to Action Program” to the Office of Management and Budget (OMB) for review and approval. CDC previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on March 31, 2023 to obtain comments from the public and affected agencies. CDC received one comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639-7570. 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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395-5806. Provide written comments within 30 days of notice publication.

Proposed Project

Reporting of the Essentials for Childhood (EfC): Preventing Adverse Childhood Experiences through Data to Action Program—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The purpose of the information collection effort is to collect Essentials for Childhood (EfC) program recipient data related to surveillance, implementation, program evaluation, and performance monitoring. This data collection is necessary to ensure that programs are progressing toward achievement of their stated goals and objectives, as well as consistently demonstrating efficient and appropriate use of federal funds. CDC will use the information collected to further understand the facilitators, barriers, and critical factors to implementing specific violence prevention strategies and conducting related program evaluation activities. Data collected will also be

used to inform CDC’s training and technical assistance, program improvement, and the development of future funding opportunities. Data collection is designed to address the following key program evaluation questions:

- To what extent have recipients accomplished the short-term and intermediate-term outcomes outlined in the Logic Model?
- To what extent do recipients effectively implement Adverse Childhood Experience (ACE) prevention strategies during the period of performance?
- To what extent have recipients leveraged multi-sector partnerships and resources among state agencies (additional funding at the local level) and other sectors to prevent ACEs, including forming sustainable systems and partnerships, and realigning/focusing/mobilizing resources to prevent ACEs?
- In what ways has the recipient built or enhanced their state-level surveillance system to monitor ACEs, PCEs, and social determinants of health?
- How has the recipient integrated and addressed racial and health inequities and social determinants of health in preventing ACEs?
- To what extent have recipients enhanced their statewide action plan to implement complementary ACEs prevention strategies (additional funding for implementation at the local level)?
- To what extent have funded recipients enhanced their ability to use ACEs and PCEs surveillance and evaluation data to inform prevention strategy allocation?
- To what extent have recipients enhanced their ability to disseminate and use data to inform partner, policy, or other action?
- To what extent have recipients seen a sustainable increase in capacity and

activities related to routine monitoring of ACEs and PCEs data among youth?

- To what extent have recipients seen a sustainable increase in capacity and activities related to routine monitoring of near real-time surveillance to monitor indicators of ACEs?
- To what extent have recipients demonstrated ability to link ACEs and PCEs data to those on the social determinants of health, and utilize these data to inform prevention strategies (if applicable)?
- What is the reach/exposure to the ACEs prevention program efforts?
- Are ACEs prevention strategies reaching populations at highest risk for ACEs?
- To what extent have recipients demonstrated use of surveillance and evaluation data to inform prevention strategy allocation and implementation to improve health equity?
- What has been the reach/exposure of ACEs and PCEs data dissemination efforts?

Information will be collected annually from recipients through the DVP Partners Portal, a web-based data collection system. The DVP Partners Portal allows recipients to fulfill their annual reporting obligations efficiently by employing user-friendly, easily accessible web-based instruments to collect necessary information for both progress reports and continuation applications. Because information from previous reports will be carried over and pre-populated for the next annual reporting, recipients will only need to enter changes, provide progress updates, and add any new information after the first year of reporting, which will help to reduce recipient burden.

CDC requests OMB approval for an estimated 168 annual burden hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Essentials For Childhood Grantees	Annual Performance Report (APR)—Project Leads.	12	1	10
	Key Informant Interview—Principal Investigators.	12	1	1
	Key Informant Interview—Principal Investigator/Implementor.	12	1	1
	Surveillance Capacity Assessment—Surveillance Lead.	12	1	30/60
	Implementation Capacity Assessment	12	1	30/60
	Evaluation and Surveillance Survey—Surveillance Lead or Evaluator.	12	1	1

Jeffrey M. Zirger,

Lead, Information Collection Review Office,
Office of Public Health Ethics and
Regulations, Office of Science, Centers for
Disease Control and Prevention.

[FR Doc. 2023-24344 Filed 11-2-23; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-24-0006; Docket No. CDC-2023-
0090]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and
Prevention (CDC), Department of Health
and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease
Control and Prevention (CDC), as part of
its continuing effort to reduce public
burden and maximize the utility of
government information, invites the
general public and other Federal
agencies the opportunity to comment on
a proposed and/or continuing
information collection, as required by
the Paperwork Reduction Act of 1995.
This notice invites comment on a
proposed information collection project
titled Statement in Support of
Application for Waiver of
Inadmissibility Under Immigration and
Nationality Act. This information
collection is related to waivers of
inadmissibility on health-related
grounds, specifically mental health
disorders with associated harmful
behavior.

DATES: CDC must receive written
comments on or before January 2, 2024.

ADDRESSES: You may submit comments,
identified by Docket No. CDC-2023-
0090 by either of the following methods:

- **Federal eRulemaking Portal:**
www.regulations.gov. Follow the
instructions for submitting comments.
- **Mail:** Jeffrey M. Zirger, Information
Collection Review Office, Centers for
Disease Control and Prevention, 1600
Clifton Road, NE, MS H21-8, Atlanta,
Georgia 30329.

Instructions: All submissions received
must include the agency name and
Docket Number. CDC will post, without
change, all relevant comments to
www.regulations.gov.

Please note: Submit all comments
through the Federal eRulemaking portal
(www.regulations.gov) or by U.S. mail to
the address listed above.

FOR FURTHER INFORMATION CONTACT: To
request more information on the
proposed project or to obtain a copy of
the information collection plan and
instruments, contact Jeffrey M. Zirger,
Information Collection Review Office,
Centers for Disease Control and
Prevention, 1600 Clifton Road NE, MS
H21-8, Atlanta, Georgia 30329;
Telephone: 404-639-7570; Email: omb@cdc.gov.

SUPPLEMENTARY INFORMATION: Under the
Paperwork Reduction Act of 1995 (PRA)
(44 U.S.C. 3501-3520), Federal agencies
must obtain approval from the Office of
Management and Budget (OMB) for each
collection of information they conduct
or sponsor. In addition, the PRA also
requires Federal agencies to provide a
60-day notice in the **Federal Register**
concerning each proposed collection of
information, including each new
proposed collection, each proposed
extension of existing collection of
information, and each reinstatement of
previously approved information
collection before submitting the
collection to the OMB for approval. To
comply with this requirement, we are
publishing this notice of a proposed
data collection as described below.

The OMB is particularly interested in
comments that will help:

1. Evaluate whether the proposed
collection of information is necessary
for the proper performance of the
functions of the agency, including
whether the information will have
practical utility;
2. Evaluate the accuracy of the
agency's estimate of the burden of the
proposed collection of information,
including the validity of the
methodology and assumptions used;
3. Enhance the quality, utility, and
clarity of the information to be
collected;
4. Minimize the burden of the
collection of information on those who
are to respond, including through the
use of appropriate automated,
electronic, mechanical, or other
technological collection techniques or
other forms of information technology,
e.g., permitting electronic submissions
of responses; and
5. Assess information collection costs.

Proposed Project

Statement in Support of Application
for Waiver of Inadmissibility Under
Immigration and Nationality Act (OMB
Control No. 0920-0006, Exp. 12/31/
2023)—Revision—National Center for
Emerging and Zoonotic Infectious
Diseases (NCEZID), Centers for Disease
Control and Prevention (CDC).

Background and Brief Description

The goal of this proposed collection is
to provide Centers for Disease Control
and Prevention (CDC) with adequate
information to fulfill its responsibilities
with regard to the processing of
applications for waivers of
inadmissibility on health-related
grounds, specifically mental health
disorders with associated harmful
behaviors. Section 212 (a) of the
Immigration and Nationality Act (INA)
states that aliens with specific health-
related grounds are ineligible to receive
visas and ineligible for admission into
the United States. The conditions are
listed in subsections as follows:

(i) aliens who have a communicable
disease of public health significance,

(iii) (I) aliens who have a physical or
mental disorder and behavior associated
with the disorder that may pose, or has
posed, a threat to the property, safety, or
welfare of the alien or others; or

(iii) (II) aliens who have had a
physical or mental disorder and a
history of behavior associated with the
disorder, which behavior has posed a
threat to property, safety, or welfare of
the alien or others and which behavior
is likely to recur or lead to other
harmful behavior.

However, section 212(g) of the INA
authorizes the Attorney General to
waive certain Class A inadmissible
health-related grounds which would
allow an alien to overcome his/her
inadmissibility. The CDC may provide
consultation to the U.S. Department of
Homeland Security (DHS) for requests
for waivers under section 212(a)(1)(A)(i)
or section 212(a)(1)(A)(iii)(I) or (II), as
indicated in the regulations (8 CFR
212.7 Waiver of certain grounds of
excludability) if: "the alien or the alien's
sponsoring family member shall submit
a statement to the consular or Service
office. The statement must be from a
clinic, hospital, institution, school, or
other specialized facility or specialist in
the United States . . . who will
complete the evaluation and provide an
evaluation report to the Centers for
Disease Control and Prevention."

Waiver requests under section
212(a)(1)(A)(i) are processed on DHS
forms I-601 and I-602. Waiver requests
under section 212(a)(1)(A)(iii)(I) or (II)
are processed under CDC form 4.422-1.
Respondents to this data collection
include U.S. medical facilities and
specialists who complete Part II of CDC
form 4.422-1 for waiver applicants
based on physical or mental disorders
and submit the appropriate evaluation
report. Respondents also include the
applicant or sponsoring family member

who complete Part III of CDC form 4.422–1

CDC requests OMB approval for an estimated 33 annual burden hours.

There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Physician	CDC 4.422–1	200	1	10/60	33
Total .....	.....	.....	.....	.....	33

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Public Health Ethics and Regulations, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023–24346 Filed 11–2–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–24–23AX]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled “Assessing Knowledge, Attitudes, and Practices (KAPs) of Hispanic/Latina Women of Reproductive Age (WRA) about Folic Acid Fortification and Supplementation” to the Office of Management and Budget (OMB) for review and approval. CDC previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on November 22, 2022, to obtain comments from the public and affected agencies. CDC received one comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. 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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Assessing Knowledge, Attitudes, and Practices (KAPs) of Hispanic/Latina Women of Reproductive Age (WRA) about Folic Acid Fortification and Supplementation—New—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Consuming 400 micrograms (mcg) of folic acid daily in the periconceptional period can reduce the risk of having a pregnancy affected by a neural tube defect (NTD), a severe birth defect of the

brain and spine. To increase the amount of folic acid consumed in the U.S. population, the U.S. Food and Drug Administration (FDA) mandated fortification of enriched cereal grain products with folic acid in 1998. Although strides have been made in preventing neural tube defects, ethnic disparities remain. Hispanic women in the U.S. have the highest risk of having a child affected by a NTD, with birth prevalence of approximately seven NTDs per 10,000 live births. In addition, prior studies have found that Hispanic women: (1) have lower levels of folate in their blood compared to non-Hispanic white women; (2) are more likely than non-Hispanic white and non-Hispanic black women to have the MTHFR C677T gene variant; (3) are less likely to know about the benefits of folic acid; and (4) are less likely to get folic acid from fortified foods or take a multivitamin with folic acid in it, particularly those women who primarily speak Spanish, were born outside of the United States, and have lived in the United States for a shorter period of time.

To effectively reach Hispanic women of reproductive age (WRA) and increase their knowledge and intake of folic acid for NTD prevention, a contemporary understanding of cultural factors in the decision-making process and how these women obtain information is needed. Previous research highlighted important nuances in potential cultural beliefs regarding folic acid. A study of Spanish-speaking Hispanic women in the southwest U.S. found no cultural barriers to incorporating folic-acid rich foods into their diets; however, focus groups of Mexican American women did find several cultural barriers. These included: (1) misperceptions of the term folic acid as an illegal substance, as the word “acid” is like LSD; (2) its importance for NTD prevention since their healthcare providers did not talk to them about folic acid; (3) its absence in injectable form at the pharmacy; and (4) mistaken belief that birth defects are not preventable (resulting from an act of

God). Studies have found contradictory findings, suggesting that Mexican American women have increased awareness of the association between folate and birth defects compared to English-speaking women. More research is needed to determine cultural factors in the decision-making process around folic acid intake for Hispanic WRA, though several studies have examined beliefs and best practices for promoting folic acid consumption.

The purpose of this project is to conduct formative research with Hispanic/Latina women of reproductive age to examine folic acid and fortified food awareness, food and supplement use practices, as well as messaging and channels to reach Hispanic/Latina women. The resulting data are expected to be used for developing new messaging and communication products to improve knowledge, awareness, and practices regarding folic acid fortification and supplementation

among Hispanic/Latina women of reproductive age. Additionally, the findings from the project will inform future intervention activities to prevent neural tube defects among Hispanic women of reproductive age.

This information collection will involve focus groups with Hispanic/Latina WRA. CDC requests OMB approval for an estimated 122 annual burden hours. There are no costs to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Hispanic/Latina Women of Reproductive Age (WRA).	Knowledge, Attitudes, and Practices (KAPs) of Hispanic/Latina Women of Reproductive Age: Focus Group Moderator Guide (English/Spanish).	81	1	90/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office,
Office of Public Health Ethics and
Regulations, Office of Science, Centers for
Disease Control and Prevention.

[FR Doc. 2023–24343 Filed 11–2–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–24–24AL; Docket No. CDC–2023–0089]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Occupational exposures to surgical smoke in veterinary personnel which will characterize occupational exposure to surgical smoke and related respiratory health effects in clinical veterinary settings and provide guidance on

engineering controls to improve air quality in veterinary medicine/animal care personnel's work environment by reducing exposure to surgical smoke.

DATES: CDC must receive written comments on or before January 2, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0089 by either of the following methods:

- *Federal eRulemaking Portal:* www.regulations.gov. Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road, NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to www.regulations.gov.

Please note: Submit all comments through the Federal eRulemaking portal (www.regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road, NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: omb@cdc.gov.

SUPPLEMENTARY INFORMATION:

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of

information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

Occupational Exposures to Surgical Smoke in Veterinary Personnel—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Surgical smoke produced during tissue cutting and cauterizing tissues and blood vessels generates hazardous gaseous compounds and aerosols that are associated with cancer and respiratory irritation; however, no research has characterized surgical smoke generated from animal tissue in clinical veterinary settings. Surgical smoke exposure is an emerging concern in human operating rooms, and several states have either passed or are considering bills requiring surgical smoke evacuation systems in human operating rooms to mitigate this occupational hazard. Surgical suites in

veterinary clinics are often multiple bay suites or have less effective ventilation systems than human operating rooms, potentially leading to higher exposure levels, yet no research has examined barriers and aids to the use of surgical smoke evacuation systems among veterinary medicine/animal care (VM/AC) personnel.

The proposed project will characterize occupational exposure to surgical smoke and related respiratory health effects in clinical veterinary settings. Data will be used to examine: (1) work-related factors that contribute to exposure to surgical smoke in clinical veterinary settings; (2) relationships between surgical smoke exposure in clinical veterinary settings and respiratory health; and (3) barriers and aids to implementing surgical smoke extraction systems that reduce occupational exposures to surgical smoke. Findings from this study will

help to provide guidance on engineering controls to improve air quality in VM/AC personnel's work environment by reducing exposure to surgical smoke.

Three veterinary teaching hospitals and a national network of community veterinary clinics have been recruited to participate in this research.

Participating VM/AC personnel at collaborating field study sites will complete: (1) a baseline questionnaire that collects data on demographics, work history, job tasks, exposures to respiratory hazards (including surgical smoke), use of personal protective equipment, workplace safety climate, and respiratory health and symptoms; and (2) a post-shift questionnaire assessing acute respiratory symptoms and job tasks during the work shift.

CDC requests OMB approval for an estimated 59 annual burden hours. There are no costs to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
VM/AC personnel	Baseline Questionnaire	33	1	28/60	15
VM/AC personnel	Post-shift Questionnaire	33	10	8/60	44
Total .....	.....	.....	.....	.....	59

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Public Health Ethics and Regulations, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023–24345 Filed 11–2–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Medicare & Medicaid Services****Privacy Act of 1974; Matching Program**

AGENCY: Center for Consumer Information and Insurance Oversight (CCIIO), Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) is providing notice of the re-establishment of a computer matching program between

CMS and the Office of Personnel Management (OPM), “Verification of Eligibility of Minimum Essential Coverage Under the Patient Protection and Affordable Care Act through an Office of Personnel Management Health Benefit Plan.”

DATES: The deadline for comments on this notice is December 4, 2023. The re-established matching program will commence not sooner than 30 days after publication of this notice, provided no comments are received that warrant a change to this notice. The matching program will be conducted for an initial term of 18 months (from approximately December 8, 2023 to June 7, 2025) and within three months of expiration may be renewed for up to one additional year if the parties make no change to the matching program and certify that the program has been conducted in compliance with the matching agreement.

ADDRESSES: Interested parties may submit comments on this notice to the CMS Privacy Act Officer by mail at: Division of Security, Privacy Policy & Governance, Information Security & Privacy Group, Office of Information Technology, Centers for Medicare &

Medicaid Services, Location: N1–14–56, 7500 Security Blvd., Baltimore, MD 21244–1850 or by email at Barbara.Demopoulos@cms.hhs.gov.

FOR FURTHER INFORMATION CONTACT: If you have questions about the matching program, you may contact Anne Pesto, Senior Advisor, Marketplace Eligibility and Enrollment Group, Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services, at 443–955–9966, by email at anne.pesto@cms.hhs.gov, or by mail at 7500 Security Blvd., Baltimore, MD 21244.

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974, as amended (5 U.S.C. 552a) provides certain protections for individuals applying for and receiving federal benefits. The law governs the use of computer matching by federal agencies when records in a system of records (meaning, federal agency records about individuals retrieved by name or other personal identifier) are matched with records of other federal or non-federal agencies. The Privacy Act requires agencies involved in a matching program to:

1. Enter into a written agreement, which must be prepared in accordance

with the Privacy Act, approved by the Data Integrity Board of each source and recipient federal agency, provided to Congress and the Office of Management and Budget (OMB), and made available to the public, as required by 5 U.S.C. 552a(o), (u)(3)(A), and (u)(4).

2. Notify the individuals whose information will be used in the matching program that the information they provide is subject to verification through matching, as required by 5 U.S.C. 552a(o)(1)(D).

3. Verify match findings before suspending, terminating, reducing, or making a final denial of an individual's benefits or payments or taking other adverse action against the individual, as required by 5 U.S.C. 552a(p).

4. Report the matching program to Congress and the OMB, in advance and annually, as required by 5 U.S.C. 552a(o) (2)(A)(i), (r), and (u)(3)(D).

5. Publish advance notice of the matching program in the **Federal Register** as required by 5 U.S.C. 552a(e)(12).

This matching program meets these requirements.

Barbara Demopolus,
*Privacy Act Officer, Division of Security,
Privacy Policy and Governance, Office of
Information Technology, Centers for Medicare
& Medicaid Services.*

Participating Agencies

The Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) is the recipient agency, and the Office of Personnel Management (OPM) is the source agency.

Authority for Conducting the Matching Program

The principal authority for the matching program is 42 U.S.C. 18001, *et seq.*

Purpose(s)

The purpose of the matching program is to provide CMS with OPM data which CMS and state Administering Entities (AEs) need to determine individuals' eligibility for financial assistance in paying for private health insurance coverage, under provisions of the Patient Protection and Affordable Care Act. In this matching program, OPM provides CMS with monthly data identifying each active federal employee's status as enrolled in or eligible for coverage under an OPM Health Benefit Plan, and an annual premium spread index file identifying the lowest premium available to a federal employee in each of 32 premium localities. CMS and AEs use the OPM data to verify whether an individual

who is applying for or is enrolled in private health insurance coverage under a qualified health plan through a federally-facilitated or state-based health insurance exchange is eligible for coverage under an OPM health benefit plan, for the purpose of determining if the individual is eligible for financial assistance (including an advance tax credit and cost sharing reduction, which are types of insurance affordability programs) in paying for the private coverage. OPM health benefit plans provide minimum essential coverage, and eligibility for such plans precludes eligibility for financial assistance in paying for private coverage.

Categories of Individuals

The categories of individuals whose information is involved in the matching program are: (1) active federal employees, and (2) consumers who apply for or are enrolled in a qualified health plan through an exchange established under the Patient Protection and Affordable Care Act and receive determinations of eligibility for insurance affordability programs.

Categories of Records

The categories of records used in the matching program are identity information about the above consumers, which are maintained by CMS, and identity information and minimum essential coverage period records about all active federal employees, and annual premium information, maintained by OPM. The data elements provided to CMS by OPM are as follows:

- Monthly status file:
 - a. Record type;
 - b. Record number;
 - c. Unique person ID;
 - d. Social security number;
 - e. Last name;
 - f. Middle name;
 - g. First name;
 - h. Last name suffix;
 - i. Gender;
 - j. Date of birth; and
 - k. Health plan code.
- Annual Premium Spread Index File:
 - a. State;
 - b. Plan;
 - c. Option;
 - d. Enrollment code;
 - e. Current total bi-weekly premium;
 - f. Future total bi-weekly premium;
 - g. Future government pays bi-weekly premium;
 - h. Future employee pays bi-weekly premium
 - i. Future change in employee payment bi-weekly premium;
 - j. Current total monthly premium;
 - k. Future total monthly premium;
 - l. Future government pays monthly premium;

m. Future employee pays monthly premium; and

n. Future change in employee payment monthly premium.

CMS will not send any data about individual applicants or enrollees to OPM in order to receive this data from OPM.

System(s) of Records

The records used in the matching program are maintained in these systems of records:

A. System of Records Maintained by CMS

CMS Health Insurance Exchanges System (HIX), System No. 09–70–0560, last published in full at 78 FR 63211 (Oct. 23, 2013), and amended at 83 FR 6591 (Feb. 14, 2018).

B. System of Records Maintained by OPM

OPM/GOVT–1 General Personnel Records, last published in full at 77 FR 79694 (Dec. 11, 2012), and amended at 80 FR 74815 (Nov. 30, 2015) and 87 FR 5874 (Feb. 2, 2022). The disclosures of OPM data to CMS are authorized by Routine Use “rr”.

[FR Doc. 2023–24331 Filed 11–2–23; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10558]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed

information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by January 2, 2024.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to <http://www.regulations.gov>. Follow the instructions for "Comment or Submission" or "More Search Options" to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: _____, Room C4-26-05, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786-4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS-10558 Machine Readable Data for Provider Network and Prescription Formulary Content for FFM QHPs

Under the PRA (44 U.S.C. 3501-3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term "collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR

1320.3(c) 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 requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of currently approved collection; *Title of Information Collection:* Machine Readable Data for Provider Network and Prescription Formulary Content for FFM QHPs; *Use:* Under 45 CFR 156.122(d)(1)(2), 156.230(b), and 156.230(c), as finalized in the rule, the Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2018 (CMS-9934-F), established standards for qualified health plan (QHP) issuers for the submission of provider and formulary data in a machine-readable format to the Department of Health and Human Services. (HHS) and for posting the data on issuer websites. These standards provide greater transparency for consumers, including by allowing software developers to access formulary and provider data to create innovative and informative tools. On September 30, 2015, the Office of Management and Budget (OMB) granted approval to the data collection Information Collection for Machine Readable Data for Provider Network and Prescription Formulary Content for FFE QHPs under OMB control number 0938-1284. OMB approval was granted again on November 3, 2017 and March 22, 2021. The Centers for Medicare and Medicaid Services (CMS) is continuing that information collection request (ICR) in connection with these machine-readable standards. This ICR serves as a formal request for the renewal of the data collection clearance. The burden estimate for the ICR included in this package reflects the time and effort for QHP and SADP issuers to update and publish the appropriate data and submit it to CMS. *Form Number:* CMS-10558 (OMB control number: 0938-1284); *Frequency:* Annually; *Affected Public:* Private Sector, State, Business, and Not-for Profits; *Number of Respondents:* 434; *Number of Responses:* 434; *Total Annual Hours:* 39,126. (For questions

regarding this collection, contact Ana Alza at (667) 290-8569, ext. 70008569).

Dated: October 31, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023-24371 Filed 11-2-23; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; Assessment and Evaluation of ACL's American Indian, Alaska Natives, and Native Hawaiian Programs Older Americans Act Title VI (OMB Control Number 0985-0059)

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under the Paperwork Reduction Act of 1995. This 30-day notice collects comments on the information collection requirements related to the Assessment and Evaluation of ACL's American Indian, Alaska Natives, and Native Hawaiian Programs Older Americans Act Title VI (OMB Control Number 0985-0059).

DATES: Submit written comments on the collection of information by December 4, 2023.

ADDRESSES: Submit written comments and recommendations for the proposed information collection within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find the information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. By mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Amanda Cash at Amanda.Cash@acl.hhs.gov or (202) 795-7369.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, the Administration for Community Living (ACL) has submitted the following

proposed collection of information to OMB for review and clearance.

The Administration for Community Living (ACL) is requesting approval for data collection associated with the Assessment and Evaluation of ACL's American Indian, Alaska Natives, and Native Hawaiian Programs Older Americans Act Title VI (OMB Control Number 0985–0059). OAA Title VI establishes grants to Native Americans for nutrition services, supportive services, and family caregiver support services.

The purpose of Title VI is “to promote the delivery of supportive services, including nutrition services, to American Indians, Alaskan Natives, and Native Hawaiians that are comparable to services provided under Title III” (42 U.S.C. 3057), which provides nutrition, caregiver and supportive services to the broader U.S. population. Title VI is comprised of three parts; Part A provides nutrition and supportive services to American Indians and Alaska Natives, Part B provides nutrition and supportive services to Native Hawaiians, and Part C provides caregiver services to any programs that have Part A/B.

The previous data collection for this project entailed a series of interviews and focus groups with Title VI program staff, elders, and caregivers. American Indian, Alaska Native, and Native Hawaiian (AI/AN/NH) populations experience significant health and socioeconomic disparities compared to the rest of the U.S. population. The AI/AN population has the highest rate of disabilities and the lowest life expectancy compared to the averages for the overall population (Centers for Disease Control and Prevention [CDC], 2008; Goins, Moss, Buchwald, & Guralnik, 2007). While 18% of the non-Hispanic white population is 65 years or older, just 8% of Native Hawaiians and

10% of the AI/AN population is 65 years or older (AoA, 2015). However, as overall life expectancy increases, the proportion of older AI/AN adults is expected to increase. By 2050, the percentage of non-Hispanic white adults is expected to decrease by 20%, while the population of older minority population adults, including AI/AN/NH, is expected to increase by 110% (AoA, 2015; CDC, 2013). For AI/AN populations, this translates to a 93% increase in the number of older adults. In addition, the population aged 75 and older needing long-term care is expected to double by the year 2030 (AoA, 2015; CDC 2013; Goins et al., 2007).

In fiscal year 2023, ACL awarded 290 Title VI three-year grants to tribes/tribal organizations elders for the provision of nutrition and supportive services, and a portion of awardees also received funds for the Native American Caregiver Support Program. The Assessment and Evaluation of the Title VI Programs will examine the effects of the program on:

1. Older Indians, their families and caregivers
2. Tribal communities
3. Intergenerational connections in tribal communities
4. Management of the Title VI program

Additionally, the assessment will examine how using COVID supplemental funds impacted Title VI services provided to older adults. This work will help ACL better understand and document the impact of these funds, how service provision changed over time, and what gaps existed despite the additional funding.

The Need for Assessment and Evaluation

The Assessment and Evaluation of the Title VI Programs is authorized under Section 206(a, c) of Title II of the OAA, which directs ACL to “. . . measure and evaluate the impact of all programs

authorized by this Act, their effectiveness in achieving stated goals in general, and in relation to their cost, their impact on related programs, their effectiveness in targeting for services under this Act unserved older individuals with greatest economic need (including low-income minority individuals and older individuals residing in rural areas) and unserved older individuals with greatest social need (including low-income minority individuals and older individuals residing in rural areas), and their structure and mechanisms for delivery of services, including, where appropriate, comparisons with appropriate control groups composed of persons who have not participated in such programs.”

Consistent with requirements of the Government Performance Results Modernization Act (GPRMA), ACL's Administration on Aging (AoA) integrates its strategic priorities and plans with performance measurement criteria. The AoA has three major performance measures: improve program efficiency, improve client outcomes, and improve effective targeting of vulnerable elders. Through program assessments, ACL seeks a better understanding of key programs, such as the programs under Title VI of the OAA for AI/AN/NH. Having completed most of the data collection, the Assessment and Evaluation of the Title VI Programs has an interest in adding a data collection activity to do a follow-up interview with grantees after they have completed the current evaluation cycle to understand which components of the technical assistance, they have received have been the most useful for them.

Table 1 provides an overview of the Assessment and Evaluation of the Title VI Program data collection activity.

Data Collection Activities

TABLE 1

Activity	Purpose, respondents, method, and relevant study
Title VI Program Staff Follow-up Interviews.	The Program Staff Follow-up Interviews will assess how the Title VI Programs have been utilizing and implementing the Technical Assistance they have received from the contractor around the practice of evaluation. Data will include how evaluation practice is being implemented and on what occurring basis, as well as perceptions of met and unmet needs around evaluation; and barriers to using evaluation. Up to 2 local staff (e.g., program director and evaluation staff person) will participate in each interview. The interviews will be conducted via telephone in Year 4 with up to 12 evaluation grantees, for a maximum of 24 participants, and will take 60 minutes to complete. <i>See Attachment A (Title VI Program Staff Consent Form and Interview Guide).</i>

Use of Information Collected

ACL's strategic priorities are to empower older people and their families to (1) make informed decisions

about, and easily access, health and long-term care options and (2) enable seniors to remain in their own homes through the provision of home and community-based services.

Central to these priorities is the pursuit of consistent and effective approaches to support older adults in their own homes and communities, and to coordinate the provision of

supportive services to seniors and their caregivers in an integrated system of long-term care. Information gathered through the Assessment and Evaluation of the Title VI Programs will inform ACL and its partners, other Federal agencies and administrators, current grantees, policymakers, and the field about ways to improve service delivery for elders and their caregivers and helping them to remain in their homes for as long as possible. For example,

information gathered through the evaluation will be used to identify gaps and challenges in service delivery, as well as areas of further need.

Without this assessment and evaluation, Federal and local officials will not be able to determine whether the Title VI Programs are having the intended impact on AI/AN/NH elders and whether the grantees are meeting the individual goals of the programs. The new proposed data collection will further allow ACL to understand how

successful the training and technical assistance provided to Title VI evaluation grantees was for their practice of data collection and use.

Comments in Response to the 60-Day Federal Register Notice

A notice published in the **Federal Register 88 FR 56633** on August 18, 2023. There were no public comments received during the 60-day FRN.

Estimated Program Burden:

ESTIMATED PROGRAM BURDEN

Respondent type	Form name	Number of annual respondents	Number of responses per respondent	Average burden (in hours) per response	Annual burden hours
Program director	Program staff follow-up interview guide	12	1	1	12

Dated: October 30, 2023.

Alison Barkoff,

Principal Deputy Administrator for the Administration for Community Living, performing the duties of the Administrator and the Assistant Secretary for Aging.

[FR Doc. 2023-24255 Filed 11-2-23; 8:45 am]

BILLING CODE 4154-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2023-N-4372]

Enforcement Policy for Clinical Electronic Thermometers; 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, Agency, or we) is announcing the availability of a final guidance entitled “Enforcement Policy for Clinical Electronic Thermometers.” This guidance applies to clinical electronic thermometers, which are regulated as class II devices. This guidance has been implemented without prior comment, but it remains subject to comment in accordance with the Agency’s good guidance practices.

DATES: The announcement of the guidance is published in the **Federal Register** on November 3, 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-2023-N-4372 for “Enforcement Policy for Clinical Electronic Thermometers.” 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 § 10.115(g)(5) (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 "Enforcement Policy for Clinical Electronic Thermometers" 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: David Wolloscheck, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2416, Silver Spring, MD 20993-0002, 301-796-1480.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a final guidance entitled "Enforcement Policy for Clinical Electronic Thermometers." During the Coronavirus Disease 2019 (COVID-19) public health emergency (PHE), FDA issued certain enforcement policies for non-invasive remote monitoring devices and clinical electronic thermometers. The policies regarding the modification of previously FDA-cleared clinical electronic thermometers within product code FLL were originally included in FDA's guidance "Enforcement Policy for Non-Invasive Remote Monitoring Devices Used to Support Patient Monitoring During the Coronavirus Disease 2019 (COVID-19) Public Health Emergency" first issued in March 2020, and subsequently revised in June 2020, October 2020, and March 2023. The policies regarding the distribution and use of clinical electronic thermometers not previously cleared under section

510(k) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360(k)) were outlined in FDA's guidance "Enforcement Policy for Clinical Electronic Thermometers During the Coronavirus Disease 2019 (COVID-19) Public Health Emergency" issued in April 2020 and revised in March 2023.

At the time, FDA stated that the policies described in these guidances were intended to remain in effect only for the duration of the PHE related to COVID-19 declared by the Secretary of Health and Human Services in accordance with section 319 of the Public Health Service Act (42 U.S.C. 247d). On March 13, 2023, FDA announced in the **Federal Register** notice "Guidance Documents Related to Coronavirus Disease 2019 (COVID-19)" (88 FR 15417) that these guidance documents were being revised to continue in effect for 180 days after the expiration of the COVID-19 PHE declaration, and that, during that time, FDA would further revise these guidances, among others. Consistent with what we said in the **Federal Register** notice of March 13, 2023, FDA has revised and consolidated the policies that apply to clinical electronic thermometers in this guidance. Elsewhere in this issue of the **Federal Register**, FDA is proposing to exempt certain clinical electronic thermometers—specifically clinical thermometers without telethermography or continuous temperature measurement functions—from premarket notification requirements under section 510(m) of the FD&C Act (see the **Federal Register** document "Medical Devices; Exemptions from Premarket Notification: Class II Devices; Clinical Electronic Thermometers; Request for Comments"). FDA intends to withdraw this guidance after any final exemption document has been published in the **Federal Register**.

The policies outlined in this guidance are organized by clinical thermometer type. The guidance describes enforcement policies that are intended to help foster compliance with certain applicable legal requirements for these devices.

The enforcement policies in this guidance apply to clinical electronic thermometers, which are regulated as class II devices under 21 CFR 880.2910, product code FLL. These devices include both contact and non-contact clinical electronic thermometers. This guidance supersedes "Enforcement Policy for Clinical Electronic Thermometers During the Coronavirus Disease 2019 (COVID-19) Public Health Emergency" issued in April 2020 and updated in March 2023.

This guidance is being implemented without prior public comment because FDA has determined that prior public participation for this guidance is not feasible or appropriate (see section 701(h)(1)(C) of the FD&C Act (21 U.S.C. 371(h)(1)(C)) and § 10.115(g)(2)). FDA has determined that this guidance document presents a less burdensome policy that is consistent with public health. Although this policy is being implemented immediately without prior comment, it remains subject to comment in accordance with FDA's good guidance practices regulation (§ 10.115). FDA will consider all comments received and revise the guidance document as appropriate.

This guidance is being issued consistent with FDA's good guidance practices regulation (§ 10.115). The guidance represents the current thinking of FDA on "Enforcement Policy for Clinical Electronic Thermometers." 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> or <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>. Persons unable to download an electronic copy of "Enforcement Policy for Clinical Electronic Thermometers" may send an email request to CDRH-Guidance@fda.hhs.gov to receive an electronic copy of the document. Please use the document number GUI00020021 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. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3521). The collections of information in the following table have been approved by OMB:

21 CFR part; guidance; or FDA form	Topic	OMB control No.
807, subpart E "Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submission Program".	Premarket notification Q-Submissions and Early Payor Feedback Request Programs for Medical Devices.	0910-0120 0910-0756
800, 801, 809, and 830	Medical Device Labeling Requirements; Unique Device Identification.	0910-0485
806	Medical Devices; Reports of Corrections and Removals	0910-0359
807, subparts A through D	Medical Device Registration and Listing	0910-0625
820	Current Good Manufacturing Practice, Quality Systems	0910-0073

Dated: October 31, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-24291 Filed 11-2-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2023-N-4372]

Medical Devices; Exemptions From Premarket Notification: Class II Devices; Clinical Electronic Thermometers; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has identified certain class II clinical electronic thermometers that, when finalized, will be exempt from premarket notification requirements, subject to certain limitations. FDA is publishing this notice of that determination and requesting public comment in accordance with the procedures established by the 21st Century Cures Act. FDA will review any comments submitted within the 60-day comment period and will consider whether any modifications should be made to the exemption for certain clinical electronic thermometers prior to publication of its final determination in the **Federal Register**.

DATES: Either electronic or written comments on the notice must be submitted by January 2, 2024.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 2, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2023-N-4372 for "Medical Devices; Exemptions from Premarket Notification: Class II Devices; Clinical Electronic Thermometers; Request for Comments." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket

and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

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

FOR FURTHER INFORMATION CONTACT: Madhusoodana Nambiar, Center for Devices and Radiological Health, Food

and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5519, Silver Spring, MD 20993, 301–796–5837, Madhusoodana.Nambiar@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Under section 513 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360c), FDA must classify devices into one of three regulatory classes: class I, class II, or class III. FDA classification of a device is determined by the amount of regulation necessary to provide a reasonable assurance of safety and effectiveness. Under the Medical Device Amendments of 1976 (1976 amendments) (Pub. L. 94–295), and the amendments of the Safe Medical Devices Act of 1990 (Pub. L. 101–629), devices are to be classified into class I (general controls) if there is information showing that the general controls of the FD&C Act are sufficient to assure safety and effectiveness; into class II (special controls), if general controls, by themselves, are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide such assurance; and into class III (premarket approval), if there is insufficient information to support classifying a device into class I or class II and the device is a life sustaining or life supporting device or is for a use which is of substantial importance in preventing impairment of human health or presents a potential unreasonable risk of illness or injury.

Most generic types of devices that were on the market before the date of the 1976 amendments (May 28, 1976) (generally referred to as preamendments devices) have been classified by FDA under the procedures set forth in section 513(c) and (d) of the FD&C Act through the issuance of classification regulations into one of these three regulatory classes. Devices introduced into interstate commerce for the first time on or after May 28, 1976 (generally referred to as postamendments devices) are classified through the premarket notification process under section 510(k) of the FD&C Act (21 U.S.C. 360(k)). Section 510(k) of the FD&C Act and the implementing regulations, part 807 of Title 21 of the Code of Federal Regulations (CFR), require persons who intend to market a new device to submit a premarket notification (510(k)) containing information that allows FDA to determine whether the new device is “substantially equivalent” within the meaning of section 513(i) of the FD&C

Act to a legally marketed device that does not require premarket approval.

The 21st Century Cures Act (Cures Act) (Pub. L. 114–255) was signed into law on December 13, 2016. Section 3054 of the Cures Act amended section 510(m) of the FD&C Act. As amended, section 510(m)(1)(A) of the FD&C Act requires FDA to publish in the **Federal Register** a notice containing a list of each type of class II device that FDA determines no longer requires a report under section 510(k) of the FD&C Act to provide reasonable assurance of safety and effectiveness. FDA is required to publish this notice within 90 days of the date of enactment of the Cures Act and at least once every 5 years thereafter, as FDA determines appropriate. Additionally, FDA must provide at least a 60-day comment period for any such notice published under section 510(m)(1)(A) of the FD&C Act.

FDA published the initial notice within the 90-day time frame in the **Federal Register** of March 14, 2017 (82 FR 13609) and issued its final determination of exemption of the devices in such notice in accordance with section 510(m)(1)(B) of the FD&C Act in the **Federal Register** of July 11, 2017 (82 FR 31976). FDA is publishing this notice and requesting public comment in accordance with section 510(m)(1)(A) of the FD&C Act. In a future final action, and after considering comments, FDA intends to amend the codified language in the clinical electronic thermometer regulation to reflect the final determination with respect to exemption.

II. Factors FDA May Consider for Exemption

There are a number of factors FDA may consider to determine whether a 510(k) is necessary to provide reasonable assurance of the safety and effectiveness of a class II device. These factors are discussed in the January 21, 1998, **Federal Register** notice (63 FR 3142) and subsequently in the guidance the Agency issued on February 19, 1998, entitled “Procedures for Class II Device Exemptions from Premarket Notification, Guidance for Industry and CDRH Staff” (“Class II 510(k) Exemption Guidance”) (Ref. 1). Accordingly, FDA generally considers the following factors to determine whether premarket notification is necessary for class II devices: (1) the device does not have a significant history of false or misleading claims or of risks associated with inherent characteristics of the device; (2) characteristics of the device necessary for its safe and effective performance are well established; (3) changes in the

device that could affect safety and effectiveness will either (a) be readily detectable by users by visual examination or other means such as routine testing, before causing harm, or (b) not materially increase the risk of injury, incorrect diagnosis, or ineffective treatment; and (4) any changes to the device would not be likely to result in a change in the device’s classification. FDA may also consider that, even when exempting devices, these devices would still be subject to the limitations on exemptions.

III. Limitations on Exemptions

FDA has determined that premarket notification is not necessary to provide a reasonable assurance of safety and effectiveness for certain class II clinical electronic thermometers subject to the limitations outlined in table 1. This determination is based, in part, on the Agency’s knowledge of the device, including past experience and relevant reports or studies on device performance (as appropriate), the applicability of general and special controls, and the Agency’s ability to limit an exemption.

A. General Limitations of Exemptions

FDA’s proposal to grant an exemption from premarket notification applies only to those devices that have existing or reasonably foreseeable characteristics of commercially distributed devices within that generic type. After comment and issuance of a notice announcing FDA’s final determination, a manufacturer of a clinical electronic thermometer would still be required to submit a premarket notification to FDA before introducing a device or delivering it for introduction into commercial distribution when the device meets any of the conditions described in § 880.9 (21 CFR 880.9).

B. Partial Limitations of Exemptions

In addition to the general limitations, FDA may also partially limit an exemption from premarket notification requirements to specific devices within a listed device type when the initial Agency assessment determines that the factors laid out in the Class II 510(k) Exemption Guidance (Ref. 1) do not weigh in favor of exemption for all devices within a generic type of device. In such situations where a partial limitation of the exemption has been identified, FDA has determined that premarket notification is necessary to provide a reasonable assurance of safety and effectiveness for devices that fall outside of the limitations. In table 1, for example, FDA is listing the proposed exemption of clinical electronic thermometers but limits the exemption

to devices that are appropriately tested in accordance with specific FDA-recognized standards (as outlined in the limitations) and excludes clinical electronic thermometers with telethermographic and continuous temperature measurement functions.

Most contact and non-contact clinical electronic thermometers that are appropriately tested in accordance with specific FDA-recognized standards are well-understood devices; however, FDA

considers premarket notification requirements for clinical thermometers with telethermographic and continuous temperature measurement functions to be necessary to provide a reasonable assurance of safety and effectiveness because such thermometers include newer technology that may require additional testing beyond that specified in FDA-recognized standards and have additional biocompatibility, interoperability, electromagnetic

compatibility, electrical safety, and sterility considerations compared to clinical electronic thermometers without these types of functions.

IV. Class II Device

FDA is identifying the following class II device that, if finalized, would no longer require premarket notification under section 510(k) of the FD&C Act, subject to the general limitations to the exemptions found in § 880.9:

TABLE 1—CLASS II DEVICES

21 CFR section	Device description	Product code	Partial exemption limitation
880.2910	Clinical electronic thermometer	FLL	Exemption is limited to the following: 1. Device is not a clinical thermometer with telethermography functions; 2. Device is not a clinical thermometer with continuous temperature measurement functions; and 3. Appropriate analysis and testing (such as outlined in the currently FDA-recognized editions of <i>ISO 80601–2–56 Medical electrical equipment—Part 2–56: Particular requirements for basic safety and essential performance of clinical thermometers for body temperature measurement</i> , or <i>ASTM E1965 Standard Specification for Infrared Thermometers for Intermittent Determination of Patient Temperature</i> , or <i>ASTM E1112 Standard Specification for Electronic Thermometer for Intermittent Determination of Patient Temperature</i> , or <i>ASTM E1104 Standard Specification for Clinical Thermometer Probe Covers and Sheaths</i>) must validate specifications and performance of the device.

FDA will assign new product codes to clinical electronic thermometers with telethermography functions and those with continuous temperature measurement functions in order to ensure that these devices can be identified distinctly from devices that will be exempt subject to the partial limitations under the existing product code (*i.e.*, exempt and non-exempt devices within a device type will have different product codes).

V. Reference

The following reference is on display in 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 address, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. FDA Guidance, “Procedures for Class II Device Exemptions from Premarket Notification, Guidance for Industry and CDRH Staff,” February 19, 1998, available at <https://www.fda.gov/media/72685/download>.

Dated: October 31, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–24290 Filed 11–2–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Standardized Work Plan Form for Use With Applications to the Bureau of Health Workforce Research and Training Grants and Cooperative Agreements OMB No. 0906–0049—Extension

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA’s ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than December 4, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Joella Roland, the HRSA Information Collection Clearance Officer, at paperwork@hrsa.gov or call (301) 443–3983.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Standardized Work Plan (SWP) Form for Use with Applications to the Bureau of Health Workforce (BHW) Research and Training Grants and Cooperative Agreements OMB No. 0906–0049—Extension

Abstract: HRSA’s BHW requires applicants for training and research grants and cooperative agreements to submit work plans via the SWP form.

Information in the SWP describes the timeframes and progress required during the grant period of performance to address each of the needs detailed in the Purpose and Need section of the application, as required in the Notice of Funding Opportunity announcement. Applicants use the SWP form when they submit their proposals, and award recipients and Project Officers use the SWP information to assist in monitoring progress once HRSA makes the awards. After awards are made, recipients complete a Quarterly Progress Update (QPU) to provide information to BHW on a quarterly basis on each activity listed in the SWP.

A 60-day notice published in the **Federal Register** on August 25, 2023, vol. 88, No. 164; pp. 58284–85. There were no public comments.

Need and Proposed Use of the Information: Information collected by the SWP form and QPUs standardizes and streamlines the data used by HRSA in reviewing applications and monitoring awardees. The form asks applicants to provide a description of the activities or steps the applicant will take to achieve each of the objectives proposed during the entire period of performance. The current standardized format and data submission by

applicants increases efficiency in reviewing, awarding, and monitoring each project.

The QPU is completed via HRSA's Electronic Handbook system and prompts recipients to report on progress of activities that were submitted using the SWP in the original application. The QPU automatically populates activities from the recipient's SWP form on a quarterly basis. For each activity listed in the submitted SWP for any particular quarter within the project period, recipients select and submit a single selection response for each activity status from a pull-down menu with five options: Activity is on Schedule, Activity is Complete, Timing is off track, Activity will be missed if action is not taken, and Activity cannot be achieved. Information provided is utilized by the program staff to regularly assess overall progress of program requirements and analyze data in order to monitor award recipient compliance and track progress against proposed targets and goals. Information gathered allows an improved and more efficient method for identifying whether projects' goals are being advanced or achieved, as set forth in 45 CFR 75.342. Program staff also use information provided over the period of performance to see emerging

trends and to assess whether an award recipient requires technical assistance to address challenges that the award recipient may be experiencing with the implementation of the project. Seeking OMB extension approval comports with the regulatory requirement imposed by 45 CFR 75.206(a), Paperwork clearances.

Likely Respondents: Respondents are applicants for, and recipients of, BHW's research and training grants and cooperative agreements.

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 annual burden hours
Standardized Work Plan (SWP)	1,000	1	1,000	1.00	1,000
Quarterly Progress Update (QPU) Form	1,000	4	4,000	.10	400
Total	¹ 1,000	.....	5,000	.....	1,400

¹ The 1,000 SWP respondents reflects the number of new grant applications submitted annually. The 1,000 QPU respondents reflects the current volume of funded, active grants.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–24273 Filed 11–2–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C.,

as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Advancing Therapeutics II.

Date: November 14, 2023.

Time: 11:00 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Lystranne Alysia Maynard Smith, Ph.D., Scientific Review Officer, Center for Scientific Review, National

Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–402–4809, lystranne.maynard-smith@nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 30, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–24277 Filed 11–2–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Center for Advancing Translational Sciences; Notice of Closed Meeting**

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; CTSA Training Application Review.

Date: February 8, 2024.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Alumi Isha, Ph.D., Scientific Review Officer, Office of Grants Management and Scientific Review, National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1016, Bethesda, MD 20892, (301) 496-9539, alumi.ishai@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: October 30, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-24278 Filed 11-2-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****Proposed Collection; 60-Day Comment Request; Office of Programs To Enhance Neuroscience (OPEN) Workforce Tracker (National Institute of Neurological Disorders and Stroke)**

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, to provide opportunity for public comment on proposed data collection projects, the National Institute of Neurological Disorders and Stroke (NINDS), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Cara Long, Health Science Policy Analyst, Office of Science Policy and Planning, NINDS, NIH, 31 Center Drive, Building 31, Room 8A52, Bethesda, MD 20892, or call non-toll-free number (301) 496-9271, or Email your request, including your address to: cara.long@nih.gov. Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated,

electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: The Office of Programs to Enhance Neuroscience (OPEN) Workforce Tracker, 0925-New, National Institute of Neurological Disorders and Stroke (NINDS), National Institutes of Health (NIH).

Need and Use of Information Collection: The OPEN Workforce Tracker database will gather and store information on neuroscience research trainees who have received NINDS support. The NINDS OPEN will use this information to analyze diversity-targeted career development program outcomes, to make improvements to these programs, and to build and foster a user-friendly community that will allow NINDS to communicate information and opportunities to current and former awardees, including those from groups that may be underrepresented and underserved within federal programs and awards. The OPEN Workforce Tracker will help NINDS collect structured information that is specific to the requirements of NINDS programs and that reflects outcome metrics used to assess program effectiveness. This information includes career stage, position, publications, degrees, and information related to NIH funding and external funding received, as well as protected class identifiers (race and ethnicity, sexual identification, gender, and disability) important for understanding program participation and outcomes across diverse groups.

The tracker follows minimization principles: it only collects relevant and necessary information to accomplish the purposes of program evaluation and communication, and it will interface with and pull in relevant information from existing NIH database systems database systems to minimize reporting burden. The database grants NINDS awardees the right to access their data held by NINDS and the ability to copy and correct any information errors. The information collection is consistent with NINDS's mission and mandate to conduct and support training in neuroscience (Public Health Service Act, 42 U.S.C. 285(j)). Also, this database aligns with the NIH-wide strategic plan to advance diversity, equity, inclusion, and accessibility (DEIA) through research and support analyses to identify and remove potential barriers to the implementation and expansion of promising and effective DEIA practices, policies, and procedures (Objective 3).

OMB approval is requested for 3 years. There are no costs to respondents

other than their time. The total estimated annualized burden hours are 167.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hour
Individuals ("trainees")	500	1	20/60	167
Total .....	.....	500	.....	167

Dated: October 31, 2023.

Paul A. Scott,

Project Clearance Liaison, National Institute of Neurological Disorders and Stroke, National Institutes of Health.

[FR Doc. 2023-24372 Filed 11-2-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2023-0002; Internal Agency Docket No. FEMA-B-2377]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before February 1, 2024.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for

each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2377, to Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are

provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Dickey County, North Dakota and Incorporated Areas Project: 19-08-0015S Preliminary Date: December 15, 2022	
City of Ludden	City Hall, 106 3rd Avenue, Ludden, ND 58474.
City of Oakes	City Hall, 124 South 5th Street, Oakes, ND 58474.
Unincorporated Areas of Dickey County	Dickey County Courthouse, 309 2nd Street N, Ellendale, ND 58436.
LaMoure County, North Dakota and Incorporated Areas Project: 19-08-0015S Preliminary Date: December 15, 2022	
City of Dickey	City Hall, 208 6th Avenue, Dickey, ND 58431.
City of Edgeley	City Hall, 519 Main Street, Edgeley, ND 58433.
City of LaMoure	City Hall, 27 Center Avenue W, LaMoure, ND 58458.
City of Marion	City Hall, 303 Main Avenue, Marion, ND 58466.
Township of Grand Rapids	Township Hall, 6836 99 Avenue SE, LaMoure, ND 58458.
Unincorporated Areas of LaMoure County	LaMoure County Courthouse, 202 4th Avenue NE, LaMoure, ND 58458.
Stutsman County, North Dakota and Incorporated Areas Project: 19-08-0015S Preliminary Date: December 15, 2022	
City of Jamestown	City Hall, 102 3rd Avenue SE, Jamestown, ND 58401.
City of Montpelier	City Hall, 4945 87th Avenue SE, Montpelier, ND 58472.
Unincorporated Areas of Stutsman County	Stutsman County Courthouse, 511 2nd Avenue SE, Jamestown, ND 58401.
Yankton County, South Dakota and Incorporated Areas Project: 18-08-0014S Preliminary Date: April 20, 2023	
City of Irene	City Hall, 110 South Till Avenue, Irene, SD 57037.
City of Yankton	City Hall, 416 Walnut Street, Yankton, SD 57078.
Town of Gayville	Town Shop, 408 Merchant Street, Gayville, SD 57031.
Town of Mission Hill	City Hall, 118 Washington Avenue, Mission Hill, SD 57046.
Town of Utica	Utica Multiuse Facility, 303 3rd Street, Utica, SD 57067.
Town of Volin	Town Hall, 300 Main Street, Volin, SD 57072.
Unincorporated Areas of Yankton County	Yankton County Government Center, 321 West 3rd Street, Yankton, SD 57078.

[FR Doc. 2023-24335 Filed 11-2-23; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2023-0002; Internal Agency Docket No. FEMA-B-2383]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency

Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online

location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in

effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Arizona:						
Maricopa	City of Phoenix, (22-09-1756P).	The Honorable Kate Gallego, Mayor, City of Phoenix, 200 West Washington Street, Phoenix, AZ 85003.	Street Transportation Department, 200 West Washington Street, 5th Floor, Phoenix, AZ 85003.	https://msc.fema.gov/portal/advanceSearch .	Feb. 2, 2024	040051
Pima	Unincorporated Areas of Pima County, (23-09-0654P).	The Honorable Adelita S. Grijalva, Chair, Board of Supervisors, Pima County, 33 North Stone Avenue, 11th Floor, Tucson, AZ 85701.	Pima County Flood Control District, 201 North Stone Avenue, 9th Floor, Tucson, AZ 85701.	https://msc.fema.gov/portal/advanceSearch .	Feb. 5, 2024	040073
Santa Cruz	City of Nogales, (23-09-0258P).	The Honorable Jorge Maldonado, Mayor, City of Nogales, 777 North Grand Avenue, Nogales, AZ 85621.	Public Works Department, 1450 North Hohokam Drive, Nogales, AZ 85621.	https://msc.fema.gov/portal/advanceSearch .	Feb. 7, 2024	040091
Florida:						
Duval	City of Jacksonville, (23-04-0131P).	The Honorable Donna Deegan, Mayor, City of Jacksonville, City Hall at St. James Building, 117 West Duval Street, Suite 400, Jacksonville, FL 32202.	Edward Ball Building Development Services, 214 North Hogan Street, Room 2100, Jacksonville, FL 32202.	https://msc.fema.gov/portal/advanceSearch .	Feb. 8, 2024	120077
Volusia	City of Daytona Beach, (23-04-0482P).	The Honorable Derrick Henry, Mayor, City of Daytona Beach, City Hall, 301 South Ridgewood Avenue, Daytona Beach, FL 32114.	City Hall, 301 South Ridgewood Avenue, Daytona Beach, FL 32114.	https://msc.fema.gov/portal/advanceSearch .	Feb. 1, 2024	125099
Idaho:						
Blaine	City of Bellevue, (23-10-0247P).	The Honorable Kathryn Goldman, Mayor, City of Bellevue, 115 East Pine Street, Bellevue, ID 83313.	City Hall, 115 East Pine Street, Bellevue, ID 83313.	https://msc.fema.gov/portal/advanceSearch .	Jan. 11, 2024	160021
Bonneville	Unincorporated Areas of Bonneville County, (23-10-0340P).	Roger Christensen, Chair, Bonneville County Board of Commissioners, 605 North Capital Avenue, Idaho Falls, ID 83402.	Bonneville County Courthouse, 605 North Capital Avenue, Idaho Falls, ID 83402.	https://msc.fema.gov/portal/advanceSearch .	Jan. 31, 2024	160027
Canyon	Unincorporated Areas of Canyon County, (22-10-0980P).	Brad Holton, Chair, Canyon County Board of Commissioners, 1115 Albany Street, Room 101, Caldwell, ID 83605.	Canyon County Administration Building, 111 North 11th Avenue, Room 101, Caldwell, ID 83605.	https://msc.fema.gov/portal/advanceSearch .	Jan. 12, 2024	160208
Minnesota:						
Anoka	City of Andover, (23-05-1134P).	The Honorable Sheri Bukkila, Mayor, City of Andover, City Hall, 1685 Crosstown Boulevard Northwest, Andover, MN 55304.	City Hall, 1685 Crosstown Boulevard Northwest, Andover, MN 55304.	https://msc.fema.gov/portal/advanceSearch .	Jan. 29, 2024	270689

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Mower	City of Austin, (22-05-1096P).	The Honorable Steve King, Mayor, City of Austin, City Hall, 500 4th Avenue Northeast, Austin, MN 55912.	City Hall, 500 4th Avenue Northeast, Austin, MN 55912.	https://msc.fema.gov/portal/advanceSearch .	Feb. 1, 2024	275228
Nevada: Douglas ..	Unincorporated Areas of Douglas County, (22-09-0499P).	The Honorable Mark Gardner, Chair, Board of Commissioners, Douglas County, P.O. Box 218, Minden, NV 89423.	Douglas County, Community Development, 1594 Esmeralda Avenue, Minden, NV 89423.	https://msc.fema.gov/portal/advanceSearch .	Jan. 18, 2024	320008
New York: Erie	City of Tonawanda, (23-02-0651X).	The Honorable John L. White, Mayor, City of Tonawanda, 200 Niagara Street, Tonawanda, NY 14150.	City Hall, 200 Niagara Street, Tonawanda, NY 14150.	https://msc.fema.gov/portal/advanceSearch .	Mar. 13, 2024	360259
Erie	Town of Grand Island, (23-02-0651X).	John Whitney, P.E., Town Supervisor, Town of Grand Island, 2255 Baseline Road, 1st Floor, Grand Island, NY 14072.	Town Hall, 2255 Baseline Road, Grand Island, NY 14072.	https://msc.fema.gov/portal/advanceSearch .	Mar. 13, 2024	360242
Onondaga	Town of Manlius, (22-02-0141P).	Edmond J. Theobald, Supervisor, Town of Manlius, 301 Brooklea Drive, Fayetteville, NY 13066.	Village Centre, One Arkie Albanese Avenue, Manlius, NY 13104.	https://msc.fema.gov/portal/advanceSearch .	Mar. 27, 2024	360584
Onondaga	Village of Fayetteville, (22-02-0141P).	The Honorable Mark Olson, Mayor, Village of Fayetteville, 425 East Genesee Street, Fayetteville, NY 13066.	Village Hall, 425 East Genesee Street, Fayetteville, NY 13066.	https://msc.fema.gov/portal/advanceSearch .	Mar. 27, 2024	360578
Suffolk	Town of Southold, (23-02-0178P).	Scott A. Russell, Supervisor, Town of Southold, 53095 Main Road, Southold, NY 11971.	Town Hall, 53095 Route 25, Southold, NY 11971.	https://msc.fema.gov/portal/advanceSearch .	Feb. 8, 2024	360813
Ohio: Summit	City of Akron, (23-05-0885P).	The Honorable Dan Horrigan, Mayor, City of Akron, 166 South High Street, Suite 200, Akron, OH 44308.	Engineering Department, 576 West Park Avenue, Barberton, OH 44236.	https://msc.fema.gov/portal/advanceSearch .	Jan. 17, 2024	390523
Summit	City of Barberton, (23-05-0885P).	The Honorable William B. Judge, Mayor, City of Barberton, 576 West Park Avenue, Barberton, OH 44203.	Engineering Department, 576 West Park Avenue, Barberton, OH 44236.	https://msc.fema.gov/portal/advanceSearch .	Jan. 17, 2024	390524
Oregon: Yamhill	City of Yamhill, (22-10-1006P).	The Honorable Yvette Potter, Mayor, City of Yamhill, 205 South Maple, Yamhill, OR 97148.	City Hall, 205 South Maple Street, Yamhill, OR 97148.	https://msc.fema.gov/portal/advanceSearch .	Jan. 3, 2024	410259
Yamhill	Unincorporated Areas of Yamhill County, (22-10-1006P).	Lindsay Berschauer, Chair, Yamhill County Board of Commissioners, 535 Northeast 5th Street, McMinnville, OR 97128.	Yamhill County, Surveyor's Office, 2060 Lafayette Avenue, McMinnville, OR 97128.	https://msc.fema.gov/portal/advanceSearch .	Jan. 3, 2024	410249
Pennsylvania: Chester.	Borough of Phoenixville, (22-03-1007P).	The Honorable Peter Urscheler, Mayor, Borough of Phoenixville, 351 Bridge Street, 2nd Floor, Phoenixville, PA 19460.	Borough Hall, 351 Bridge Street, 2nd Floor, Phoenixville, PA 19460.	https://msc.fema.gov/portal/advanceSearch .	Jan. 29, 2024	420287
Texas: Collin	Unincorporated Areas of Collin County, (23-06-0707P).	The Honorable Chris Hill, County Judge Precinct 3, Collin County Administration Building, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071.	Collin County Engineering Department, 4690 Community Avenue, Suite 200, McKinney, TX 75071.	https://msc.fema.gov/portal/advanceSearch .	Jan. 16, 2024	480130
Washington: Spokane.	Unincorporated Areas of Spokane County, (23-10-0428P).	Mary Kuney, Chair, Spokane County Board of Commissioners, 1116 West Broadway Avenue, Spokane County, WA 99260.	Spokane County Public Works Building, 1026 West Broadway Avenue, Spokane, WA 99260.	https://msc.fema.gov/portal/advanceSearch .	Feb. 7, 2024	530174

[FR Doc. 2023-24334 Filed 11-2-23; 8:45 am]

BILLING CODE 9119-12-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Docket ID FEMA-2023-0002; Internal Agency Docket No. FEMA-B-2381]

Proposed Flood Hazard Determinations**AGENCY:** Federal Emergency Management Agency, Department of Homeland Security.**ACTION:** Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before February 1, 2024.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective

Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2381, to Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the

revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison. (Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Dane County, Wisconsin and Incorporated Areas	
Project: 21-05-0012S Preliminary Date: July 11, 2023	
City of Madison	City County Building, 210 Martin Luther King Jr. Boulevard, Room 403, Madison, WI 53703.
City of Monona	City Hall, 5211 Schluter Road, Monona, WI 53716.
City of Sun Prairie	City Hall, 300 East Main Street, Sun Prairie, WI 53590.
Ho-Chunk Nation of Wisconsin	Tribal Office Building, W9814 Airport Road, Black River Falls, WI 54615.
Unincorporated Areas of Dane County	City County Building, 210 Martin Luther King Jr. Boulevard, Room 116, Madison, WI 53703.
Village of McFarland	Municipal Center, 5915 Milwaukee Street, McFarland, WI 53558.

Community	Community map repository address
Village of Windsor	Windsor Village Hall, 4084 Mueller Road, DeForest, WI 53532.

[FR Doc. 2023–24336 Filed 11–2–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency****[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2382]****Changes in Flood Hazard Determinations****AGENCY:** Federal Emergency Management Agency, Department of Homeland Security.**ACTION:** Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) patrick.sacibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer

of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, “Flood Insurance.”)

Kevin Werner,

Assistant Administrator for Risk Management (Acting), Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Arkansas:						
Benton	City of Bentonville (22–06–2867P).	The Honorable Stephanie Orman, Mayor, City of Bentonville, 305 Southwest A Street, Bentonville, AR 72712.	Public Works Department, 3200 Southwest Municipal Drive, Bentonville, AR 72712.	https://msc.fema.gov/portal/advanceSearch .	Dec. 29, 2023	050012
Benton	City of Centerton (22–06–2867P).	The Honorable Bill Edwards, Mayor, City of Centerton, 200 Municipal Drive, Centerton, AR 72719.	Planning and Development Department, 200 Municipal Drive, Centerton, AR 72719.	https://msc.fema.gov/portal/advanceSearch .	Dec. 29, 2023	050399

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Colorado: Boulder.	City of Boulder (22–08–0838P).	The Honorable Aaron Brockett, Mayor, City of Boulder, 1777 Broadway Street, Boulder, CO 80302.	Municipal Building, 1777 Broadway Street, Boulder, CO 80302.	https://msc.fema.gov/portal/advanceSearch .	Dec. 18, 2023	080024
Florida: Hillsborough.	Unincorporated areas of Hillsborough County (23–04–2315P).	Bonnie Wise, Hillsborough County Administrator, 601 East Kennedy Boulevard, 26th Floor, Tampa, FL 33602.	Hillsborough County Center, 601 East Kennedy Boulevard, 22nd Floor, Tampa, FL 33602.	https://msc.fema.gov/portal/advanceSearch .	Jan. 18, 2024	120112
Hillsborough.	Unincorporated areas of Hillsborough County (23–04–2913P).	Bonnie Wise, Hillsborough County Administrator, 601 East Kennedy Boulevard, 26th Floor, Tampa, FL 33602.	Hillsborough County Center, 601 East Kennedy Boulevard, 22nd Floor, Tampa, FL 33602.	https://msc.fema.gov/portal/advanceSearch .	Jan. 18, 2024	120112
Monroe	Unincorporated areas of Monroe County (23–04–4347P).	The Honorable Craig Cates, Mayor, Monroe County Board of Commissioners, 500 Whitehead Street, Suite 102, Key West, FL 33040.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.	https://msc.fema.gov/portal/advanceSearch .	Dec. 15, 2023	125129
Orange	City of Orlando (23–04–1723P).	The Honorable Buddy Dyer, Mayor, City of Orlando, 400 South Orange Avenue, Orlando, FL 32801.	Public Works Department Engineering Division, 400 South Orange Avenue, 8th Floor Orlando, FL 32801.	https://msc.fema.gov/portal/advanceSearch .	Dec. 18, 2023	120186
Osceola	City of St. Cloud (22–04–4332P).	Veronica Miller, Manager, City of St. Cloud, 1300 9th Street, St. Cloud, FL 34769.	Building Department, Building A, 1300 9th Street, St. Cloud, FL 34769.	https://msc.fema.gov/portal/advanceSearch .	Dec. 20, 2023	120191
Palm Beach.	Unincorporated areas of Palm Beach County (22–04–4645P).	Verdenia Baker, Palm Beach County Administrator, 301 North Olive Avenue, 11th Floor, West Palm Beach, FL 33401.	Palm Beach County Building Division, Planning, Zoning and Building Department, Vista Center, 1st Floor, Room 1E–17, 2300 North Jog Road, West Palm Beach, FL 33411.	https://msc.fema.gov/portal/advanceSearch .	Dec. 11, 2023	120192
Sarasota ...	Unincorporated areas of Sarasota County (23–04–0451P).	Ron Cutsinger, Chair, Sarasota County Board of Commissioners, 1660 Ringling Boulevard, Sarasota, FL 34236.	Sarasota County Planning and Development Services Department, 1001 Sarasota Center Boulevard, Sarasota, FL 34240.	https://msc.fema.gov/portal/advanceSearch .	Dec. 14, 2023	125144
Sumter	City of Wildwood (23–04–2289P).	The Honorable Ed Wolf, Mayor, City of Wildwood, 100 North Main Street, Wildwood, FL 34785.	City Hall, 100 North Main Street, Wildwood, FL 34785.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2023	120299
Sumter	Unincorporated areas of Sumter County (23–04–2289P).	Craig A. Estep, Chair, Sumter County Board of Commissioners, 7375 Powell Road, Wildwood, FL 34785.	Sumter County Administration, 7375 Powell Road, Wildwood, FL 34785.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2023	120296
Volusia	City of Daytona Beach (23–04–1622P).	Deric C. Feacher, Manager, City of Daytona Beach, 301 South Ridgewood Avenue, Daytona Beach, FL 32114.	Utilities Department, 125 Basin Street, Daytona Beach, FL 32114.	https://msc.fema.gov/portal/advanceSearch .	Jan. 15, 2024	125099
Volusia	Unincorporated areas of Volusia County (23–04–1622P).	George Recktenwald, Manager, Volusia County, 123 West Indiana Avenue, DeLand, FL 32720.	Thomas C. Kelly Administration Center, 123 West Indiana Avenue, DeLand, FL 32720.	https://msc.fema.gov/portal/advanceSearch .	Jan. 15, 2024	125155
Georgia: Cobb	City of Kennesaw (23–04–1243P).	The Honorable Derek Easterling, Mayor, City of Kennesaw, 2529 J.O. Stephenson Avenue, Kennesaw, GA 30144.	City Hall, 2529 J.O. Stephenson Avenue, Kennesaw, GA 30144.	https://msc.fema.gov/portal/advanceSearch .	Dec. 11, 2023	130055
Kentucky: Fayette.	Lexington-Fayette Urban County Government (23–04–1858P).	The Honorable Linda Gorton, Mayor, Lexington-Fayette Urban County Government, 200 East Main Street, Lexington, KY 40507.	Engineering Department, 101 East Vine Street, 4th Floor, Lexington, KY 40507.	https://msc.fema.gov/portal/advanceSearch .	Jan. 4, 2024	210067
Maryland: Frederick.	Unincorporated areas of Frederick County (23–03–0887P).	The Honorable Jessica Fitzwater, Frederick County Executive, 12 East Church Street, Frederick, MD 21701.	Frederick County Division of Planning and Permitting, 30 North Market Street, Frederick, MD 21701.	https://msc.fema.gov/portal/advanceSearch .	Dec. 27, 2023	240027
Massachusetts: Plymouth.	Town of Duxbury (23–01–0101P).	René J. Read, Town of Duxbury Manager, 878 Tremont Street, Duxbury, MA 02332.	Town Hall, 878 Tremont Street, Duxbury, MA 02332.	https://msc.fema.gov/portal/advanceSearch .	Jan. 4, 2024	250263
North Carolina:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Alamance	Unincorporated areas of Alamance County (23-04-2547P).	John Paisley, Chair, Alamance County Board of Commissioners, 124 West Elm Street, Graham, NC 27253.	Alamance County Planning Department, 201 West Elm Street, Graham, NC 27253.	https://msc.fema.gov/portal/advanceSearch .	Jan. 19, 2024	370001
Buncombe	Unincorporated areas of Buncombe County (23-04-1182P).	Brownie Newman, Chair, Buncombe County Board of Commissioners, 200 College Street, Suite 300, Asheville, NC 28801.	Buncombe County Planning and Development Department, 46 Valley Street, Asheville, NC 28801.	https://msc.fema.gov/portal/advanceSearch .	Nov. 10, 2023	370031
Oklahoma: Oklahoma.	City of Oklahoma City (23-06-0313P).	The Honorable David Holt, Mayor, City of Oklahoma City, 200 North Walker Avenue, 3rd Floor, Oklahoma City, OK 73102.	Public Works Department, 420 West Main Street, Suite 700, Oklahoma City, OK 73102.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2023	405378
Texas: Atascosa ...	City of Pleasanton (23-06-0894P).	The Honorable Clinton J. Powell, Mayor, City of Pleasanton, P.O. Box 209, Pleasanton, TX 78064.	Engineering Department, 108 2nd Street, Pleasanton, TX 78064.	https://msc.fema.gov/portal/advanceSearch .	Dec. 7, 2023	480015
Brazos	City of Bryan (22-06-2814P).	The Honorable Bobby Gutierrez, Mayor, City of Bryan, P.O. Box 1000, Bryan, TX 77805.	City Hall, 300 South Texas Avenue, Bryan, TX 77803.	https://msc.fema.gov/portal/advanceSearch .	Dec. 6, 2023	480082
Collin and Denton.	City of Frisco (22-06-2393P).	The Honorable Jeff Cheney, Mayor, City of Frisco, 6101 Frisco Square Boulevard, Frisco, TX 75034.	Development Engineers Department, 6101 Frisco Square Boulevard, Frisco, TX 75034.	https://msc.fema.gov/portal/advanceSearch .	Jan. 16, 2024	480134
Collin	City of Plano (23-06-1026P).	The Honorable John B. Muns, Mayor, City of Plano, 1520 K Avenue, Suite 250, Plano, TX 75074.	Engineering Department, 1520 K Avenue, Plano, TX 75074.	https://msc.fema.gov/portal/advanceSearch .	Jan. 16, 2024	480140
Denton	City of Fort Worth (23-06-0279P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Transportation and Public Works, Engineering Vault, 200 Texas Street, Fort Worth, TX 76102.	https://msc.fema.gov/portal/advanceSearch .	Jan. 5, 2024	480596
Denton	Unincorporated areas of Denton County (23-06-0279P).	The Honorable Andy Eads, Denton County Judge, 1 Courthouse Drive, Suite 3100, Denton, TX 76208.	Denton County Hall, 1 Courthouse Drive, Denton, TX 76208.	https://msc.fema.gov/portal/advanceSearch .	Jan. 5, 2024	480774
Grayson ...	Unincorporated areas of Grayson County (23-06-0018P).	The Honorable Bruce Dawsey, Grayson County Judge, 100 West Houston Street, Sherman, TX 75090.	Grayson County Development Services/Floodplain Management, 100 West Houston Street, Suite G-1, Sherman, TX 75090.	https://msc.fema.gov/portal/advanceSearch .	Jan. 3, 2024	480829
Johnson ...	City of Godley (23-06-0207P).	The Honorable Acy McGehee, Mayor, City of Godley, 200 West Railroad Street, Godley, TX 76044.	City Hall, 104 South Main Street, Godley, TX 76044.	https://msc.fema.gov/portal/advanceSearch .	Jan. 2, 2024	480880
Kaufman ...	City of Forney (23-06-0547P).	Charles W. Daniels, City of Forney Manager, P.O. Box 826, Forney, TX 75126.	City Hall, 101 East Main Street, Forney, TX 75126.	https://msc.fema.gov/portal/advanceSearch .	Dec. 15, 2023	480410
Kaufman ...	Unincorporated areas of Kaufman County (23-06-0547P).	The Honorable Jackie Allen, Kaufman County Judge, 1902 East U.S. Highway 175, Kaufman, TX 75142.	Kaufman County Development Services Department, 106 West Grove Street, Kaufman, TX 75142.	https://msc.fema.gov/portal/advanceSearch .	Dec. 15, 2023	480411
Rockwell ...	City of Fate (23-06-2327X).	The Honorable David Billings, Mayor, City of Fate, 1900 C.D. Boren Parkway, Fate, TX 75087.	City Hall, 1900 C.D. Boren Parkway, Fate, TX 75087.	https://msc.fema.gov/portal/advanceSearch .	Jan. 22, 2024	480544
Tarrant	City of Fort Worth (23-06-0331P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Transportation and Public Works, Engineering Vault, 200 Texas Street, Fort Worth, TX 76102.	https://msc.fema.gov/portal/advanceSearch .	Dec. 11, 2023	480596
Tarrant	Unincorporated areas of Tarrant County (23-06-0331P).	The Honorable Tim O'Hare, Tarrant County Judge, 100 East Weatherford Street, Suite 501, Fort Worth, TX 76196.	Tarrant County Administration Building, 100 East Weatherford Street, Suite 501, Fort Worth, TX 76196.	https://msc.fema.gov/portal/advanceSearch .	Dec. 11, 2023	480582
Travis	City of Pflugerville (23-06-0568P).	The Honorable Victor Gonzales, Mayor, City of Pflugerville, P.O. Box 589, Pflugerville, TX 78691.	Planning and Development Services Department, 100 West Main Street, Pflugerville, TX 78691.	https://msc.fema.gov/portal/advanceSearch .	Dec. 18, 2023	481028
Victoria	City of Victoria (22-06-2362P).	The Honorable Jeff Bauknight, Mayor, City of Victoria, P.O. Box 1758, Victoria, TX 77901.	Victoria County Courthouse, 101 North Bridge Street, Victoria, TX 77901.	https://msc.fema.gov/portal/advanceSearch .	Jan. 8, 2024	480638

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Victoria	Unincorporated areas of Victoria County (22-06-2362P).	The Honorable Ben Zeller, Victoria County Judge, 101 North Bridge Street, Room 102, Victoria, TX 77901.	Victoria County Courthouse, 101 North Bridge Street, Victoria, TX 77901.	https://msc.fema.gov/portal/advanceSearch .	Jan. 8, 2024	480637

[FR Doc. 2023-24338 Filed 11-2-23; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Docket ID FEMA-2023-0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address

listed in the table below and online through the FEMA Map Service Center at <https://msc.fema.gov>.

FOR FURTHER INFORMATION CONTACT: Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65. The currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that

the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at <https://msc.fema.gov>.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
California: San Luis Obispo (FEMA Docket No.: B-2368).	City of Arroyo Grande (22-09-1729P).	Whitney McDonald, City of Arroyo Grande Manager, 300 East Branch Street, Arroyo Grande, CA 93420.	Public Works Department, 300 East Branch Street, Arroyo Grande, CA 93420.	Oct. 2, 2023	060305
Colorado: Adams (FEMA Docket No.: B-2372).	City of Thornton (23-08-0196P).	The Honorable Janifer Kulmann, Mayor, City of Thornton, 9500 Civic Center Drive, Thornton, CO 80229.	City Hall, 9500 Civic Center Drive, Thornton, CO 80229.	Oct. 13, 2023	080007
El Paso (FEMA Docket No.: B-2368).	City of Colorado Springs (22-08-0842P).	The Honorable John Suthers, Mayor, City of Colorado Springs, 30 South Nevada Avenue, Suite 601, Colorado Springs, CO 80903.	Pikes Peak Regional Building Department, Floodplain Management Office, 2880 International Circle, Colorado Springs, CO 80910.	Oct. 12, 2023	080060
El Paso (FEMA Docket No.: B-2368).	City of Manitou Springs (22-08-0492P).	The Honorable John Graham, Mayor, City of Manitou Springs, 606 Manitou Avenue, Manitou Springs, CO 80829.	Pikes Peak Regional Building Department, Floodplain Management Office, 2880 International Circle, Colorado Springs, CO 80910.	Sep. 29, 2023	080063
Jefferson (FEMA Docket No.: B-2368).	City of Lakewood (23-08-0091P).	The Honorable Adam Paul, Mayor, City of Lakewood, 480 South Allison Parkway, Lakewood, CO 80226.	Public Works Department, 470 South Allison Parkway, Lakewood, CO 80226.	Oct. 6, 2023	085075

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Florida:					
Brevard (FEMA Docket No.: B-2361).	City of Palm Bay (22-04-2818P).	The Honorable Rob Medina, Mayor, City of Palm Bay, 120 Malabar Road, Palm Bay, FL 32907.	Building Department, 190 Malabar Road Southwest, Suite 105, Palm Bay, FL 32908.	Oct. 6, 2023	120404
Charlotte (FEMA Docket No.: B-2372).	Unincorporated areas of Charlotte County (23-04-1652P).	Bill Truex, Chair, Charlotte County Board of Commissioners, 18500 Murdock Circle, Suite 536, Port Charlotte, FL 33948.	Charlotte County Building Department, 18500 Murdock Circle, Port Charlotte, FL 33948.	Oct. 13, 2023	120061
Hillsborough (FEMA Docket No.: B-2361).	City of Tampa (21-04-0665P).	John Bennett, Chief of Staff, City of Tampa, 306 East Jackson Street, Tampa, FL 33602.	Construction Services Department, 1400 North Boulevard, Tampa, FL 33607.	Oct. 23, 2023	120114
Hillsborough (FEMA Docket No.: B-2361).	Unincorporated areas of Hillsborough County (21-04-0665P).	Bonnie Wise, Hillsborough County Administrator, 601 East Kennedy Boulevard, 26th Floor, Tampa, FL 33602.	Hillsborough County Center, 601 East Kennedy Boulevard, 22nd Floor, Tampa, FL 33602.	Oct. 23, 2023	120112
Hillsborough (FEMA Docket No.: B-2361).	Unincorporated areas of Hillsborough County (23-04-1767P).	Bonnie Wise, Hillsborough County Administrator, 601 East Kennedy Boulevard, 26th Floor, Tampa, FL 33602.	Hillsborough County Center, 601 East Kennedy Boulevard, 22nd Floor, Tampa, FL 33602.	Oct. 12, 2023	120112
Monroe (FEMA Docket No.: B-2368).	Village of Islamorada (23-04-2764P).	The Honorable Joseph Buddy Pinder III, Mayor, Village of Islamorada, 86800 Overseas Highway, Islamorada, FL 33036.	Building Department, 86800 Overseas Highway, Islamorada, FL 33036.	Oct. 10, 2023	120424
Palm Beach (FEMA Docket No.: B-2361).	Unincorporated areas of Palm Beach County (22-04-3946P).	Verdenia C. Baker, Palm Beach County Administrator, 301 North Olive Avenue, West Palm Beach, FL 33401.	Palm Beach County Building Division, Planning, Zoning and Building Department, 2300 North Jog Road, West Palm Beach, FL 33411.	Oct. 2, 2023	120192
Kentucky: Boyd (FEMA Docket No.: B-2361).	Unincorporated areas of Boyd County (22-04-5324P).	The Honorable Eric Chaney, Judge Executive, Boyd County, 2800 Louisa Street, Catlettsburg, KY 41129.	Boyd County Code Enforcement Department, 2800 Louisa Street, Catlettsburg, KY 41129.	Oct. 16, 2023	210016
Massachusetts:					
Essex (FEMA Docket No.: B-2372).	City of Gloucester (23-01-0347P).	The Honorable Greg Varga, Mayor, City of Gloucester, 9 Dale Avenue, Gloucester, MA 01930.	City Hall, 3 Pond Road, 2nd Floor, Gloucester, MA 01930.	Oct. 19, 2023	250082
Suffolk (FEMA Docket No.: B-2372).	City of Boston (21-01-1039P).	The Honorable Michelle Wu, Mayor, City of Boston, 1 City Hall Square, Suite 500, Boston, MA 02201.	City Hall, 1 City Hall Square, Suite 500, Boston, MA 02201.	Oct. 20, 2023	250286
Suffolk (FEMA Docket No.: B-2372).	City of Revere (21-01-1039P).	The Honorable Brian M. Arrigo, Mayor, City of Revere, 281 Broadway, Revere, MA 02151.	City Hall, 281 Broadway, Revere, MA 02151.	Oct. 20, 2023	250288
New Mexico:					
Bernalillo (FEMA Docket No.: B-2361).	City of Albuquerque (22-06-2510P).	The Honorable Tim Keller, Mayor, City of Albuquerque, 1 Civic Plaza Northwest, Albuquerque, NM 87102.	City Hall, 1 Civic Plaza Northwest, Albuquerque, NM 87102.	Oct. 23, 2023	350002
Bernalillo (FEMA Docket No.: B-2361).	Unincorporated areas of Bernalillo County (22-06-2510P).	Barbara Baca, Chair, Bernalillo County Board of Commissioners, 415 Silver Avenue Southwest, Albuquerque, NM 87102.	Bernalillo County at Alvarado Square, 415 Silver Avenue Southwest, Albuquerque, NM 87102.	Oct. 23, 2023	350001
Pennsylvania:					
Montgomery (FEMA Docket No.: B-2368).	Borough of Collegeville (23-03-0045P).	Catherine Kernen, President, Borough of Collegeville Council, 491 East Main Street, Collegeville, PA 19426.	Borough Hall, 491 East Main Street, Collegeville, PA 19426.	Oct. 16, 2023	421900
Montgomery (FEMA Docket No.: B-2368).	Township of Lower Providence (23-03-0045P).	E.J. Mentry, Manager, Township of Lower Providence, 100 Parklane Drive, Eagleville, PA 19403.	Community Development Department, 100 Parklane Drive, Eagleville, PA 19403.	Oct. 16, 2023	420703
Texas:					
Collin (FEMA Docket No.: B-2372).	City of Murphy (22-06-2774P).	The Honorable Scott Bradley, Mayor, City of Murphy, 206 North Murphy Road, Murphy, TX 75094.	City Hall, 206 North Murphy Road, Murphy, TX 75094.	Oct. 23, 2023	480137
Collin (FEMA Docket No.: B-2372).	City of Plano (22-06-2774P).	The Honorable John Muns, Mayor, City of Plano, 1520 K Avenue, Suite 250, Plano, TX 75074.	Engineering Department, 1520 K Avenue, Suite 250, Plano, TX 75074.	Oct. 23, 2023	480140
Collin (FEMA Docket No.: B-2372).	City of Richardson (22-06-2774P).	The Honorable Bob Dubey, Mayor, City of Richardson, 411 West Arapaho Road, Richardson, TX 75080.	Engineering Department, 1302 East Collins Boulevard, Richardson, TX 75081.	Oct. 23, 2023	480184
Collin (FEMA Docket No.: B-2361).	City of Wylie (23-06-0077P).	The Honorable Matthew Porter, Mayor, City of Wylie, 300 Country Club Road, Building 100, Wylie, TX 75098.	City Hall, 300 Country Club Road, Building 100, Wylie, TX 75098.	Oct. 12, 2023	480759
Collin (FEMA Docket No.: B-2372).	Unincorporated areas of Collin County (22-06-2774P).	The Honorable Chris Hill, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071.	Collin County Engineering Department, 4690 Community Avenue, Suite 200, McKinney, TX 75071.	Oct. 23, 2023	480130
Collin (FEMA Docket No.: B-2361).	Unincorporated areas of Collin County (23-06-0077P).	The Honorable Chris Hill, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071.	Collin County Engineering Department, 4690 Community Avenue, Suite 200, McKinney, TX 75071.	Oct. 12, 2023	480130
Denton (FEMA Docket No.: B-2368).	City of Denton (23-06-0154P).	Sara Hensley, City of Denton Manager, 215 East McKinney Street, Denton, TX 76201.	Development Services Department, 401 North Elm Street, Denton, TX 76201.	Oct. 10, 2023	480194
Denton (FEMA Docket No.: B-2368).	Unincorporated areas of Denton County (23-06-0154P).	The Honorable Andy Eads, Denton County Judge, 1 Courthouse Drive, Suite 3100, Denton, TX 76208.	Denton County Hall, 1 Courthouse Drive, Denton, TX 76208.	Oct. 10, 2023	480774

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Ellis (FEMA Docket No.: B-2361).	Unincorporated areas of Ellis County (22-06-2111P).	The Honorable Todd Little, Ellis County Judge, 101 West Main Street, Waxahachie, TX 75165.	Ellis County Courts and Administration, 109 South Jackson Street, Waxahachie, TX 75165.	Oct. 19, 2023	480798
Grayson (FEMA Docket No.: B-2368).	City of Denison (22-06-2995P).	The Honorable Janet Gott, Mayor, City of Denison, 300 West Main Street, Denison, TX 75020.	City Hall, 300 West Main Street, Denison, TX 75020.	Oct. 2, 2023	480259
Grayson (FEMA Docket No.: B-2368).	City of Sherman (22-06-2995P).	The Honorable David Plyler, Mayor, City of Sherman, 220 West Mulberry Street, Sherman, TX 75090.	City Hall, 220 West Mulberry Street, Sherman, TX 75090.	Oct. 2, 2023	485509
Hunt (FEMA Docket No.: B-2368).	City of Josephine (23-06-0202P).	The Honorable Jason Turney, Mayor, City of Josephine, P.O. Box 99, Josephine, TX 75164.	City Hall, 201 South Main Street, Josephine, TX 75173.	Sep. 29, 2023	480756
Hunt (FEMA Docket No.: B-2368).	Unincorporated areas of Hunt County (23-06-0202P).	The Honorable Bobby W. Stovall, Hunt County Judge, 2507 Lee Street, 2nd Floor, Greenville, TX 75401.	Hunt County Courthouse, 2507 Lee Street, 2nd Floor, Greenville, TX 75401.	Sep. 29, 2023	480363
Johnson (FEMA Docket No.: B-2314).	City of Burleson (22-06-0312P and, 23-06-2065P).	The Honorable Chris Fletcher, Mayor, City of Burleson, 141 West Renfro Street, Burleson, TX 76028.	City Hall, 141 West Renfro Street, Burleson, TX 76028.	Apr. 13, 2023 and Oct. 4, 2023.	485459
Johnson (FEMA Docket No.: B-2314).	Unincorporated areas of Johnson County (22-06-0312P and, 23-06-2065P).	The Honorable Roger Harmon, Johnson County Judge, 2 North Main Street, Cleburne, TX 76033.	Johnson County Public Works Department, 2 North Main Street, Cleburne, TX 76033.	Apr. 13, 2023 and Oct. 4, 2023.	480879
Tarrant (FEMA Docket No.: B-2368).	City of Everman (22-06-2189P).	The Honorable Ray Richardson, Mayor, City of Everman, 212 North Race Street, Everman, TX 76140.	City Hall, 212 North Race Street, Everman, TX 76140.	Oct. 2, 2023	480594
Tarrant (FEMA Docket No.: B-2372).	City of Everman (23-06-0333P).	The Honorable Ray Richardson, Mayor, City of Everman, 212 North Race Street, Everman, TX 76140.	City Hall, 212 North Race Street, Everman, TX 76140.	Oct. 16, 2023	480594
Tarrant (FEMA Docket No.: B-2372).	City of Fort Worth (22-06-1840P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Department of Transportation and Public Works, Engineering Vault and Map Repository, 200 Texas Street, Fort Worth, TX 76102.	Oct. 23, 2023	480596
Tarrant (FEMA Docket No.: B-2368).	City of Fort Worth (22-06-2189P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Transportation and Public Works Department, Engineering Vault, 200 Texas Street, Fort Worth, TX 76102.	Oct. 2, 2023	480596
Tarrant (FEMA Docket No.: B-2368).	City of Fort Worth (23-06-0163P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Transportation and Public Works Department, Engineering Vault, 200 Texas Street, Fort Worth, TX 76102.	Oct. 10, 2023	480596
Tarrant (FEMA Docket No.: B-2372).	City of Fort Worth (23-06-0164P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Department of Transportation and Public Works, Engineering Vault and Map Repository, 200 Texas Street, Fort Worth, TX 76102.	Oct. 23, 2023	480596
Williamson (FEMA Docket No.: B-2368).	City of Round Rock (22-06-2322P).	The Honorable Craig Morgan, Mayor, City of Round Rock, 221 East Main Street, Round Rock, TX 78664.	Utilities and Environmental Services Department, 3400 Sunrise Road, Round Rock, TX 78665.	Oct. 16, 2023	481048
Virginia: Independent City (FEMA Docket No.: B-2368).	City of Fairfax (22-03-1047P).	Robert A. Stalzer, City of Fairfax Manager, 10455 Armstrong Street, Room 316, Fairfax, VA 22030.	Public Works Department, 10455 Armstrong Street, Room 200, Fairfax, VA 22030.	Oct. 2, 2023	515524

[FR Doc. 2023-24337 Filed 11-2-23; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency****[Docket ID FEMA-2023-0002]****Final Flood Hazard Determinations**

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting

Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below. The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP).

DATES: The date of March 13, 2024 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables

below and will be available online through the FEMA Map Service Center at <https://msc.fema.gov> by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that

publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone

areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at <https://msc.fema.gov>.

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Fayette County, Iowa and Incorporated Areas Docket No.: FEMA-B-2145 and FEMA-B-2298	
City of Elgin	City Hall, 212 Main Street, Elgin, IA 52141.
City of Oelwein	City Hall, 20 2nd Avenue Southwest, Oelwein, IA 50662.
Unincorporated Areas of Fayette County	Fayette County Courthouse, 114 North Vine Street, West Union, IA 52175.
Dickinson County, Kansas and Incorporated Areas Docket No.: FEMA-B-1975, FEMA-B-2179, FEMA-B-2298	
City of Abilene	Office of the City Inspector, 419 North Broadway Street, Abilene, KS 67410.
City of Chapman	City Hall, 446 North Marshall Street, Chapman, KS 67431.
City of Enterprise	City Hall, 206 South Factory Street, Enterprise, KS 67441.
City of Herington	City Office, 17 North Broadway, Herington, KS 67449.
City of Hope	City Office, 113 North Main Street, Hope, KS 67451.
City of Manchester	City Office, 610 Lina Avenue, Manchester, KS 67410.
City of Solomon	City Office, 116 West Main Street, Solomon, KS 67480.
Unincorporated Areas of Dickinson County	Dickinson County Courthouse, 109 East 1st Street, Suite 202, Abilene, KS 67410.
Carlton County, Minnesota and Incorporated Areas Docket No.: FEMA-B-2204	
City of Barnum	City Hall, 3842 Main Street, Barnum, MN 55707.
City of Carlton	City Hall, 310 Chestnut Avenue, Carlton, MN 55718.
City of Cloquet	City Hall, 101 14th Street, Cloquet, MN 55720.
City of Cromwell	Cromwell City Office, 1272 Highway 73, Cromwell, MN 55726.
City of Moose Lake	City Hall, 412 4th Street, Moose Lake, MN 55767.
City of Scanlon	Community Center, 2801 Dewey Avenue, Scanlon, MN 55720.
City of Wright	City Office, 1426 3rd Street, Wright, MN 55798.
Fond du Lac Band of Lake Superior Chippewa	Fond du Lac Band of Lake Superior Chippewa Tribal Center, 1720 Big Lake Road, Cloquet, MN 55720.
Unincorporated Areas of Carlton County	Carlton County Courthouse, 301 Walnut Avenue, Room 103, Carlton, MN 55718.
Wheatland County, Montana and Incorporated Areas Docket No.: FEMA-B-2210	
City of Harlowton	City Hall, 17 South Central Avenue, Harlowton, MT 59036.
Unincorporated Areas of Wheatland County	Wheatland County Court Clerk, 201 A Avenue NW, Harlowton, MT 59036.
Day County, South Dakota and Incorporated Areas Docket No.: FEMA-B-2273	
City of Waubay	City Hall, 45 North Main Street, Waubay, SD 57273.
City of Webster	City Hall, 800 Main Street, Webster, SD 57274.
Town of Andover	City and Fire Department Building, 123 South Main Street, Andover, SD 57422.
Town of Grenville	Town Hall, 911 Kosciuszko Avenue, Grenville, SD 57239.
Town of Pierpont	Water Storage Building, 207 South 2nd Avenue, Pierpont, SD 57468.
Sisseton Wahpeton Oyate Tribe	Sisseton Wahpeton Oyate Emergency Management Office, 114 Lake Traverse Drive, Sisseton, SD 57262.
Unincorporated Areas of Day County	Day County Courthouse, 711 1st Street W, Webster, SD 57274.
Taylor County, Wisconsin and Incorporated Areas Docket No.: FEMA-B-2235	
City of Medford	City Hall, 639 South 2nd Street, Medford, WI 54451.
Unincorporated Areas of Taylor County	Taylor County Courthouse, 224 South 2nd Street, Medford, WI 54451.

Community	Community map repository address
Village of Gilman	Village Hall, 380 East Main Street, Gilman, WI 54433.
Village of Rib Lake	Village Hall, 655 Pearl Street, Rib Lake, WI 54470.
Village of Stetsonville	Village Hall, 105 North Gershwin Street, Stetsonville, WI 54480.

[FR Doc. 2023–24333 Filed 11–2–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7071–N–25]

60-Day Notice of Proposed Information Collection: Green and Resilient Retrofit Program (GRRP) Supporting Documents and Processing Requirements; OMB Control No.: 2502–NEW

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* January 2, 2024.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be submitted within 60 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting, “Currently under 60-day Review—Open for Public Comments” or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Anna Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at PaperworkReductionActOffice@hud.gov.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette.Pollard@hud.gov or telephone

202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Green and Resilient Retrofit Program (GRRP) Supporting Documentation.

OMB Approval Number: Pending.

OMB Expiration Date: TBD

Type of Request: New collection.

Form Numbers: TBD. While numbers have not yet been assigned, the covered forms include Transaction Plan Templates, Commitment Templates, Escrow Deposit Agreement template, Use Agreement, Surplus Cash loan agreement, Grant Agreement, Surplus Cash Loan Note, Amortizing Loan Note, Surplus Cash Loan Mortgage, Amortizing Loan Mortgage, Addendum to Assistance Contract template including efficiency add-on, Resilience Survey and Completion Certification.

Description of the need for the information and proposed use: The Green and Resilient Retrofit Program (“GRRP”) is funded through Title III of the Inflation Reduction Act of 2022, H.R. 5376 (IRA), in section 30002 titled “Improving Energy Efficiency or Water Efficiency or Climate Resilience of Affordable Housing” (the “IRA”), authorizing HUD to make loans, grants to improve energy or water efficiency; enhance indoor air quality or sustainability; implement the use of zero-emission electricity generation, low-emission building materials or processes, energy storage, or building electrification strategies; or address climate resilience of eligible HUD-assisted multifamily properties. The program leverages significant technological advancements in utility efficiency and adds a focus on preparing for climate hazards—both reducing

residents’ and properties’ exposure to hazards and protecting life, livability, and property when disaster strikes. With its dual focus, GRRP is the first program to consider, at the national scale, how best to approach both green and energy efficiency upgrades simultaneously with investment in climate resilience strategies in multifamily housing. HUD is taking a multi-faceted approach to deploy these funds multiple funding rounds and for properties at different development stages.

Funding under this program will be made through multiple cohorts under one or multiple Notices of Funding Opportunity (NOFOs) that will detail the application process for eligible applicants. This collection is necessary in order to receive applications requesting funding under this program and to complete processing requirements for multifamily owners selected under one of the GRRP cohorts (Elements, Leading Edge & Comprehensive). Documents will include information an owner may need to collect, maintain, or submit to ensure GRRP programmatic and statutory compliance with eligibility requirements and documentation required for HUD approval of any legal and financial obligations including:

- Award eligibility requirements as described in the GRRP Notices.
- Information needed to determine compliance with program requirements.
- Information the Department may require in order to exercise discretionary judgment authorized under the GRRP Notice.
- Demonstration of transaction closing preparedness, including, as applicable:
- Documentation required for HUD approval for any financial information relative to GRRP grants and loans.
- Maintenance of other information that could be requested such as utility and energy consumption and efficiency, and other viable green and retrofitting components.

Respondents: HUD-assisted multifamily owners.

Estimated Number of Respondents: 583.

Estimated Number of Responses: 583.
Frequency of Response: Once per application and awardee package.

Average Hours per Response: 34.5 hours.

Total Estimated Burden: 8,952.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Jeffrey D. Little,

General Deputy Assistant Secretary, Office of Housing.

[FR Doc. 2023–24319 Filed 11–2–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R7–SM–2023–N084;
FXFR1335070640–234–FF07J00000; OMB
Control Number 1018–0075]

Agency Information Collection Activities; Submission to the Office of Management and Budget; Federal Subsistence Regulations and Associated Forms

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing to renew a currently approved information collection, without change.

DATES: Interested persons are invited to submit comments on or before December 4, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be submitted within 30 days of publication of this notice at <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or by email to Info_Coll@fws.gov. Please reference “1018–0075” in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT:

Madonna L. Baucum, Service Information Collection Clearance Officer, by email at Info_Coll@fws.gov, or by telephone at (703) 358–2503. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act (PRA; 44 U.S.C. 3501 *et seq.*) and its implementing regulations in the Code of Federal Regulations (CFR) at 5 CFR 1320, all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

On February 27, 2023, we published in the **Federal Register** (88 FR 12285) a proposed rule (RIN 1018–BG72) containing a notice of our intent to request that OMB approve the existing and new information collections contained in that rulemaking. We solicited comments for 60 days, ending on April 28, 2023. We did not receive any comments addressing the information collection requirements contained in that proposed rule. The Service plans to publish the associated final rule, which will request OMB approval of the new information collections, in the spring of 2024. However, due to this collection expiring before the anticipated publication of that final rule, we are now requesting OMB approve an extension, without change, to this collection.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again inviting the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your that your entire comment—including your personal identifying information—may be publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The Alaska National Interest Lands Conservation Act (ANILCA; 16 U.S.C. 3111–3126), and regulations in the Code of Federal Regulations (CFR) at 50 CFR part 100 and 36 CFR part 242, require persons engaged in taking fish, shellfish, and wildlife on public lands in Alaska for subsistence uses to apply for and obtain a permit to do so, and comply with reporting provisions of that permit.

We currently use four forms in the recruitment and selection of members for regional advisory councils:

- Form 3–2300, “Federal Subsistence Regional Advisory Council Membership Incumbent Application.”

- Form 3–2321, “Federal Subsistence Regional Advisory Council Membership Application/Nomination.”

- Form 3–2322, “Regional Advisory Council Candidate Interview.”

- Form 3–2323, “Regional Advisory Council Reference/Key Contact Interview.”

The member selection process begins with the information that we collect on the application. Ten interagency review panels interview all applicants and nominees, their references, and regional key contacts. These contacts are based on the information that the applicant provides on the application form. The information that we collect through the application form and subsequent interviews is the basis of the Federal Subsistence Board’s recommendations to the Secretaries of the Interior and Agriculture for appointment and reappointment of council members.

We use the following forms to collect information from qualified rural residents for subsistence harvest:

- Form 3–2326, “Federal Subsistence Hunt Application, Permit, and Report.”

- Form 3–2327, “Designated Hunter Permit Application, Permit, and Report.”

- Form 3–2328, “Federal Subsistence Fishing Application, Permit, and Report.”

- Form 3–2378, “Designated Fishing Permit Application, Permit, and Report.”

- Form 3–2379, “Federal Subsistence Customary Trade Recordkeeping Form.”

We use the information collected to evaluate:

- Eligibility of applicant.
- Subsistence harvest success.
- Effectiveness of season lengths, harvest quotas, and harvest restrictions.
- Hunting patterns and practices.
- Hunter use.

The Federal Subsistence Board uses the harvest data, along with other information, to set future season dates and harvest limits for Federal subsistence resource users. These seasons and harvest limits are set to meet the needs of subsistence users without adverse impact to the health of existing animal populations.

In addition to the above forms, regulations at 50 CFR part 100 and 36 CFR part 242 contain requirements for the collection of information. We collect nonform information on:

- Repeal of Federal subsistence rules and regulations (50 CFR 100.14 and 36 CFR 242.14).

- Proposed changes to Federal subsistence regulations (50 CFR 100.18 and 36 CFR 242.18).

- Special action requests (50 CFR 100.19 and 36 CFR 242.19).

- Requests for reconsideration (50 CFR 100.20 and 36 CFR 242.20).

- Requests for permits and reports, such as traditional religious/cultural/educational permits, fishwheel permits, fyke net permits, and under-ice permits (50 CFR 100.25–27 and 36 CFR 242.25–27).

Title of Collection: Federal Subsistence Regulations and Associated Forms, 50 CFR 100 and 36 CFR 242.

OMB Control Number: 1018–0075.

Form Numbers: FWS Forms 3–2300, 3–2321 through 3–2323, 3–2326 through 3–2328, and 3–2378 through 3–2379.

Type of Review: Extension of the currently approved collection.

Respondents/Affected Public:

Individuals; private sector; and State, local, and Tribal governments. Most respondents are individuals who are federally defined rural residents in Alaska.

Total Estimated Number of Annual Respondents: 15,242.

Total Estimated Number of Annual Responses: 15,242.

Estimated Completion Time per Response: Varies from 15 minutes to 4 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 6,769.

Respondent’s Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2023–24376 Filed 11–2–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–ES–2023–0148; FF09E42000–FXES11609BFEDR–234]

John H. Chafee Coastal Barrier Resources System; Florida, Georgia, Louisiana, Maine, and New York; Draft 5-Year Review Boundaries

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: The Coastal Barrier Resources Act (CBRA) requires the Secretary of the

Interior to review the maps of the John H. Chafee Coastal Barrier Resources System (CBRS) at least once every 5 years and make any minor and technical modifications to the boundaries of the CBRS as are necessary to reflect changes that have occurred in the size or location of any unit as a result of natural forces. We, the U.S. Fish and Wildlife Service (Service), have conducted this review for CBRS units in Florida, Georgia, Louisiana, Maine, and the Great Lakes region of New York. With this notice, we announce the findings of our review and invite comments on the draft revised boundaries from Federal, State, and local officials.

DATES: To ensure consideration, we must receive your written comments by December 4, 2023.

ADDRESSES:

Accessing Files: The draft revised boundaries may be viewed in a web mapping application accessed from the Service’s website at <https://www.fws.gov/project/cbrs-5-year-review>. For more information, see Request for Comments under **SUPPLEMENTARY INFORMATION**.

Submitting Comments: You may submit written comments by one of the following methods:

- *Internet:* Go to: <https://www.regulations.gov>. Search for and submit comments on Docket No. FWS–HQ–ES–2023–0148.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–HQ–ES–2023–0148, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB/3W, Falls Church, VA 22041–3808.

We request that you send comments by only one of the methods described above. We will post all information received on <https://www.regulations.gov>. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT:

Katie Niemi, Coastal Barriers Coordinator, via telephone at 703–358–2071 or email at CBRA@fws.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The Coastal Barrier Resources Act (CBRA; 16 U.S.C. 3501 *et seq.*) requires the Secretary of the Interior (Secretary) to review the maps of the CBRS at least once every 5 years and make, in consultation with the appropriate Federal, State, and local officials, such minor and technical modifications to the boundaries of the CBRS as are necessary solely to reflect changes that have occurred in the size or location of any unit as a result of natural forces (16 U.S.C. 3503(c)).

The Service's review included:

- Six of the 137 total units located in Florida
- All 13 units located in Georgia
- Fifteen of the 21 total units located in Louisiana
- All 34 units located in Maine
- All 21 units located in the Great Lakes region of New York

The remaining Louisiana and New York (Long Island) units were not included in this review because they are part of separate comprehensive mapping projects (the related maps are awaiting adoption by Congress through legislation). The remaining Florida units were not included in this review but are planned for review in the future.

Of the 89 total units reviewed, the Service revised 13 units that changed in size or location as a result of natural forces since they were last mapped. The Service's review of these areas also found two CBRS units that require modifications to correct administrative errors made in the past on maps for Lee County, Florida.

Background and Methodology

Background information on the 5-year review effort and the methodology used to produce the revised boundaries can be found in a notice the Service published in the **Federal Register** on November 22, 2022 (87 FR 71352).

Prior to the Service's "digital conversion" effort for the CBRS maps (carried out during the period 2013–2016), the official CBRS maps had significant limitations due to their age, scale, and the now antiquated techniques used to create them. On August 29, 2013 (78 FR 53467), the Service published a notice in the **Federal Register** describing the limitations of those original maps, along with the methodology that was used to transcribe the boundaries from those maps to new base map imagery for the purposes of the 5-year review. In that notice, the Service also described limited circumstances under which CBRS boundaries may be modified to correct administrative errors made in

the past, either in (a) the transcription of the boundaries from maps that were reviewed and approved by Congress to the official CBRS maps on file with the Service or (b) the inclusion of unqualifying areas to the CBRS through a map modification to account for natural changes under 16 U.S.C. 3503(c). We found two administrative errors in Units P19 and P19P that were introduced through the digital conversion and 5-year review effort in Florida in 2016. Minor corrections to these two units are described below.

Proposed Modifications to the CBRS

In accordance with CBRA's requirement to update the CBRS maps at least once every 5 years to account for natural changes, the Service has conducted a review of certain unit boundaries in Florida, Georgia, Louisiana, Maine, and the Great Lakes region of New York.

The Service made modifications due to natural changes in the size or location of a total of 13 CBRS units (of the 89 units reviewed). In addition, two units in Florida were modified to correct administrative errors made in the past on maps for Lee County, Florida. Below is a summary of those changes and the results of our review.

Florida

The Service's review found that five of the six CBRS units in Florida that are included in this review (Units FL–70, FL–70P, P19, P19P, P20, and P20P) require changes due to natural forces. In addition, two units in Florida, P19 and P19P, were modified to correct administrative errors. The imagery that was used on the currently effective maps is dated 2013. The imagery that was used for this review, and will be used for the revised maps, is dated 2022. Other CBRS units in Florida were not assessed as part of this review.

For Unit P19, the administrative errors affect three privately owned structures that were inadvertently added to the unit when the Service modified the boundary in a prior 5-year review. Additionally, one adjustment was needed to correct an error in the transcription of a portion of the boundary of Unit P19P along the excluded area at the northern end of North Captiva Island affecting one structure. These errors are corrected as described below under these two units.

Otherwise Protected Area (OPA) Unit P19P is made up of 15 discrete segments on North Captiva Island that are interspersed with System Unit P19. We are only modifying the northernmost segment of Unit P19P to reflect changes from natural forces. Although erosion

has been occurring along the other 14 segments, we found that modifications beyond the scope of this project and our 5-year review authority are needed to first address significant misalignments in the locations of the OPA boundaries and the Cayo Costa State Park parcels they were intended to follow. These alignment errors were already present on the map adopted by Congress in 2000 via Public Law 106–360 and can be attributed to imprecise information regarding the location of the parcel boundaries at the time the CBRS map was produced. However, because these other errors are not of the administrative nature described in the Background and Methodology section above, they cannot be corrected administratively by the Service. Rather, such changes must be made through the comprehensive remapping process, which is described in more detail in a notice the Service published in the **Federal Register** on January 4, 2021 (86 FR 118).

FL–70P: GASPARILLA ISLAND. Unit FL–70P has two discrete segments, but modifications to account for natural changes were only necessary in the western segment. The western boundary of the excluded area of this segment has been modified to account for natural changes in the shoreline between the Boca Grande Rear Range Lighthouse and Sea Grape Beach.

P19: NORTH CAPTIVA ISLAND. The boundary along the western side of North Captiva Island that is coincident with the northernmost segment of Unit P19P has been modified to account for natural changes in the shoreline along the Gulf of Mexico. The excluded area boundary at the northern tip of North Captiva Island has been modified to account for natural changes in the shoreline along the Gulf of Mexico and Captiva Pass.

In addition, two segments of the boundary along the excluded area have been modified to correct an administrative error made during the previous 5-year review for this unit that affected three existing structures. That boundary was modified in 2016 to account for natural changes in the shoreline. However, that boundary modification was not included in the description of the 5-year review changes included in the **Federal Register** notices associated with this unit dated November 17, 2015 (80 FR 71826) and March 14, 2016 (81 FR 13407). The 2016 boundary change inadvertently resulted in adding to the unit three existing structures along the beach in the North Captiva Dunes subdivision. The boundary has been modified so that the structures will no longer be located within the unit.

P19P: NORTH CAPTIVA ISLAND.

Unit P19P has 15 discrete segments that are all coincident with Unit P19. In the northernmost segment of Unit P19P, the western boundary coincident with Unit P19 has been modified to account for natural changes in the shoreline along the Gulf of Mexico.

Additionally, an adjustment has been made to correct an administrative error in the transcription of the boundary from the CBRS map dated October 27, 2000, to the official map dated January 11, 2016, for this unit. We found that when we digitized the southern boundary of the excluded area on North Captiva Island for the purposes of the 5-year review in 2015–2016, we did not properly follow the boundary transcription methodology described in the notice published in the **Federal Register** (August 29, 2013; 78 FR 53467).

This transcription error resulted in small portions of six privately owned parcels, including one existing structure, being incorrectly depicted as within the unit in 2016. The southern boundary of the excluded area (part of the northern boundary of Unit P19P) is adjusted to correct this error and maintain the relationship between the OPA boundary, and the boundary of Cayo Costa State Park as established by Congress via Public Law 106–360 in 2000 and clearly indicated by legislative history and our background records on Unit P19P.

P20: CAYO COSTA. The coincident boundary between Units P20 and P20P at the northern tip of Cayo Costa has been modified to account for natural changes in the shoreline along Boca Grande Pass.

P20P: CAYO COSTA. Unit P20P has 13 discrete segments, but modifications to account for natural changes were only necessary in the northernmost segment. The coincident boundary between Units P20 and P20P at the northern tip of Cayo Costa has been modified to account for natural changes in the shoreline along Boca Grande Pass.

Georgia

The Service's review found that 4 of the 13 CBRS units in Georgia require changes due to natural forces. The imagery that was used on the currently effective map is dated 2013. The imagery that was used for this review, and will be used for the revised map, is dated 2021.

GA-05P: ALTAMAHA/WOLF ISLANDS: The coincident boundary between Units GA-05P and N03 has been modified to account for accretion at the northern tip of Little St. Simons Island.

N03: LITTLE ST. SIMONS ISLAND: The coincident boundary between Units GA-05P and N03 has been modified to account for accretion at the northern tip of Little St. Simons Island.

N06: CUMBERLAND ISLAND: Unit N06 has five discrete segments, but modifications to account for natural changes were only necessary in the southernmost segment. The coincident boundary between Units N06 and N06P along Beach Creek near its confluence with Cumberland Sound has been modified to account for natural changes in the shoreline.

N06P: CUMBERLAND ISLAND: Unit N06P has six discrete segments, but modifications to account for natural changes were only necessary in the southernmost segment. The coincident boundary between Units N06 and N06P along Beach Creek near its confluence with Cumberland Sound has been modified to account for natural changes in the shoreline.

Louisiana

The Service's review found that 3 of the 15 CBRS units in Louisiana that are included in this review (Units LA-03P, LA-04P, LA-05P, LA-07, LA-08P, LA-09, LA-10, S01, S01A, S02, S03, S08, S09, S10, and S11) require changes due to natural forces. The imagery that was used on the currently effective maps is dated 2013. The imagery that was used for this review, and will be used for the revised maps, is dated 2021.

The remaining six Louisiana units were not assessed as part of this review because they are part of a separate comprehensive mapping project (the related maps are awaiting adoption by Congress through legislation).

LA-05P: MARSH ISLAND/RAINEY. The boundary of the unit has been modified to account for wetland erosion along Vermilion Bay and West Cote Blanche Bay. Due to the significant rate of erosion in this area, some of the boundary has been generalized (*i.e.*, simplified so that the map is clear, and the boundary is not overly detailed).

LA-10: CALCASIEU PASS. A portion of the northern boundary of the unit has been modified to account for wetland erosion along West Cove. Due to the significant rate of erosion in this area, some of the boundary has been generalized (*i.e.*, simplified so that the map is clear, and the boundary is not overly detailed).

S10: MERMENAU RIVER. The southern boundary of the excluded area at the western end of the unit has been modified to account for shoreline erosion along the Gulf of Mexico.

Maine

The Service's review found that the 34 CBRS units in Maine do not need to be modified due to changes from natural forces. The imagery that was used on the currently effective maps is dated 2011 and/or 2012, with the exception of one map that also utilizes imagery dated 2003–2005. The imagery that was used for this review, and will be used for the revised maps, is dated 2021.

New York (Great Lakes)

The Service's review found that 1 of the 21 CBRS units in the Great Lakes region of New York (the only CBRS units in New York that were part of this review) requires changes due to natural forces. The imagery that was used on the currently effective maps is dated 2013. The imagery that was used for this review, and will be used for the revised maps, is dated 2022.

The remaining CBRS units in the Long Island region of New York were not assessed as part of this review because they are part of a separate comprehensive mapping project related to Hurricane Sandy (the related maps are awaiting adoption by Congress through legislation).

NY-62: GRENADIER ISLAND. The eastern lateral boundary of the unit has been modified to account for the accretion of a sand spit that has migrated outside the unit.

Request for Comments

CBRA requires consultation with the appropriate Federal, State, and local officials on the proposed CBRS boundary modifications to reflect changes that have occurred in the size or location of any unit as a result of natural forces (16 U.S.C. 3503(c)). We therefore invite interested Federal, State, and local officials to review and comment on the draft revised boundaries for Florida, Georgia, Louisiana, Maine, and the Great Lakes region of New York. The Service is specifically notifying the following stakeholders concerning the availability of the draft revised boundaries: (1) the Chair and Ranking Member of the House of Representatives Committee on Natural Resources, the Chair and Ranking Member of the Senate Committee on Environment and Public Works, and the members of the Senate and House of Representatives for the affected areas; (2) the governors of the affected areas; (3) State and local officials with floodplain management and/or land use responsibilities for the affected areas; and (4) Federal officials with knowledge of the coastal geomorphology within the affected areas.

Federal, State, and local officials may submit written comments and accompanying data as described in **ADDRESSES**, above. Comments regarding specific CBRS unit(s) should reference the appropriate unit number(s) and unit name(s). Please note that boundary modifications through the 5-year review process can only be made to reflect changes that have occurred in the size or location of any CBRS unit as a result of natural forces. Other requests for changes to the CBRS outside of the Service's administrative authorities (16 U.S.C. 3503(c)–(d)) will not be considered at this time. We must receive comments on or before the date listed above in **DATES**.

The draft revised boundaries may be viewed in a web mapping application accessed from the Service's website at <https://www.fws.gov/project/cbrs-5-year-review>. A shapefile of the draft revised CBRS boundaries, which can be used with GIS software, is also available for download. The shapefile is best viewed using the base imagery to which the boundaries were drawn; the base imagery sources and dates are included in the metadata for the shapefile. The Service is not responsible for any misuse or misinterpretation of the shapefile.

Interested parties who are unable to access the draft revised boundaries or other information online may contact the individual identified in **FOR FURTHER INFORMATION CONTACT**, above, and reasonable accommodations will be made.

Next Steps

Following the close of the comment period, the Service will review all comments received on the draft revised boundaries; adjust the boundaries, as appropriate; prepare final revised maps; and publish a notice in the **Federal Register** to announce the availability of the final revised maps. The revised maps will take effect upon the date of publication of that notice in the **Federal Register**.

Authority

Coastal Barrier Resources Act (CBRA); 16 U.S.C. 3501 *et seq.*

Gary Frazer,

Assistant Director for Ecological Services.

[FR Doc. 2023–23864 Filed 11–2–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2023–0047]

Notice of Availability of a Joint Record of Decision for the Proposed Coastal Virginia Offshore Wind Commercial Project

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Record of decision (ROD); notice of availability.

SUMMARY: BOEM announces the availability of the joint ROD on the Final Environmental Impact Statement (EIS) for the construction and operations plan (COP) submitted by Virginia Electric and Power Company (dba Dominion Energy) for its proposed Coastal Virginia Offshore Wind Commercial Project (Project), offshore Virginia Beach, Virginia. The joint ROD includes the Department of the Interior's (DOI) decision regarding the COP and NMFS' plans for decision, pending completion of all statutory processes, regarding Dominion Energy's requested Incidental Take Regulations (ITR) and an associated Letter of Authorization (LOA) under the Marine Mammal Protection Act (MMPA). NMFS has adopted the final EIS to support its decision of whether or not to issue the requested ITR under the MMPA. The joint ROD concludes the National Environmental Policy Act process for each agency.

ADDRESSES: The joint ROD and associated information are available on BOEM's website at <https://www.boem.gov/renewable-energy/state-activities/CVOW-C>.

FOR FURTHER INFORMATION CONTACT: For information related to BOEM's action, contact Jessica Stromberg, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, VAM–OREP, Sterling, Virginia 20166, (703) 787–1730, or jessica.stromberg@boem.gov; For information related to NMFS' action, contact Katherine Renshaw, NOAA Office of General Counsel, (302) 515–0324.

SUPPLEMENTARY INFORMATION: Dominion Energy seeks approval to construct, operate, and maintain the Project: a wind energy facility and the associated export cables on the Outer Continental Shelf (OCS) offshore Virginia. The Project would be developed within the range of design parameters outlined in

the COP, subject to applicable mitigation measures.

The Project as proposed in the COP would include up to 202 wind turbine generators (WTGs); 3 offshore, high voltage, alternating current substations; inter-array cables linking the individual turbines to the offshore substations; substation interconnector cables linking the substations to each other; offshore export cables; an onshore export cable system; an onshore switching station north of Harpers Road (Harpers Switching Station) or north of Princess Anne Road (Chicory Switching Station) in Virginia Beach, Virginia; and an overhead power line connection to the existing electrical grid at the Fentress Substation in Chesapeake, Virginia.

The WTGs, offshore substations, inter-array cables, and substation interconnector cables would be located on the OCS approximately 24 nautical miles (27 statute miles) east of Virginia Beach, Virginia, within the area defined by Renewable Energy Lease OCS–A–0483. The offshore export cables would be buried below the seabed surface on the OCS and Commonwealth of Virginia-owned submerged lands. The onshore export cables, substations, and grid connections would be located in Princess Anne County, Virginia.

After carefully considering public comments on the draft EIS and the alternatives described and analyzed in the final EIS, DOI selected Alternative B, “Revised Layout to Accommodate the Fish Haven and Navigation,” in combination with Alternative D–1, “Onshore Habitat Impact Minimization Alternative.” This combination of alternatives B and D–1 is the preferred alternative identified in the final EIS. The anticipated mitigation, monitoring, and reporting requirements, which will be included in BOEM's COP approval as terms and conditions, are included in the ROD, which is available at: <https://www.boem.gov/renewable-energy/state-activities/CVOW-C>.

NMFS has adopted BOEM's final EIS to support its decision of whether or not to promulgate the requested ITR and issue the associated LOA to Dominion Energy. NMFS' final decision of whether or not to promulgate the requested ITR and issue the LOA will be documented in a separate Decision Memorandum prepared in accordance with internal NMFS policy and procedures. The final ITR and a notice of issuance of the LOA, if issued, will be published in the **Federal Register**. The LOA would authorize Dominion Energy to take small numbers of marine mammals incidental to Project construction and would set forth permissible methods of incidental

taking; means of affecting the least practicable adverse impact on the species and their habitat; and requirements for monitoring and reporting. Pursuant to section 7 of the Endangered Species Act, NMFS issued a final Biological Opinion to BOEM on September 18, 2023, evaluating the effects of the proposed action on ESA-listed species. The proposed action in the Biological Opinion includes the associated permits, approvals, and authorizations that may be issued.

Authority: National Environmental Policy Act of 1969, as amended, (42 U.S.C. 4321 *et seq.*); 40 CFR 1505.2.

Karen Baker,

Chief, Office of Renewable Energy Programs,
Bureau of Ocean Energy Management.

[FR Doc. 2023-24295 Filed 11-2-23; 8:45 am]

BILLING CODE 4340-98-P

OFFICE OF MANAGEMENT AND BUDGET

Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

AGENCY: Office of Management and Budget.

ACTION: Notice of public comment period.

SUMMARY: The Office of Management and Budget (OMB) is seeking public comment on a draft memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)*. As proposed, the memorandum would establish new agency requirements in areas of AI governance, innovation, and risk management, and would direct agencies to adopt specific minimum risk management practices for uses of AI that impact the rights and safety of the public. The full text of the draft memorandum is available for review at <https://www.ai.gov/input> and <https://www.regulations.gov>.

DATES: Written comments must be received on or before December 5, 2023.

ADDRESSES: Please submit comments via <https://www.regulations.gov>, a Federal website that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type “OMB–2023–0020” in the search box, click “Search,” click the “Comment” button underneath “Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of

Artificial Intelligence Memorandum,” and follow the instructions for submitting comments. The OMB System of Records Notice, OMB Public Input System of Records, OMB/INPUT/01, includes a list of routine uses associated with the collection of this information.

Privacy/FOIA Notice: Comments submitted in response to this notice may be publicly available and are subject to disclosure under the Freedom of Information Act. For this reason, please do not include in your comments information of a confidential nature, such sensitive personal information or proprietary information, or any other information that you would not want publicly disclosed.

FOR FURTHER INFORMATION CONTACT:

Please direct questions regarding this Notice to Cindy Martinez at OFCIO_AI@OMB.eop.gov with “AI Memo Request for Comment” in the subject line, or by phone at 202–395–0379. Please direct media inquiries to OMB OFCIO’s Office of Public Affairs, email: MBX.OMB.Media@OMB.eop.gov.

SUPPLEMENTARY INFORMATION: The Administration has undertaken numerous efforts to advance responsible AI innovation and secure protections for people’s rights and safety. This work spans targeted sector-specific initiatives, such as the Department of Health and Human Services’ proposed rule to protect patients from discriminatory algorithms in health care,ⁱ as well as more broadly applicable guidance from the Department of Justice and Equal Employment Opportunity Commission to help employers avoid AI-enabled disability discrimination in employment.ⁱⁱ Significant efforts have also yielded the development of landmark voluntary frameworks such as the National Institute of Standards and Technology’s (NIST) AI Risk Management Framework and White House Office of Science and Technology Policy’s Blueprint for an AI Bill of Rights. To build upon this body of policy, and in accord with President Biden’s Executive Order of October 30, 2023 (Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence), OMB has prepared a draft memorandum that would direct Federal agencies to strengthen their AI governance and innovation programs while managing risks from the use of AI,

particularly when that use affects the safety and rights of the public. This memorandum also would carry out provisions of the AI in Government Act of 2020, secs. 101–104, Div. U, Public Law 116–260, and the Advancing American AI Act, secs. 7221–7228, Public Law 117–263.

Requests for Comment

Through this Request for Comment, OMB hopes to gather information on the questions posed below. However, this list is not intended to limit the scope of topics that may be addressed. Commenters are invited to provide feedback on any topic believed to have implications for the content or implementation of the proposed memorandum.

When responding to one or more of the questions below, please note in the text of your response the number of the question to which you are responding. Commenters should include a page number on each page of their submissions. Commenters are not required to respond to all questions.

OMB is requesting feedback related to the following:

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency’s size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?
2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?
3. How can OMB best advance responsible AI innovation?
4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?
5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?
6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How

ⁱ Section 1557 of the Patient Protection and Affordable Care Act; 42 U.S.C. 18116, <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>.

ⁱⁱ *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring*, Department of Justice and Equal Employment Opportunity Commission, <https://www.ada.gov/resources/ai-guidance/>.

can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

Clare Martorana,

U.S. Federal Chief Information Officer, Office of the Federal Chief Information Officer, Office of Management Budget.

[FR Doc. 2023-24269 Filed 11-2-23; 8:45 am]

BILLING CODE 3110-05-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE: 23-110]

Name of Information Collection: Property Inventory Report—Grants With Educational and Nonprofit Entities

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

DATES: Comments are due by January 2, 2024

ADDRESSES: Written comments and recommendations for this information collection should be sent within 60 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 60-day Review-Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Bill Edwards-Bodmer, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, 757-864-7998, or b.edwards-bodmer@nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The information submitted by recipients is an annual report of

Government-owned property in the possession of educational or nonprofit institutions holding NASA grants. In addition to the annual report, a property report may also be required at the end of the grant, or on the occurrence of certain events. The collected information is used by NASA to effectively maintain an appropriate internal control system for equipment and property provided or acquired under grants and cooperative agreements with institutions of higher education and other nonprofit organizations, and to comply with statutory requirements.

II. Methods of Collection

Grant and Cooperative Agreement awardees submit annual property reports via an automated NASA Form 1018 by way of the NASA Electronic Submission System (NESS).

III. Data

Title: Property Inventory Report—Grants with Educational and Nonprofit Entities.

OMB Number: 2700-0047.

Type of review: Reinstatement without change.

Affected Public: Educational and not-for-profit institutions.

Estimated Annual Number of Activities: 238.

Estimated Number of Respondents per Activity: 1.

Annual Responses: 238.

Estimated Time Per Response: 8.33 hours.

Estimated Total Annual Burden Hours: 1,983 hours.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection.

They will also become a matter of public record.

William Edwards-Bodmer,
NASA PRA Clearance Officer.

[FR Doc. 2023-24267 Filed 11-2-23; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Submission for OMB Review, Comment Request, Proposed Collection: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

ACTION: Submission for OMB review, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Services announces that the following information collection request has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. This Notice proposes the approval of the Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery for the next three years. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before December 03, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this Notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection request by selecting "Institute of Museum and Library Services" under "Currently Under Review;" then check "Only Show ICR for Public Comment" checkbox. Once you have found this information collection request, select "Comment,"

and enter or upload your comment and information. Alternatively, please mail your written comments to Office of Information and Regulatory Affairs, Attn.: OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, or call (202) 395-7316.

OMB is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

FOR FURTHER INFORMATION CONTACT: Jake Soffronoff, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024-2135. Mr. Soffronoff may be reached by telephone at 202-653-4648, or by email at jsoffronoff@imls.gov. Persons who are deaf or hard of hearing (TTY users) may contact IMLS at 202-207-7858 via 711 for TTY-Based Telecommunications Relay Service.

SUPPLEMENTARY INFORMATION: The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. To learn more, visit www.imls.gov.

Current Actions: This Notice proposes the approval of the Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery for the next three years. It will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback, we mean information that provides useful insights on perceptions and opinions but not statistical surveys that yield quantitative results that can be

generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences, and expectations; provide an early warning of issues with service; and/or focus attention on areas where communication, training, or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. They will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield statistically reliably actionable results, such as monitoring trends over time or documenting generalizable program performance. Such data uses require more rigorous designs that address the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The 60-day Notice was published in the **Federal Register** on September 6, 2023 (88 FR 60989). No comments were received under this Notice.

Agency: Institute of Museum and Library Services.

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Control Number: 3137-0081.

Agency Number: 3137.

Respondents/Affected Public:

Individuals and Households; Businesses and Organizations; State, Local or Tribal Governments; Museums; Libraries.

Average Expected Annual Number of Activities: 11.

Total Number of Annual Respondents: 9,975.

Frequency of Response: Once per request.

Average Minutes per Response: 18.

Total Estimated Number of Annual Burden Hours: 2,975.

Total Annualized Capital/Startup Costs: n/a.

Cost Burden (dollars): \$90,619.

Total Annual Federal Costs: \$51,590.

Dated: October 31, 2023.

Suzanne Mbollo,

Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2023-24315 Filed 11-2-23; 8:45 am]

BILLING CODE 7036-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-395; NRC-2023-0152]

Notice of Intent To Conduct Scoping Process and Prepare Environmental Impact Statement; Dominion Energy South Carolina, Inc.; Virgil C. Summer Nuclear Station, Unit 1

AGENCY: Nuclear Regulatory Commission.

ACTION: Intent to conduct scoping process and prepare environmental impact statement; public scoping meeting, and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) will conduct a scoping process to gather information necessary to prepare an environmental impact statement (EIS) to evaluate the environmental impacts for the subsequent license renewal (SLR) of Renewed Facility Operating License No. NPF-12 for Virgil C. Summer Nuclear Station, Unit 1 (V.C. Summer). The NRC is seeking public comment on this action and has scheduled two public scoping meetings on this action.

DATES: The NRC will hold two public scoping meetings: one through an online webinar and teleconference call and one in-person meeting near the V.C. Summer facility. Both meetings will include a presentation on the license renewal process and a transcribed public comment session. The online webinar will be held on November 9, 2023, at 2 p.m. eastern time (ET). The in-person meeting will be held on November 14, 2023, at 6 p.m. ET at the McCrorey-Liston School of Technology, 1978 State Highway 215, Blair, SC 29015. Details on both meetings can be found on the NRC's Public Meeting Schedule at <https://www.nrc.gov/pmns/mtg>. Submit comments on the scope of the EIS by December 4, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. See Section IV, "Public

Scoping Meeting,” of this notice for additional information.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to <https://regulations.gov> and search for Docket ID NRC–2023–0152. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Email comments to:* SummerEnvironmental@nrc.gov.

- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see “Obtaining Information and Submitting Comments” in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Kim Conway, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1335; email: Kimberly.Conway@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0152 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2023–0152.

- *NRC’s Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC’s Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to PDR.Resource@nrc.gov. The ADAMS accession number for each document referenced in this document (if it is available in ADAMS) is provided the first time that it is referenced.

- *NRC’s PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. ET, Monday through Friday, except Federal holidays.

- *Public Library:* A copy of the SLR application for V.C. Summer, including the environmental report (ER), is available for public review at the following public library location: Fairfield County Library, 300 W Washington St., Winnsboro, SC 29180.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC–2023–0152 in the subject line of your comment submission in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at <https://www.regulations.gov> as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

On August 17, 2023, Dominion Energy South Carolina, Inc. submitted to the NRC an application for SLR of Renewed Facility Operating License No. NPF–12 for V.C. Summer, Unit 1, for an additional 20 years of operation (ADAMS Accession No. ML23233A172). This submission initiated the NRC’s proposed action of determining whether to grant the SLR application. The V.C. Summer unit is a pressurized-water reactor designed by Westinghouse and is located near Jenkinsville, South Carolina. The current operating license

for V.C. Summer expires August 6, 2042. The SLR application was submitted pursuant to part 54 of title 10 of the *Code of Federal Regulations* (10 CFR), “Requirements for Renewal of Operating Licenses for Nuclear Power Plants,” and seeks to extend the renewed facility operating license for V.C. Summer Unit 1 to midnight on August 6, 2062. A notice of receipt of the SLR application was published in the **Federal Register** on September 11, 2023 (88 FR 62409). A notice of acceptance for docketing of the application and opportunity to request a hearing was published in the **Federal Register** on October 16, 2023 (88 FR 71384) and is available on the Federal rulemaking website (<https://www.regulations.gov>) by searching for Docket ID NRC–2023–0152.

III. Request for Comment

This notice informs the public of the NRC’s intention to conduct environmental scoping and prepare an EIS related to the SLR application for V.C. Summer, and to provide the public an opportunity to participate in the environmental scoping process, as defined in 10 CFR 51.29, “Scoping-environmental impact statement and supplement to environmental impact statement.”

The regulations in 36 CFR 800.8, “Coordination with the National Environmental Policy Act,” allow agencies to use their National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*) (NEPA) process to fulfill the requirements of Section 106 of the National Historic Preservation Act of 1966 (54 U.S.C. 300101, *et seq.*) (NHPA). Therefore, pursuant to 36 CFR 800.8(c), the NRC intends to use its process and documentation required for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth at 36 CFR 800.3 through 800.6.

In accordance with 10 CFR 51.53(c) and 10 CFR 54.23, V.C. Summer submitted an ER as part of the SLR application. The ER was prepared pursuant to 10 CFR part 51, “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,” and is available in ADAMS under Accession No. ML23233A174. The ER will also be available for viewing at <https://www.nrc.gov/reactors/operating/licensing/renewal/subsequent-license-renewal.html>. In addition, the SLR application, including the ER, is available for public review at the Fairfield County Library, 300 W Washington St., Winnsboro, SC 29180.

The NRC intends to gather the information necessary to prepare a site-specific EIS related to the SLR application for V.C. Summer. The site-specific EIS will evaluate the environmental impacts of subsequent license renewal for V.C. Summer and reasonable alternatives thereto. Possible alternatives to the proposed action include the no action alternative and reasonable alternative energy sources. This notice is being published in accordance with NEPA and the NRC's regulations at 10 CFR part 51.

As part of its environmental review, the NRC will first conduct a scoping process for the site-specific EIS and, as soon as practicable thereafter, will prepare a draft site-specific EIS for public comment. Participation in this scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the site-specific EIS will be used to accomplish the following:

- a. Define the proposed action that is to be the subject of the site-specific EIS;
- b. Determine the scope of the site-specific EIS and identify the significant issues to be analyzed in depth;
- c. Identify and eliminate from detailed study those issues that are peripheral or are not significant or that have been covered by prior environmental review;
- d. Identify any environmental assessments and other EISs that are being or will be prepared that are related to, but are not part of, the scope of the site-specific EIS under consideration;
- e. Identify other environmental review and consultation requirements related to the proposed action;
- f. Indicate the relationship between the timing of the preparation of the environmental analyses and the NRC's tentative planning and decision-making schedule;
- g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the site-specific EIS to the NRC and any cooperating agencies; and
- h. Describe how the site-specific EIS will be prepared, including any contractor assistance to be used.

The NRC invites the following entities to participate in scoping:

- a. The applicant, Dominion Energy South Carolina, Inc.;
- b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or that is authorized to develop and enforce relevant environmental standards;

- c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards;
- d. Any affected Indian Tribe;

- e. Any person who requests or has requested an opportunity to participate in the scoping process; and
- f. Any person who has petitioned or intends to petition for leave to intervene under 10 CFR 2.309.

IV. Public Scoping Meeting

In accordance with 10 CFR 51.26(b), the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to the proposed action and to determine the scope of issues to be addressed in the EIS.

The NRC is announcing that it will hold an online webinar and teleconference call and an in-person public scoping meeting for the V.C. Summer SLR site-specific EIS. Both meetings will include a presentation on the license renewal process and a transcribed public comment session. The online webinar will be held on November 9, 2023, at 2 p.m. ET. The in-person meeting will be held on November 14, 2023, at 6 p.m. ET at the McCrorey-Liston School of Technology, 1978 State Highway 215, Blair, SC 29015. Details on both meetings can be found on the NRC's Public Meeting Schedule at <https://www.nrc.gov/pmns/mtg>. A court reporter will transcribe all comments received during each public scoping meeting. To be considered, comments must be provided either at a transcribed public meeting or in writing, as discussed in the **ADDRESSES** section of this notice.

Persons interested in attending this meeting should monitor the NRC's Public Meeting Schedule website at <https://www.nrc.gov/pmns/mtg> for additional information and the agenda for the meeting. Please contact the environmental project manager, Kim Conway, no later than November 6, 2023, if accommodations or special equipment is needed to attend or to provide comments, so that the NRC staff can determine whether the request can be accommodated.

The public scoping meeting will include: (1) an overview by the NRC staff of the environmental and safety review processes, the proposed scope of site-specific EIS, and the proposed review schedule; and (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on environmental issues or the proposed scope of the V.C. Summer SLR site-specific EIS.

Participation in the scoping process for the V.C. Summer SLR site-specific EIS does not entitle participants to become parties to the proceeding to which the site-specific EIS relates. Matters related to participation in any hearing are outside the scope of matters to be discussed at this public meeting.

Dated: October 31, 2023.

For the Nuclear Regulatory Commission.

Theodore B. Smith,

Chief, Environmental Review License Renewal Branch, Division of Rulemaking, Environment, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023-24329 Filed 11-2-23; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-445 and 50-446; NRC-2022-0183]

Vistra Operations Company LLC; Comanche Peak Nuclear Power Plant, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft supplemental environmental impact statement; public meeting and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft Supplement 60, License Renewal, to the Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants, NUREG-1437, regarding the renewal of Facility Operating License Nos. NPF-87 and NPF-89 for an additional 20 years of operation for Comanche Peak Nuclear Power Plant, Units 1 and 2 (CPNPP). The CPNPP facility is in Somervell County, Texas. Possible alternatives to the proposed action (license renewal) include no action and reasonable replacement power alternatives.

DATES: The staff will hold a local public meeting on the draft Supplemental Environmental Impact Statement on December 7, 2023, from 7:00 p.m. to 9:00 p.m. central time, including a presentation on the preliminary findings and a transcribed public comment session. The public meeting details will be announced in the near future on the NRC's Public Meeting Schedule at <https://www.nrc.gov/pmns/mtg>. Members of the public are invited to submit comments by December 18, 2023. Comments received after this date will be considered, if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC-2022-0183. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301-415-0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to:* Office of Administration, Mail Stop: TWFN-7-A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see "Obtaining Information and Submitting Comments" in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Tam Tran, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-3617; email: Tam.Tran@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC-2022-0183 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document by any of the following methods:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket ID NRC-2022-0183.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff by email to PDR.Resource@nrc.gov. Draft Supplement 60, License Renewal, to the GEIS for License Renewal of Nuclear Plants, NUREG-1437, is available in ADAMS under Accession No. ML23299A252.

- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open

by appointment. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1-800-397-4209 or 301-415-4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

- *Public Library:* A copy of draft Supplement 60, License Renewal, to the GEIS for License Renewal of Nuclear Plants, NUREG-1437, will be available at the following locations: Somervell County Library, 108 Allen Dr., Glen Rose, TX 76043 and Hood County Library, 222 N Travis St., Granbury, TX 76048.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC-2022-0183 in the subject line of your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at <https://www.regulations.gov> as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

The NRC is issuing for public comment draft Supplement 60, License Renewal, to the GEIS for License Renewal of Nuclear Plants, NUREG-1437, regarding the renewal of Facility Operating License Nos. NPF-87 and NPF-89 for an additional 20 years of operation for CPNPP. Draft Supplement 60, License Renewal, to the GEIS includes the preliminary analysis that evaluates the environmental impacts of the proposed action and alternatives to the proposed action. The NRC staff's preliminary recommendation is that the adverse environmental impacts of license renewal for CPNPP are not so great that preserving the option of

license renewal for energy-planning decisionmakers would be unreasonable.

Dated: October 31, 2023.

For the Nuclear Regulatory Commission.

John M. Moses,

Deputy Director, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023-24294 Filed 11-2-23; 8:45 am]

BILLING CODE 7590-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-139, OMB Control No. 3235-0128]

Proposed Collection; Comment Request; Extension: Rule 12f-1

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the existing collection of information provided for in Rule 12f-1 (17 CFR 240.12f-1), under the Securities Exchange Act of 1934 ("Act") (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Rule 12f-1 ("Rule"), originally adopted in 1979 pursuant to Sections 12(f) and 23(a) of the Act, and as further modified in 1995 and 2005, sets forth the requirements for filing an exchange application to reinstate unlisted trading privileges ("UTP") in a security in which UTP has been suspended by the Commission pursuant to Section 12(f)(2)(A) of the Act. Under Rule 12f-1, an exchange must submit one copy of an application for reinstatement of UTP to the Commission that contains specified information, as set forth in the Rule. The application for reinstatement, pursuant to the Rule, must provide the name of the issuer, the title of the security, the name of each national securities exchange, if any, on which the security is listed or admitted to unlisted trading privileges, whether transaction information concerning the security is reported pursuant to an effective transaction reporting plan contemplated by Rule 601 of Regulation NMS, the date of the Commission's suspension of unlisted trading privileges in the security on the exchange, and any other pertinent

information related to whether the reinstatement of UTP in the subject security is consistent with the maintenance of fair and orderly markets and the protection of investors. Rule 12f-1 further requires a national securities exchange seeking to reinstate its ability to extend unlisted trading privileges in a security to indicate that it has provided a copy of such application to the issuer of the security, as well as to any other national securities exchange on which the security is listed or admitted to unlisted trading privileges.

The information required by Rule 12f-1 enables the Commission to make the necessary findings under the Act prior to granting applications to reinstate unlisted trading privileges. This information is also made available to members of the public who may wish to comment upon the applications. Without the Rule, the Commission would be unable to fulfill these statutory responsibilities.

There are currently 24 national securities exchanges subject to Rule 12f-1. The burden of complying with Rule 12f-1 arises when a potential respondent seeks to reinstate its ability to extend unlisted trading privileges to any security for which unlisted trading privileges have been suspended by the Commission, pursuant to Section 12(f)(2)(A) of the Act. The staff estimates that each application would require approximately one hour to complete. Thus, each potential respondent would incur on average one burden hour in complying with the Rule.

The Commission staff estimates that there could be as many as 24 responses annually for an aggregate annual hour burden for all respondents of approximately 24 hours (24 responses $\times$ 1 hour per response). Each respondent's related internal cost of compliance for Rule 12f-1 would be approximately \$242.00 (the cost of one hour of professional work of a paralegal needed to complete the application). The total annual cost of compliance for all potential respondents, therefore, is approximately \$5,808 (24 responses $\times$ \$242.00 per response).

Compliance with Rule 12f-1 is mandatory. Rule 12f-1 does not have a record retention requirement *per se*. However, responses made pursuant to Rule 12f-1 are subject to the recordkeeping requirements of Rules 17a-3 and 17a-4 of the Act. Information received in response to Rule 12f-1 shall not be kept confidential; the information collected is public information.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper

performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by January 2, 2024.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or send an email to: PRA_Mailbox@sec.gov.

Dated: October 31, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-24370 Filed 11-2-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98826; File No. SR-PEARL-2023-59]

Self-Regulatory Organizations; MIAx PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAx Pearl Equities Fee Schedule To Extend the Sunset Period for the Step-Added Liquidity Rebate

October 30, 2023.

Pursuant to the provisions of section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 18, 2023, MIAx PEARL, LLC ("MIAx Pearl" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the fee schedule (the "Fee Schedule") applicable to MIAx Pearl Equities, an equities trading facility of the Exchange.

The text of the proposed rule change is available on the Exchange's website at <https://www.miaxglobal.com/markets/us-options/pearl-options/rule-filings>, at MIAx Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section 1)f) of the Fee Schedule to modify the expiration month (referred to herein as the "sunset period") of the required criteria of the Step-Up Added Liquidity Rebate table. This table provides that Equity Members³ who satisfy the required criteria will receive the Step-Up Added Liquidity Rebate (described below). The Exchange originally filed this proposal on October 12, 2023, (SR-PEARL-2023-57). On October 18, 2023, the Exchange withdrew SR-PEARL-2023-57 and resubmitted this proposal.

Background

The Exchange currently provides a standard rebate of (\$0.0024)⁴ per share for executions of orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange. The Exchange also currently offers various volume-based tiers and incentives through which an Equity Member may receive an enhanced

³ The term "Equity Member" is a Member authorized by the Exchange to transact business on MIAx Pearl Equities. See Exchange Rule 1901.

⁴ Rebates are indicated by parentheses. See the General Notes Section of the Fee Schedule.

rebate for executions of orders that add displayed liquidity to the Exchange by achieving the specified criteria that corresponds to a particular tier/incentive.

In particular, the Exchange adopted a volume based pricing incentive, referred to as the “Step-Up Added Liquidity Rebate,” in which qualifying Equity Members receive an enhanced rebate of (\$0.0031) per share for executions of orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange.⁵ The enhanced rebate provided by the Step-Up Added Liquidity Rebate applies to Liquidity Indicator Codes AA (adds liquidity, displayed order, Tape A), AB (adds liquidity, displayed order, Tape B) and AC (adds liquidity, displayed order, Tape C).⁶

On September 27, 2023, the Exchange filed SR-PEARL-2023-50 which amended the baseline month from May 2023 to July 2023 and extended the sunset period from September 29, 2023 to January 31, 2024. These changes were scheduled to become effective on October 1, 2023. However, prior to these changes becoming effective the Exchange filed SR-PEARL-2023-54 which superseded SR-PEARL-2023-50 and reverted the baseline month back to May 2023 and changed the sunset period to November 30, 2023, with an effective implementation date of October 1, 2023. Insofar as Equity Members are concerned, the baseline month has not changed, as it was May 2023 for the month of September and remains May 2023 for the month of October. The only substantive change for Equity Members is the extension of the sunset period from September 2023 to November 2023.

Equity Members qualify for the Step-Up Added Liquidity Rebate by achieving a “Step-Up ADAV as a % of TCV”⁷ of at least 0.03% over the baseline month of May 2023. Average daily added volume (“ADAV”) means average daily added volume calculated as the number of shares added per day and average daily volume (“ADV”) means average daily volume calculated as the number of shares added or

removed, combined, per day. ADAV and ADV are calculated on a monthly basis.⁸ Total consolidated volume (“TCV”) means total consolidated volume calculated as the volume in shares reported by all exchanges and reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.⁹ For example, if an Equity Member had an ADAV as a percent of TCV of 0.01% in May 2023, then that Equity Member has to achieve an ADAV as a percent of TCV equal to or greater than 0.04% in any subsequent month in order to qualify for the Step-Up Added Liquidity Rebate.

Proposal

The Exchange now proposes to amend Section 1(f) of the Fee Schedule to modify the required criteria for Equity Members to receive the Step-Up Added Liquidity Rebate. In particular, the Exchange proposes that the criteria to qualify for the Step-Up Added Liquidity Rebate will expire no later than November 30, 2023.¹⁰ The Exchange will issue an alert to market participants should the Exchange determine that the Step-Up Added Liquidity Rebate will expire earlier than November 30, 2023, or if the Exchange determines to amend the criteria or rate applicable to the Step-Up Added Liquidity Rebate prior to the end of the sunset period. The Exchange notes that at least one other competing equities exchange provides a similar “sunset period” for one of its enhanced rebates subject to the same baseline month as the Exchange proposes.¹¹

⁸ The Exchange excludes from its calculation of ADAV and ADV shares added or removed on any day that the Exchange’s system experiences a disruption that lasts for more than 60 minutes during regular trading hours, on any day with a scheduled early market close, and on the “Russell Reconstitution Day” (typically the last Friday in June). Routed shares are not included in the ADAV or ADV calculation. With prior notice to the Exchange, an Equity Member may aggregate ADAV or ADV with other Equity Members that control, are controlled by, or are under common control with such Equity Member (as evidenced on such Equity Member’s Form BD). See the Definitions Section of the Fee Schedule.

⁹ The Exchange excludes from its calculation of TCV volume on any given day that the Exchange’s system experiences a disruption that lasts for more than 60 minutes during Regular Trading Hours, on any day with a scheduled early market close, and on the “Russell Reconstitution Day” (typically the last Friday in June). See the Definitions Section of the Fee Schedule.

¹⁰ The Exchange notes that at the end of the sunset period, the Step-Up Added Liquidity Rebate will no longer apply unless the Exchange files another 19b-4 Filing with the Commission to amend the criteria terms.

¹¹ See Securities Exchange Act Release No. 97662 (June 7, 2023), 88 FR 38576 (June 13, 2023) (SR-MEMX-2023-09); see also MEMX LLC (“MEMX”) Fee Schedule, Liquidity Provision Tiers, Tier 6,

The Exchange does not propose any other changes to the qualifying criteria for Equity Members to receive the Step-Up Added Liquidity Rebate. The Exchange also does not propose to amend the amount of the enhanced rebate of (\$0.0031) per share for Equity Members that qualify for the Step-Up Added Liquidity Rebate. Finally, the Exchange does not propose to change the baseline ADAV of 0.00% of TCV used for firms that become Equity Members of the Exchange after May 2023 for the purpose of the Step-Up Added Liquidity Rebate calculation.

The purpose of this proposed change is to simply extend the sunset period two months, from September 2023 to November 2023. The Exchange believes that the Step-Up Added Liquidity Rebate will continue to provide an incentive for Equity Members to strive for higher ADAV on the Exchange (above their ADAV in the baseline month of May 2023) to receive the enhanced rebate for qualifying executions of orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange. The Exchange believes that with the extension of the sunset period the Step-Up Added Liquidity Rebate will continue to encourage the submission of additional displayed added liquidity to the Exchange, thereby promoting price discovery and contributing to a deeper and more liquid market, which benefits all market participants and enhances the attractiveness of the Exchange as a trading venue. The Exchange notes that earlier this year, MEMX filed a proposal to use May 2023 as the baseline month for one of its enhanced Liquidity Provision Tiers (Tier 6) for MEMX’s members to receive an enhanced rebate and used November 30, 2023, as the sunset period.¹² The purpose of including the proposed sunset period in the Fee Schedule is to provide clarity to Equity Members that, unless the Exchange determines to amend or otherwise modify the Step-Up Added Liquidity Rebate, the Step-Up Added Liquidity Rebate will expire at the end of the sunset period.

Implementation

The proposed changes will become immediately effective.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with section 6(b) of the Act¹³

available at <https://info.memxtrading.com/fee-schedule/> (last visited September 29, 2023).

¹² See *id.*

¹³ 15 U.S.C. 78f(b).

⁵ See Securities Exchange Act Release No. 95614 (August 26, 2022), 87 FR 53813 (September 1, 2022) (SR-PEARL-2022-33).

⁶ See Fee Schedule, Section 1(b), Liquidity Indicator Codes and Associated Fees.

⁷ The term “Step-Up ADAV as a % of TCV” means ADAV as a percent of TCV in the relevant baseline month subtracted from the current month’s ADAV as a percent of TCV. See the Definitions Section of the Fee Schedule. The Exchange notes that the Step-Up Added Liquidity Rebate does not apply to executions of orders in securities priced below \$1.00 per share or executions of orders that constitute added non-displayed liquidity.

in general, and furthers the objectives of section 6(b)(4) of the Act¹⁴ in particular, in that it is an equitable allocation of reasonable fees and other charges among its Equity Members and issuers and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange operates in a highly fragmented and competitive market in which market participants can readily direct their order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of sixteen registered equities exchanges, and there are a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. As of September 29, 2023, based on publicly available information, no single registered equities exchange currently has more than approximately 15–16% of the total market share of executed volume of equities trading for the month of September 2023.¹⁵ Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange represents approximately 1.79% of the overall market share as of September 29, 2023, for the month of September 2023.¹⁶ The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁷

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces

constrain the Exchange’s transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure designed to incentivize market participants to direct additional orders that add liquidity to the Exchange, which the Exchange believes would deepen liquidity and promote market quality on the Exchange to the benefit of all market participants.

The Exchange notes that volume-based incentives and discounts (such as tiers) have been widely adopted by exchanges (including the Exchange), and believes they are reasonable, equitable and not unfairly discriminatory because they are available to all Equity Members on an equal basis, provide additional benefits or discounts that are reasonably related to the value of an exchange’s market quality associated with higher levels of market activity (such as higher levels of liquidity provision and/or growth patterns), and the introduction of higher volumes of orders into the price and volume discovery process.

The Exchange believes that the Step-Up Added Liquidity Rebate, as modified by the proposed change to the sunset period, is reasonable, equitable and not unfairly discriminatory as the Step-Up Added Liquidity Rebate will continue to be available to all Equity Members on an equal basis, and is reasonably designed to encourage Equity Members to maintain or increase their order flow in liquidity-adding volume. The Exchange believes this will continue to promote price discovery, enhance liquidity and market quality, and contribute to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Equity Members and market participants. The Exchange also notes that MEMX filed a proposal which also uses May 2023 as the baseline month as well as November 2023 as its expiration month, for one of its enhanced Liquidity Provision Tiers (Tier 6) for its members to receive an enhanced rebate.¹⁸

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to amend the sunset period in the Fee Schedule for the Step-Up Added Liquidity Rebate because it will provide clarity to Equity Members that, unless the Exchange determines to amend or otherwise modify the Step-Up Added Liquidity Rebate, the Step-Up Added Liquidity Rebate will expire at

the end of the sunset period. This will allow Equity Members to take into account that the enhanced rebate provided for by the Step-Up Added Liquidity Rebate may be discontinued at the end of sunset period unless the Exchange announces otherwise and files a revised proposal with the Commission. The Exchange further notes that it will issue an alert to market participants should the Exchange determine that the Step-Up Added Liquidity Rebate will expire earlier than November 30, 2023, or if the Exchange determines to amend the criteria or rate applicable to the Step-Up Added Liquidity Rebate prior to the end of the sunset period. At least one other competing equities exchange provided a similar sunset period in its fee schedule for one of its enhanced rebates.¹⁹

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange believes that the proposed change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposal will impose any burden on intramarket competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the Step-Up Added Liquidity Rebate, as modified by this proposal, will continue to incentivize Equity Members to submit additional orders that add liquidity to the Exchange, thereby contributing to a deeper and more liquid market and promoting price discovery and market quality on the Exchange to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Equity Members by providing more trading opportunities and encourages Equity Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. As described above, the opportunity to qualify for the proposed new Step-Up Added Liquidity Rebate, and thus receive the proposed rebate for qualifying executions of orders in securities priced at or above \$1.00 per share that add displayed volume will continue to be available to all Equity Members that meet the associated volume requirement, and the

¹⁴ 15 U.S.C. 78f(b)(4).

¹⁵ See MIAX’s “The market at a glance/MTD AVERAGE,” available at <https://www.miaxglobal.com/> (Data as of 9/1/2023—9/28/2023).

¹⁶ See *id.*

¹⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37499 (June 29, 2005).

¹⁸ See *supra* note 11.

¹⁹ See *id.*

Exchange believes the proposed extension of the sunset period is reasonably related to the enhanced market quality that the Step-Up Added Liquidity Rebate is designed to promote. As such the Exchange does not believe the proposed changes would impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purpose of the Act.

The Exchange believes its proposal to extend the sunset period in the Fee Schedule for the Step-Up Added Liquidity Rebate will not impose any burden on intramarket competition not necessary or appropriate in furtherance of the purposes of the Act because it will provide clarity to Equity Members that, unless the Exchange determines to amend or otherwise modify the Step-Up Added Liquidity Rebate, the Step-Up Added Liquidity Rebate will be discontinued at the end of the sunset period. This will allow Equity Members to take into account that the enhanced rebate provided for by the Step-Up Added Liquidity Rebate may be discontinued at the end of the sunset period unless the Exchange announces otherwise. The Exchange further notes that it will issue an alert to market participants should the Exchange determine that the Step-Up Added Liquidity Rebate will expire earlier than November 30, 2023, or if the Exchange determines to amend the criteria or rate applicable to the Step-Up Added Liquidity Rebate prior to the end of the sunset period. At least one other competing equities exchange provided a similar sunset period in its fee schedule for one of its enhanced rebates.²⁰

Intermarket Competition

The Exchange believes its proposal will benefit competition, and the Exchange notes that it operates in a highly competitive market. The Exchange notes that by extending its sunset period to November 2023, its program has a sunset period similar to that of at least one other equities exchange.²¹ Equity Members have numerous alternative venues they may participate on and direct their order flow to, including fifteen other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, as of September 29, 2023, based on publicly available information, no single registered equities exchange currently has more than approximately 15–16% of the total market share of executed volume of equities trading for the month of

September 2023.²² Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange represents approximately 1.79% of the overall market share as of September 29, 2023 for the month of September 2023.²³ Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow in response to new or different pricing structures being introduced to the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates generally, including with respect to the criteria for Equity Members to achieve the Step-Up Added Liquidity Rebate, and market participants can readily choose to send their orders to other exchanges and off-exchange venues if they deem rebate criteria at those other venues to be more favorable.

As described above, the proposed changes represent a competitive proposal through which the Exchange is seeking to continue to encourage additional order flow to the Exchange through a volume-based incentive that is comparable to the criteria for volume-based incentives adopted by at least one other competing exchange that has a similar sunset period for a specific enhanced rebate that adds liquidity to that market.²⁴ Accordingly, the Exchange believes that its proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar pricing incentives to market participants that achieve certain volume criteria and thresholds.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”²⁵ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and*

Exchange Commission, the D.C. circuit stated: “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ . . .”²⁶ Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act,²⁷ and Rule 19b-4(f)(2)²⁸ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or

²⁰ See *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSE–2006–21)).

²¹ 15 U.S.C. 78s(b)(3)(A)(ii).

²² 17 CFR 240.19b-4(f)(2).

²³ See *supra* note 15.

²⁴ See *id.*

²⁵ See *supra* note 11.

²⁶ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

²⁰ See *supra* note 11.

²¹ See *id.*

• Send an email to rule-comments@sec.gov. Please include file number SR-PEARL-2023-59 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-PEARL-2023-59. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-PEARL-2023-59 and should be submitted on or before November 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-24271 Filed 11-2-23; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

[License No. 02/02-0535]

Argentum Capital Partners, LP; Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration under the Small Business Investment Act of 1958, as amended, under section 309 of the Act and section 107.1900 of the Small Business Administration Rules and Regulations (13 CFR 107.1900) to function as a small business investment company under the Small Business Investment Company License No. 02/02-0535 issued to Argentum Capital Partners, LP said license is hereby declared null and void.

Bailey DeVries,

Associate Administrator, Office of Investment and Innovation, United States Small Business Administration.

[FR Doc. 2023-24298 Filed 11-2-23; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

[License No. 05/05-0301]

Monroe Capital Partners Fund LP; Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration under the Small Business Investment Act of 1958, as amended, under section 309 of the Act and section 107.1900 of the Small Business Administration Rules and Regulations (13 CFR 107.1900) to function as a small business investment company under the Small Business Investment Company License No. 05/05-0301 issued to Monroe Capital Partners Fund LP, said license is hereby declared null and void.

Bailey Devries,

Associate Administrator, Office of Investment and Innovation, United States Small Business Administration.

[FR Doc. 2023-24303 Filed 11-2-23; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20026 and #20027;
FLORIDA Disaster Number FL-20000]

Administrative Declaration of a Disaster for the State of Florida

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Florida dated 10/30/2023.

Incident: Tornado.

Incident Period: 10/12/2023.

DATES: Issued on 10/30/2023.

Physical Loan Application Deadline Date: 12/29/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 07/30/2024.

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:

Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205-6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Citrus.

Contiguous Counties:

Florida: Hernando, Levy, Marion, Sumter.

The Interest Rates are:

	Percent
<i>For Physical Damage:</i>	
Homeowners with Credit Available Elsewhere	5.000
Homeowners without Credit Available Elsewhere	2.500
Businesses with Credit Available Elsewhere	8.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere ...	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
<i>For Economic Injury:</i>	
Business and Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 20026C and for economic injury is 200270.

The State which received an EIDL Declaration is Florida.

²⁹ 17 CFR 200.30-3(a)(12).

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,
Administrator.

[FR Doc. 2023–24301 Filed 11–2–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #18100 and #18101;
ALASKA Disaster Number AK–00059]**

Presidential Declaration Amendment of a Major Disaster for the State of Alaska

AGENCY: Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Alaska (FEMA–4730–DR), dated 08/23/2023.

Incident: Flooding.

Incident Period: 05/12/2023 through 06/03/2023.

DATES: Issued on 10/30/2023.

Physical Loan Application Deadline Date: 12/22/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 05/23/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT:

Alan 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: The notice of the President's major disaster declaration for the State of Alaska, dated 08/23/2023, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Areas (Physical Damage and Economic Injury Loans): Kusilvak Census Area, Yupiit REAA.

Contiguous Areas (Economic Injury Loans Only): All contiguous areas have previously been declared.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,
Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–24351 Filed 11–2–23; 8:45 am]

BILLING CODE 8026–09–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2023–2011]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Centers for Medicare & Medicaid Services (CMS). Under this matching program, the CMS will disclose to SSA certain individuals' admission and discharge information for care received in a nursing care facility covered by the agreement. SSA will use this information to administer the Supplemental Security Income (SSI) program efficiently and to identify Special Veterans' Benefits (SVB) beneficiaries who are no longer residing outside of the United States.

DATES: The deadline to submit comments on the proposed matching program is December 4, 2023.

The matching program will be applicable on December 20, 2023, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2023–2011 so that we may associate your comments with the correct regulation.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at <https://www.regulations.gov>. Use the *Search* function to find docket number SSA–2023–2011 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to 1(833) 410–1631.

3. *Mail:* Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing Matthew.Ramsey@ssa.gov. Comments are also available for public viewing on the Federal eRulemaking portal at <https://www.regulations.gov> or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT:

Interested parties may submit general questions about the matching program to Cynthia Scott, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, at telephone: (410) 966–1943, or send an email to Cynthia.Scott@ssa.gov.

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

PARTICIPATING AGENCIES:

SSA and CMS.

AUTHORITY FOR CONDUCTING THE MATCHING PROGRAM:

This matching agreement between CMS and SSA is executed pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, as amended by the Computer Matching and Privacy Protection Act of 1988, Public Law 100–503, and the regulations promulgated thereunder.

Legal authority for the SSI portion of the matching program is contained in sections 1611(e)(1) and 1631(f) of the Social Security Act (Act) (42 U.S.C. 1382(e)(1) and 1383(f)), and 20 Code of Federal Regulations (CFR) 416.211. Section 1611(e)(1)(B) of the Act (42 U.S.C. 1382(e)(1)(B)) limits the amount of SSI benefits that eligible individuals or their eligible spouse may receive when that individual is, throughout any month, in a medical treatment facility receiving payments (with respect to such individual or spouse), under a State plan approved under title XIX of the Act, or the amount of benefits an eligible child under the age of 18 may receive who is receiving payments under any health insurance policy issued by a private provider.

Sections 801 and 806(a) and (b) of the Act (42 U.S.C. 1001 and 1006(a) and (b)) contain the legal authorities for the SVB portion of the matching program.

Section 1631(f) of the Act (42 U.S.C. 1383(f)) requires CMS to provide SSA with “such information as the Commissioner of [SSA] needs for purposes of determining eligibility for or amount of benefits, or verifying other information with respect thereto.”

Additional legal authority for CMS’ disclosures under this agreement is 45 CFR 164.512(a) (“Standard: Uses and disclosures required by law,” also referred to as the Health Insurance Portability and Accountability Act of 1996 Privacy Rule). The legal authority for SSA to reimburse CMS under this interagency transaction is the Economy Act, 31 U.S.C. 1535.

PURPOSE(S):

This matching program establishes the conditions under which CMS will disclose to SSA certain individuals’ admission and discharge information for care received in a nursing care facility covered by the agreement. SSA will use this information to administer the SSI program efficiently and to identify SVB beneficiaries who are no longer residing outside of the United States.

CATEGORIES OF INDIVIDUALS:

The individuals whose information is involved in this matching program are recipients of SSI and SVB benefits.

CATEGORIES OF RECORDS:

SSA will provide CMS with a monthly finder file, which will be extracted from SSA’s SSI and SVB’s records. The finder file will consist of data elements related to an individual’s SSI/SVB eligibility. CMS will match the SSA finder file against data maintained pursuant to the Long Term Care-Minimum Data Set (LTC/MDS) systems of records.

SYSTEM(S) OF RECORDS:

SSA will provide CMS with a monthly finder file, which will be extracted from SSA’s SSI and SVB’s records, 60–0103, last fully published on January 11, 2006 (71 FR 1830); and amended on December 10, 2007 (72 FR 69723), July 3, 2018 (83 FR 31250–31251), and November 1, 2018 (83 FR 54969).

CMS will match the SSA finder file against data maintained pursuant to the LTC/MDS (System Number 09–70–0528) SOR, last fully published on March 19, 2007 (72 FR 12801), and amended on April 23, 2013 (78 FR 23938), May 29, 2013 (78 FR 32257), and February 14, 2018 (83 FR 6591); and submit its response file to SSA.

[FR Doc. 2023–24263 Filed 11–2–23; 8:45 am]

BILLING CODE 4191–02–P

SURFACE TRANSPORTATION BOARD

Release of Waybill Data

The Surface Transportation Board has received a request from Andrew Sweeting and Louis Preonas of University of Maryland (WB23–57–10/26/23) for permission to use data from the Board’s annual 1984–2021 unmasked Carload Waybill Sample. A copy of this request may be obtained from the Board’s website under docket no. WB23–57.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board’s Office of Economics within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Alexander Dusenberry, (202) 245–0319.

Regena Smith-Bernard,
Clearance Clerk.

[FR Doc. 2023–24339 Filed 11–2–23; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Decommissioning and Disposition of the National Historic Landmark Nuclear Ship Savannah; Notice of Public Meeting

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: The Maritime Administration (MARAD) announces a public meeting of the Peer Review Group (PRG) which will be held online or by phone only. The PRG was established pursuant to the requirements of the National Historic Preservation Act (NHPA) and its implementing regulations to plan for the decommissioning and disposition of the Nuclear Ship Savannah (NSS). PRG membership is comprised of officials from the U.S. Department of Transportation, MARAD, the U.S. Nuclear Regulatory Commission (NRC), the Advisory Council on Historic Preservation (ACHP), and the Maryland State Historic Preservation Officer (SHPO) and other consulting parties. The public meeting affords the public an opportunity to participate in PRG activities, including reviewing and providing comments on draft deliverables. MARAD encourages public participation and provides the PRG meeting information below.

DATES: The meeting will be held on Tuesday, November 21, 2023, from 2:30 p.m. to 4 p.m. Eastern Standard Time (EST). Requests to attend the meeting virtually must be received by 5 p.m. EST, Tuesday, November 14, 2023, to receive instructions to participate online. Requests for accommodations for a disability must also be received by Tuesday, November 14, 2023.

ADDRESSES: The meeting will be held online or by phone.

FOR FURTHER INFORMATION CONTACT:

Erhard W. Koehler, (202) 680–2066 or via email at marad.history@dot.gov. You may send mail to N.S. Savannah/Savannah Technical Staff, Pier 13 Canton Marine Terminal, 4601 Newgate Avenue, Baltimore, MD 21224, ATTN: Erhard Koehler.

SUPPLEMENTARY INFORMATION:

I. Background

The decommissioning and disposition of the NSS is an Undertaking under Section 106 of the NHPA. Section 106 requires that Federal agencies consider views of the public regarding their Undertakings; therefore, in 2020, MARAD established a Federal docket at <https://www.regulations.gov/docket/MARAD-2020-0133> to provide public notice about the NSS Undertaking. The Federal docket was also used in 2021 to solicit public comments on the future uses of the NSS. MARAD is continuing to use this same docket to take in public comment, share information, and post agency actions.

The NHPA Programmatic Agreement (PA) for the Decommissioning and Disposition of the NSS is available on the MARAD docket located at www.regulations.gov under docket id “MARAD–2020–0133.” The PA stipulates a deliberative process by which MARAD will consider the disposition of the NSS. This process requires MARAD to make an affirmative, good-faith effort to preserve the NSS. The PA also establishes the PRG in Stipulation II. The PRG is the mechanism for continuing consultation during the effective period of the PA and its members consist of the signatories and concurring parties to the PA, as well as other consulting parties. The PRG members will provide individual input and guidance to MARAD regarding the implementation of stipulations in the PA. PRG members and members of the public are invited to provide input by attending bi-monthly meetings and reviewing and commenting on deliverables developed as part of the PA.

II. Agenda

The agenda will include (1) welcome and introductions; (2) program update; (3) status of PA stipulations; (4) other business; and (5) date of next meeting. The agenda topic titled PA stipulations involves deliverables identified in the PA. MARAD will provide status updates for the following items: the Disposition Alternatives Study; the Notice of Availability/Request for Information; the License Termination Plan; the Collections Management Plan, and the Historic Context. The agenda will also be posted on MARAD's website at <https://www.maritime.dot.gov/outreach/history/maritime-administration-history-program> and on the MARAD docket located at www.regulations.gov under docket id "MARAD-2020-0133."

III. Public Participation

The meeting will be open to the public. Members of the public who wish to attend online must RSVP to the person listed in the **FOR FURTHER INFORMATION CONTACT** section with your name and affiliation. Members of the public may also call-in using the following number: 312-600-3163 and conference ID: 930 866 814#.

Special services. The U.S. Department of Transportation is committed to providing all participants equal access to this meeting. If you need alternative formats or services such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

(Authority: 49 CFR 1.81 and 1.93; 36 CFR part 800; 5 U.S.C. 552b.)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023-24285 Filed 11-2-23; 8:45 am]

BILLING CODE 4910-81-P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied.

All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT:

OFAC: Associate Director for Global Targeting, tel.: 202-622-2420; Assistant Director for Licensing, tel.: 202-622-2480; Assistant Director for Regulatory Affairs, tel.: 202-622-4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202-622-2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (<https://www.treasury.gov/ofac>).

Notice of OFAC Actions

A. Blocking of Property and Interests in Property Pursuant to E.O. 14014

On October 31, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Individuals

1. AUNG, Swe Swe, Burma; DOB 1960; nationality Burma; Gender Female (individual) [BURMA-EO14014].

Designated pursuant to section 1(a)(iii)(B) of Executive Order 14014 of February 10, 2021, "Blocking Property With Respect to the Situation in Burma", 86 FR 9429 ("E.O. 14014") for being or having been a leader or official of the Government of Burma on or after February 2, 2021.

2. MIN, Zaw, Burma; DOB 1970; nationality Burma; Gender Male (individual) [BURMA-EO14014].

Designated pursuant to section 1(a)(iii)(B) of E.O. 14014 for being or having been a leader or official of the Government of Burma on or after February 2, 2021.

3. THAN, Charlie, Room No 23, Building No 25, Palm Village Villa, Yankin Yanshin Street, Yangon, Burma; DOB 1950; nationality Burma; Gender Male (individual) [BURMA-EO14014].

Designated pursuant to section 1(a)(iii)(B) of E.O. 14014 for being or having been a leader or official of the Government of Burma on or after February 2, 2021.

4. AYE, Maung Maung (a.k.a. "AYE, Mg Mg"), Burma; DOB 1962; POB Burma; nationality Burma; Gender Male (individual) [BURMA-EO14014].

Designated pursuant to section 1(a)(iii)(A) of E.O. 14014 for being or having been a leader or official the military or security forces of Burma, or any successor entity to any of the foregoing.

5. ZAW, Kan, Burma; DOB 11 Oct 1954; POB Salin Township, Magwe Region, Burma;

nationality Burma; Gender Male (individual) [BURMA-EO14014].

Designated pursuant to section 1(a)(iii)(B) of E.O. 14014 for being or having been a leader or official of the Government of Burma on or after February 2, 2021.

Entities

1. SKY ROYAL HERO COMPANY LIMITED (a.k.a. SKY ROYAL HERO LTD; a.k.a. "SKY ROYAL HERO"), No. LB-B2-14A, B, Sagawah Street, Malikha Housing, 14/Bawamyint Quarter, Thingangyun Township, Yangon, Burma; Organization Established Date 28 Nov 2019; Organization Type: Non-specialized wholesale trade; Business Registration Number 123614291 (Burma) [BURMA-EO14014].

Designated pursuant to section 1(a)(i) of E.O. 14014 for operating in the defense sector of the Burmese economy.

2. SUNTAC TECHNOLOGIES COMPANY LIMITED (a.k.a. SUNTAC GROUP; a.k.a. SUNTAC TECHNOLOGIES; a.k.a. SUNTAC TECHNOLOGIES CO., LTD.), Room 5, 7, 8, Building 5, Building 8, MICT Park, Hlaing Township, Yangon Region, Burma; Bldg 5, Room 5/7/8/12 Myanmar ICP Park, Hlaing Po 1052 Township, Yangon, Burma; Organization Established Date 28 Dec 2000; Organization Type: Mining of hard coal; alt. Organization Type: Mining of lignite; Business Registration Number 181472561 (Burma) [BURMA-EO14014] (Linked To: AUNG, Sit Taing).

Designated pursuant to section 1(a)(vii) of E.O. 14014 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Sit Taing Aung, a person whose property and interests in property are blocked pursuant to E.O. 14014.

3. SUNTAC INTERNATIONAL TRADING COMPANY LIMITED (a.k.a. SUN TAC INTERNATIONAL TRADING CO., LIMITED; a.k.a. SUN TEC INTERNATIONAL TRADING CO., LIMITED; a.k.a. SUNTAC GROUP; a.k.a. SUNTAC GROUP OF COMPANIES; a.k.a. SUNTAC INTERNATIONAL TRADING CO., LIMITED; a.k.a. SUNTEC INTERNATIONAL TRADING CO., LIMITED; a.k.a. "SUN TEC"; a.k.a. "SUNTAC"), Thiriyadanar Shopping Complex, No. 177, Zabu Thiri Township, Nay Pyi Taw, Burma; 151 B Thiri Mingalar Lane, Mayangon Township, Yangon, Burma; Organization Established Date 03 Jul 1996; Organization Type: Management consultancy activities [BURMA-EO14014] (Linked To: AUNG, Sit Taing).

Designated pursuant to section 1(a)(vii) of E.O. 14014 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Sit Taing Aung, a person whose property and interests in property are blocked pursuant to E.O. 14014.

B. Persons Determined To Be Subject to Directive 1 Under E.O. 14014

On October 31, 2023, OFAC determined that the following entity (a) is a political subdivision, agency, or instrumentality of the Government of Burma; and (b) shall, on the effective date below, be subject to the

prohibitions of Directive 1 under E.O. 14014, "Prohibitions Related to Financial Services to or for the Benefit of Myanmar Oil and Gas Enterprise." These names have been placed on OFAC's Non-SDN Menu-Based Sanctions List.

1. MYANMA OIL AND GAS ENTERPRISE (a.k.a. "M.O.G.E."; a.k.a. "MOGE"), Complex No. 44, Nay Pyi Taw, Naypyidaw Union Territory, Burma; Building No. 6, Nay Pyi Taw, Burma; Organization Established Date 1963; Organization Type: Extraction of crude petroleum; Target Type State-Owned Enterprise; Executive Order 14014 Directive Information: Subject to Directive 1—As of the effective date, the provision, exportation, or reexportation, directly or indirectly, of financial services to or for the benefit of Myanmar Oil and Gas Enterprise (MOGE) or its property or interests in property is prohibited.; alt. Executive Order 14014 Directive Information: For more information on directives, please visit the following link: <https://ofac.treasury.gov/sanctions-programs-and-country-information/burma#directives>; Listing Date (E.O. 14014 Directive 1): 31 Oct 2023; Effective Date (E.O. 14014 Directive 1): 15 Dec 2023 [BURMA-EO14014].

Authority: E.O. 14014, 86 FR 9429.

Dated: October 31, 2023.

Bradley T. Smith,

*Director, Office of Foreign Assets Control,
U.S. Department of the Treasury.*

[FR Doc. 2023-24308 Filed 11-2-23; 8:45 am]

BILLING CODE 4810-AL-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8946

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service (IRS), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning the PTIN Supplemental Application For Foreign Persons Without a Social Security Number. **DATES:** Written comments should be received on or before January 2, 2024 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to pra.comments@irs.gov.

Please reference the "OMB number 1545-2189" in the subject line of the message.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the form and instructions should be directed to Sara Covington, (202) 317-5744 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington DC 20224, or through the internet, at Sara.L.Covington@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: PTIN Supplemental Application For Foreign Persons Without a Social Security Number.

OMB Number: 1545-2189.

Form Number: 8946.

Abstract: Form 8946 is used by foreign persons without a social security number (SSN) who want to prepare tax returns for compensation. Foreign persons who are tax return preparers must obtain a preparer tax identification number (PTIN) to prepare tax returns for compensation. Generally, the IRS requires an individual to provide an SSN to get a PTIN. Because foreign persons cannot get an SSN, they must file Form 8946 to establish their identity and status as a foreign person.

Current Actions: There were editorial edits made to the internal only box of form 8946. However, these edits did not affect the burden estimates.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 4,466.

Estimated Time per Respondent: 5.27 hrs.

Estimated Total Annual Burden Hours: 23,536.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 30, 2023.

Sara L. Covington,

IRS Tax Analyst.

[FR Doc. 2023-24289 Filed 11-2-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request Relating to the Employee Plans Determination Letter Program

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning the application form for a determination letter for Employee Benefit Plans.

DATES: Written comments should be received on or before January 2, 2024 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to pra.comments@irs.gov. Please include "OMB Number 1545-0197" in the subject line of the message.

Requests for additional information or copies of the regulations should be directed to Sara Covington, at (202) 317-5744 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at sara.l.covington@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Employee Plans Determination Letter Program.

OMB Control Number: 1545–0197.
Form Number: 5300.

Abstract: Internal Revenue Code sections 401(a) and 501(a) set out requirements for qualification of employee benefit trusts and the tax-exempt status of these trusts. Form 5300 is used to request a determination letter from the IRS for the qualification of a defined benefit or a defined contribution plan and the exempt status of any related trust.

Current Actions: There is no change to the burden previously approved by OMB. This request is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals.

Estimated Number of Respondents: 85,000.

Estimated Time per Respondent: 84 hours, 43 min.

Estimated Total Annual Burden Hours: 7,201,200.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Desired Focus of Comments: The Internal Revenue Service (IRS) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by

permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: October 30, 2023.

Sara L. Covington,

IRS Tax Analyst.

[FR Doc. 2023–24288 Filed 11–2–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Requesting Comments on Employer's Annual Federal Unemployment Forms

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, Form 940–PR, Planilla para la Declaración Federal Anual del Patrono de la Contribución Federal para el Desempleo (FUTA), and their associated forms and schedules.

DATES: Written comments should be received on or before January 2, 2024] to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to pra.comments@irs.gov. Include OMB Control No. 1545–0028 in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this collection should be directed to Jon Callahan, (737) 800–7639, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at jon.r.callahan@irs.gov.

SUPPLEMENTARY INFORMATION: The IRS is currently seeking comments concerning the following information collection tools, reporting, and record-keeping requirements:

Title: Employer's Annual Federal Unemployment (FUTA) Tax Return.

OMB Number: 1545–0028.

Form Numbers: Form 940, Form 940–PR, Form 940–V, Form 940–V (PR), Schedule A (Form 940), Schedule R (Form 940), and Anexo A (Formulario 940–PR).

Abstract: Internal Revenue Code section 3301 imposes a tax on employers based on the first \$7,000 of taxable wages paid to each employee. The tax is computed and reported on Forms 940 and 940–PR (Puerto Rico employers only). The IRS uses the information on Forms 940 and 940–PR to ensure that employers have reported and figured the correct FUTA wages and tax.

Current Actions: There is no change to the existing collection. However, the estimated number of responses has been updated based on current filing data. Corrections were also made to the burden calculations for the 940–PR forms and schedules.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations, individuals, or households, and farms.

Estimated Number of Responses: 7,128,700.

Estimated Time Per Respondent: 12 hours, 22 minutes.

Estimated Total Annual Burden Hours: 88,115,561.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of

information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 30, 2023.

Jon R. Callahan,

Senior Tax Analyst.

[FR Doc. 2023–24266 Filed 11–2–23; 8:45 am]

BILLING CODE 4830–01–P

UNIFIED CARRIER REGISTRATION PLAN

Sunshine Act Meetings

TIME AND DATE: November 9, 2023, 12:00 p.m. to 3:00 p.m., Eastern time.

PLACE: This meeting will be accessible via conference call and via Zoom Meeting and Screenshare. Any interested person may call (i) 1–929–205–6099 (US Toll) or 1–669–900–6833 (US Toll), Meeting ID: 996 3685 6347, to listen and participate in this meeting. The website to participate via Zoom Meeting and Screenshare is <https://kellen.zoom.us/join/99636856347>.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Audit Subcommittee (the “Subcommittee”) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement. The subject matter of this meeting will include:

Proposed Agenda

I. Call to Order—UCR Audit Subcommittee Chair

The UCR Audit Subcommittee Chair will welcome attendees, call the meeting to order, call roll for the Audit Subcommittee, confirm whether a quorum is present, and facilitate self-introductions.

II. Verification of Publication of Meeting Notice—UCR Executive Director

The UCR Executive Director will verify the publication of the meeting notice on the UCR website and distribution to the UCR contact list via email followed by the subsequent publication of the notice in the **Federal Register**.

III. Review and Approval of Subcommittee Agenda and Setting of Ground Rules—UCR Audit Subcommittee Chair

For Discussion and Possible Subcommittee Action

The agenda will be reviewed, and the Subcommittee will consider adoption.

Ground Rules

Subcommittee action only to be taken in designated areas on the agenda.

IV. Review and Approval of Subcommittee Minutes From the August 10, 2023 Meeting—UCR Audit Subcommittee Chair

For Discussion and Possible Subcommittee Action

Draft minutes from the August 10, 2023, Subcommittee meeting via teleconference will be reviewed. The Subcommittee will consider action to approve.

V. Discuss Options To Replace the Retreat Audit Program With a Program That Relies on the NRS Roadside Inspection Data—UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, DSL Transportation Representative, and Seikosoftware Representative

For Discussion and Possible Subcommittee Action

The UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, DSL Transportation Representative, and Seikosoftware Representative will lead a discussion on options to replace the Retreat Audit Program currently utilized by the States with an automated roadside inspection data driven audit for non-IRP and IRP plated commercial motor vehicles (CMVs) and the motor carriers operating this type of registered equipment. The Subcommittee may take action to recommend to the Board a modification to the current retreat audit program to one that relies on NRS roadside inspection data.

VI. Announcement of the Vice-Chair Position for the Audit Subcommittee—UCR Audit Subcommittee Chair and UCR Audit Subcommittee Vice-Chair

For Discussion and Possible Subcommittee Action

The UCR Audit Subcommittee Chair and UCR Audit Subcommittee Vice-Chair will announce the Subcommittee member receiving the most votes for the position of Vice-Chair of the Audit Subcommittee and address questions. The Subcommittee may take action to recommend that the UCR Board Chair appoint the Subcommittee member receiving the most votes to the position of Vice-Chair of the Audit Subcommittee.

VII. General Discussion on a Policy To Close a Participating and Non-Participating Focused Anomaly Review (FAR)—UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, and DSL Transportation Representative

For Discussion and Possible Subcommittee Action

The UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, and DSL Transportation Representative will lead a discussion on required steps to close both participating and non-participating state FARs. The Subcommittee may take action to recommend to the Board a required policy for the closing of FARs from participating and non-participating states.

VIII. General Discussion of Hot Shot Auto Transporters and the Negative Impact They Have on the UCR and Safety—UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, and DSL Transportation Representative

The UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, and DSL Transportation Representative will lead a discussion on options to address the potential underpayment of hot shot transporters.

IX. 2021 UCR Financial Audit Update—UCR Executive Director and Kellen Representative

The UCR Executive Director and Kellen Representative will provide an update on the 2021 UCR financial audit conducted by Warren Averett.

X. Update on the Quarterly Question and Answer Session for State Auditors—UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, and UCR Executive Director

The UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair and UCR Executive Director will lead discussion of possible future items for discussion for the quarterly question and answer session for state auditors, and also its overall value and continuation.

XI. Other Business—UCR Audit Subcommittee Chair

The UCR Audit Subcommittee Chair will call for any other items Subcommittee members would like to discuss.

XII. Adjournment—UCR Audit Subcommittee Chair

The UCR Audit Subcommittee Chair will adjourn the meeting.

The agenda will be available no later than 5:00 p.m. Eastern time, November 1, 2023 at: <https://plan.ucr.gov>.

CONTACT PERSON FOR MORE INFORMATION:

Elizabeth Leaman, Chair, Unified Carrier Registration Plan Board of Directors, (617) 305–3783, eleaman@board.ucr.gov.

Alex B. Leath,

Chief Legal Officer, Unified Carrier Registration Plan.

[FR Doc. 2023–24454 Filed 11–1–23; 4:15 pm]

BILLING CODE 4910–YL–P

DEPARTMENT OF VETERANS AFFAIRS

Findings of Research Misconduct

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) gives notice, pursuant to Veterans Health Administration (VHA) Handbook 1058.02, Research Misconduct, dated February 7, 2014,

paragraph 6.k., that the Department has made findings of research misconduct against Hee-Jeong Im Sampen, Ph.D., a research biologist at the Jesse Brown VA Medical Center (VAMC) in Chicago, Illinois. The findings were upheld on appeal per VHA Handbook 1058.02, paragraph 25, which is the version of the applicable VHA policy that was in effect at the time the research misconduct investigation commenced.

FOR FURTHER INFORMATION CONTACT: Shara Kabak, Research Misconduct Officer, Office of Research Oversight (10RO), 810 Vermont Avenue NW, Washington, DC 20420, 202-632-7620 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: VA has made final findings of research misconduct against Hee-Jeong Im Sampen, Ph.D. (“Respondent”), a research biologist at the Jesse Brown VAMC in Chicago, Illinois.

Based on the recommended findings of a joint investigation conducted by Rush University and Jesse Brown VAMC, the Department found that the Respondent engaged in research misconduct by intentionally, knowingly and/or recklessly falsifying/fabricating data included in the following three published papers, unpublished manuscript, poster presentation and grant application:

- PKC δ Null Mutations in a Mouse Model of Osteoarthritis Alter Osteoarthritic Pain Independently of Joint Pathology by Augmenting NGF/TrkA-Induced Axonal Outgrowth. *Annals of the Rheumatic Diseases*. 2016 Dec;75(12):2133–2141. doi: 10.1136/annrheumdis-2015-208444 (hereafter “*Ann Rheum Dis*. 2016”);
- Environmental Disruption of Circadian Rhythm Predisposes Mice to

Osteoarthritis-Like Changes in Knee Joint. *Journal of Cellular Physiology*. 2015 Sep;230(9):2174–2183. doi: 10.1002/jcp.24946 (hereafter “*J Cell Physiol*. 2015a”);

- Development of an Experimental Animal Model for Lower Back Pain by Percutaneous Injury-Induced Lumbar Facet Joint Osteoarthritis. *Journal of Cellular Physiology*. 2015 Nov;230(11):2837–2847. doi: 10.1002/jcp.25015 (hereafter “*J Cell Physiol*. 2015b”);

- “NGF Selective Inhibition Therapy on Facet Joint Pain”—DRAFT manuscript for *Arthritis and Rheumatism* (hereafter “*Arthritis Rheum* manuscript”);

- “Inhibition of Glial NF κ B Abolished Pain in a Knee Osteoarthritis Model”—2016 poster for the Osteoarthritis Research Society International (hereafter “OARSI presentation 2016”); and

- VA Biomedical Laboratory Research and Development (BLR&D) Merit Award proposal, I01 BX002647–01, “Osteoarthritis and Knee Joint Pain,” submitted on September 18, 2013 (hereafter “VA Merit Award proposal”).

Specifically, the Department found that the Respondent intentionally, knowingly and/or recklessly committed research misconduct by:

- Fabricating/falsifying images in Figures 1A and 1C, and inflating the “n” (sample size) values in Figures 1B and 1E, of *Ann Rheum Dis*. 2016;
- Fabricating/falsifying images in Figure 4A of *J Cell Physiol*. 2015a;
- Fabricating/falsifying images in Figures 7A and 7B, and inflating the “n” values in Figure 4A, of *J Cell Physiol*. 2015b;

- Fabricating/falsifying an image and inflating the “n” values in Figure 1A of the *Arthritis Rheum* manuscript;

- Fabricating/falsifying data and inflating “n” values in Figures in the OARSI presentation 2016; and

- Fabricating/falsifying images in Figures 1A, 4A, 6, 9, 12, and 17B of the VA Merit Award proposal.

Based on these findings of research misconduct, upheld by the Under Secretary for Health on appeal in a decision dated April 24, 2023, the Department has imposed the following corrective actions:

- (1) Permanent prohibition from conducting VA research;
- (2) Publication of VA’s findings of research misconduct;
- (3) Notification to the relevant Federal funding agencies of the findings;
- (4) Requesting retraction of the affected publications;
- (5) Prohibition from publishing the *Arthritis Rheum* manuscript; and
- (6) Prohibition from re-presenting the content of the OARSI presentation 2016.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on October 26, 2023, 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.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 2023-24342 Filed 11-2-23; 8:45 am]

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FEDERAL REGISTER

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Part II

Securities and Exchange Commission

17 CFR Part 240

Reporting of Securities Loans; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–98737; File No. S7–18–21]

RIN 3235–AN01

Reporting of Securities Loans

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“SEC” or “Commission”) is adopting a new rule under the Securities Exchange Act of 1934 (“Exchange Act”) to increase the transparency and efficiency of the securities lending market by requiring certain persons to report information about securities loans to a registered national securities association (“RNSA”). The new rule also requires certain confidential information to be reported to an RNSA to enhance an RNSA’s oversight and enforcement functions. Further, the new rule requires that an RNSA make certain information it receives, along with daily information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security, available to the public.

DATES:

Effective date: January 2, 2024.

Compliance date: The applicable compliance dates are discussed in Part VIII of this release.

FOR FURTHER INFORMATION CONTACT:

Elizabeth Sandoe, Senior Special Counsel, James Curley, Special Counsel, Elisabeth Van Derslice, Attorney-Advisor, Theresa Hajost, Special Counsel, Brendan McLeod, Attorney-Advisor, Roland Lindmayer, Attorney-Advisor, Josephine J. Tao, Assistant Director, Office of Trading Practices, or Carol McGee, Associate Director, Office of Derivatives Policy and Trading Practices, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010, at (202) 551–5777.

SUPPLEMENTARY INFORMATION: The Commission is adopting 17 CFR 240.10c–1a (“final Rule 10c–1a” or “final rule”) under the Exchange Act, which requires covered persons to provide to an RNSA information concerning certain securities loans, in the format and manner required by an RNSA, and within specified time periods. The final rule requires an RNSA to make publicly available certain information it receives, within specified time periods, and to keep confidential

certain information it receives. The final rule contains requirements regarding an RNSA’s data retention and availability and permits an RNSA to establish and collect reasonable fees.

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I. Introduction

The securities lending market is opaque.¹ There is a general lack of comprehensive information on current market conditions in the securities lending market. Although various market participants, such as certain registered investment companies (“investment companies”), are required to periodically make certain disclosures regarding their securities lending activities,² parties to securities lending

¹ See *Reporting of Securities Loans*, Release No. 34–93613 (Nov. 18, 2021), 86 FR 69802 (Dec. 8, 2021) (“Proposing Release”), 86 FR 69804–21.

² See, e.g., Form N–CEN, Item C.6 (requiring general disclosures relating to an investment company’s securities lending activities); Form N–PORT, Items B.4 and C.12 (requiring disclosure by certain investment companies of certain aggregate information on borrowers of loaned securities and collateral received for loaned securities); 17 CFR 274.101; 17 CFR 274.150. See also *Investment Company Reporting Modernization*, Release No. 34–79095 (Oct. 13, 2016), 81 FR 81870 (Nov. 18, 2016) (discussing, among other things, requirements for securities lending disclosures on Form N–PORT by certain investment companies).

transactions are not currently required to report the material terms of those transactions.³ The lack of public information and data gaps creates inefficiencies in the securities lending market. The gaps in securities lending data render it difficult for end borrowers and lenders alike to ascertain market conditions and to know whether the terms that they receive are consistent with market conditions. These gaps also impact the ability of the Commission, RNSAs and other self-regulatory organizations (“SROs”), and other Federal financial regulators to oversee transactions that are vital to fair, orderly, and efficient markets.⁴ Indeed, the size of the U.S. securities lending market can only be estimated as the data currently available with respect to securities lending transactions are “spotty and incomplete.”⁵ Further, the FSOC 2020 Annual Report noted data gaps in certain important financial markets including transaction data for securities lending arrangements.⁶

Private vendors have attempted to address the opacity in the securities lending market by offering systems that provide data to borrowers and lenders of securities, such as systems that are only available to those who voluntarily provide their transaction data to the

data vendor.⁷ However, data gaps remain despite the private vendor attempts to address opacity in the securities lending market. The private systems are limited to voluntary submissions of data. Further, the data captured by these private vendors is not available to the general public without a subscription, and is not available in one centralized location. Only subscribers to the private vendor have access to such data, which only provides a limited view into securities lending activity. No single vendor has access to pricing information that reflects all securities lending transactions that take place. In addition, data from certain private vendors is limited to loans from a lending program to a broker or dealer and do not capture loans from a broker or dealer to an end borrower. There have also been calls from industry observers and market participants for the Commission to consider measures to provide additional transparency in the securities lending market.⁸

II. Background

Securities lending is the market practice by which securities are transferred temporarily from one party, a securities lender, to another, a securities borrower, for a fee.⁹ A securities loan is typically a fully collateralized transaction. Securities lenders are generally large institutional investors including investment companies, central banks, sovereign wealth funds, pension funds, endowments, and insurance companies.¹⁰ Owners of large, static, unleveraged portfolios, mainly pension funds, increasingly cite securities lending as an important income-enhancing strategy with minimal, or at least controlled, risk.¹¹ This incremental income not only helps defined-benefit pension funds to generate income, but also provides investment company investors with additional returns.¹²

Traditionally, securities lending and borrowing transactions have been conducted on a bilateral basis.¹³ Generally, when an end investor wishes to borrow securities, it may obtain a loan from its broker or dealer from the broker's or dealer's inventory or through customer margin accounts, or the broker

or dealer will borrow the securities from a lending agent with whom it has a relationship and will then re-lend the securities to its customer. Loans from lending programs to brokers or dealers occur in what is referred to by market participants as the “Wholesale market,” while loans from a broker or dealer to the end borrower occur in what is referred to by market participants as the “Customer market” (sometimes also known as the “retail market”). Obtaining a securities loan often involves an extensive search for counterparties by brokers or dealers.¹⁴

Brokers and dealers are the primary borrowers of securities; they borrow for their market making activities or on behalf of their customers.¹⁵ Brokers and dealers who borrow securities typically re-lend those securities or use the securities to cover fails to deliver or short sales arising from proprietary or customer transactions.¹⁶ While the identities of the ultimate securities borrowers are usually unknown, anecdotally, hedge funds rank among the largest securities borrowers and access the lending market mainly through their prime brokers.¹⁷ Brokers and dealers may also lend securities that are owned by the broker or dealer, customer securities that have not been fully paid for (*i.e.*, have been purchased with a margin loan from the broker or dealer), and the securities of customers who have agreed to participate in a fully paid securities lending program offered by their broker or dealer.¹⁸

Other securities lending transactions are often facilitated by a third party. Custodian banks have traditionally been the primary lending agent or intermediary¹⁹ and lend securities on behalf of their customers for a fee.²⁰ Advances in technology and operational efficiency have made it easier to separate securities lending services from custody services. Such developments have given rise to specialist third party agent lenders, who have established themselves as an alternative to custodian banks.²¹ Agent lenders provide potential borrowers with the inventory of securities available for lending on a daily basis.²²

³ See Proposing Release, 86 FR 69803.

⁴ In its 2021 Annual Report, the Financial Stability Oversight Council (“FSOC”) provides that “[c]entralized monitoring of securities lending activities is difficult due to the lack of comprehensive, standardized statistics on securities lending activities . . . the estimated value of securities on loan globally was \$3.1 trillion at the end of September 2021, up from \$2.5 trillion at the end of September 2020 . . . U.S. securities continue to account for the majority of global securities on loan, accounting for 58 percent of global securities on loan as of the end of September 2021.” See FSOC 2021 Annual Report, at 46, available at <https://home.treasury.gov/system/files/261/FSOC2021AnnualReport.pdf>. See also Viktoria Baklanova, Adam Copeland & Rebecca McCaughrin, Reference Guide to U.S. Repo and Securities Lending Markets (Off. of Fin. Research, Working Paper No. 15–17, 2015), at 5, available at https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf (“Office of Financial Research Reference Guide” or “OFR Reference Guide”).

⁵ OFR Reference Guide, at 5, available at https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf.

⁶ See FSOC 2020 Annual Report, at 187. See also the FSOC 2020 Annual Report describing securities lending as “support[ing] the orderly operation of capital markets, principally by enabling the establishment of short positions and thereby facilitating price discovery and hedging . . . it is estimated that at the end of September 2020 the global securities lending volume outstanding was \$2.5 trillion, with around 57 percent of it attributed to the U.S.,” at 45, available at <https://home.treasury.gov/system/files/261/FSOC2020AnnualReport.pdf>.

⁷ See OFR Reference Guide, at 64, available at https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf.

⁸ See Proposing Release, 86 FR 69803 n.11.

⁹ See Proposing Release, 86 FR 69804.

¹⁰ See Proposing Release, 86 FR 69804.

¹¹ See Proposing Release, 86 FR 69804.

¹² See Proposing Release, 86 FR 69804.

¹³ See Proposing Release, 86 FR 69805.

¹⁴ See Proposing Release, 86 FR 69805.

¹⁵ See Proposing Release, 86 FR 69805.

¹⁶ See Proposing Release, 86 FR 69805.

¹⁷ See Proposing Release, 86 FR 69805.

¹⁸ See Proposing Release, 86 FR 69805.

¹⁹ As discussed below, in Part VII.A, the final rule defines the term “intermediary” as a person that agrees to a covered securities loan on behalf of the lender.

²⁰ See *infra* Part VII.A.

²¹ See Proposing Release, 86 FR 69805.

²² See Proposing Release, 86 FR 69805.

III. Statutory Mandate

Section 984(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) added section 10(c) to the Exchange Act to provide the Commission with authority over securities lending.²³ Section 984(b) of the Dodd-Frank Act mandates that the Commission increase transparency of information available to brokers, dealers, and investors.²⁴

On November 18, 2021, to supplement the publicly available information involving securities lending, close the data gaps in this market, and minimize information asymmetries between market participants, the Commission proposed Rule 10c–1 under the Exchange Act (“proposed Rule 10c–1” or “proposed rule”).²⁵ Proposed Rule 10c–1 was designed to provide investors and other market participants with access to pricing and other material information regarding securities lending transactions in a timely manner. The Commission stated that the data collected and made available by the proposed rule would improve price discovery in the securities lending market and lead to a reduction of the information asymmetry faced by end borrowers and beneficial owners in the securities lending market.²⁶ In addition, the Commission stated its preliminary belief that the proposed rule would close securities lending data gaps, increase market efficiency, and lead to increased competition among providers of securities lending analytics services and reduced administrative costs for broker-

dealers and lending programs.²⁷ On balance, the final rule requirements are designed to achieve the objectives of the proposed rule,²⁸ as discussed below, in Parts VII and IX, and are designed to increase the transparency of information available to brokers, dealers, and investors with respect to loans or borrowing securities.

IV. Proposed Rule 10c–1

The Commission proposed that any person that loans a security on behalf of itself or another person (a “Lender”) provide certain securities lending information (“Rule 10c–1 information”) to an RNSA²⁹ in the time periods specified by the proposed rule (*e.g.*, transaction data elements and confidential data elements would be reported within 15 minutes after each loan is effected).³⁰ As proposed, all securities would be within the scope of the rule.³¹

The proposed rule stated that a bank, clearing agency, broker, or dealer that acts as an intermediary to a loan of securities (lending agent) on behalf of a person that owns the loaned securities (beneficial owner) shall provide the Rule 10c–1 information to an RNSA on behalf of the beneficial owner within the time periods specified by the proposed rule or enter into a written agreement with a broker or dealer that agrees to provide the Rule 10c–1 information to an RNSA (reporting agent) in accordance with the proposed rule’s requirements.³² The proposed rule also provided that a beneficial owner would not be required to provide Rule 10c–1 information to an RNSA if a lending agent acts as an intermediary to the loan of securities on behalf of the beneficial owner.³³

The proposed rule would have permitted persons required to report (including intermediaries) to enter into a written agreement with a reporting agent that is a broker or dealer to provide the Rule 10c–1 information to an RNSA.³⁴ Such a reporting agent would be required to establish, maintain, and enforce policies and procedures as well as preserve

records.³⁵ The reporting agent would also be required to provide an RNSA with an updated list of persons on whose behalf the reporting agent is providing information under the proposed rule.³⁶

The proposed rule would have required that an RNSA make certain reported information publicly available as soon as practicable but no later than the next business day.³⁷ To track the securities lending transaction, the proposed rule would require an RNSA to assign each securities lending transaction with a unique transaction identifier.³⁸ Loan modifications would be provided to an RNSA if the modifications to the loan involved any of the terms required to be reported.³⁹ The terms of the loan modification, but not the parties to the loan, would be made public.⁴⁰ In addition, proposed Rule 10c–1 required that by the end of each business day information concerning securities “on loan” and “available to loan” would be provided to an RNSA.⁴¹ Such information would be made publicly available by an RNSA on an aggregated basis per security.⁴²

Not all information reported to an RNSA would have been made publicly available under the proposed rule. Certain information reported to an RNSA would be necessary for regulatory functions, but would not have been made publicly available due to the likelihood that it would identify market participants or reveal investment decisions.⁴³ Proposed Rule 10c–1 would have required an RNSA to keep certain information confidential, subject to the provisions of applicable law.⁴⁴

The proposed rule would have allowed an RNSA to charge fees to lenders, but prohibited an RNSA from charging for or limiting the use of the publicly reported data. Specifically, the proposed rule would have required an RNSA to make the published information available without use restrictions and without charge, for at least five years.⁴⁵

In response to the Proposing Release, the Commission received numerous comments expressing a diversity of

²³ Section 984(a) of the Dodd-Frank Act, now section 10(c)(1) of the Exchange Act, makes it unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange to effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. 15 U.S.C. 78j(c)(1). Section 10(c)(2) of the Exchange Act states that nothing in section 10(c)(1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in 12 U.S.C. 1813(q)), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk. 15 U.S.C. 78j(c)(2).

²⁴ Section 984(b) of the Dodd-Frank Act directs the SEC to “promulgate rules that are designed to increase the transparency of information available to brokers, dealers, and investors with respect to loan or borrowing securities.” Public Law 111–203, sec. 984(b), 124 Stat. 1376 (2010).

²⁵ See Proposing Release, 86 FR 69851–53.

²⁶ Proposing Release, 86 FR 69804.

²⁷ Proposing Release, 86 FR 69804.

²⁸ See Proposing Release, 86 FR 69804.

²⁹ See proposed Rule 10c–1(a). Proposed Rule 10c–1 referred to “Rule 10c–1 information” as “the information in paragraphs (b) through (e) of this section.” These paragraphs specifically included transaction data elements, loan modification data elements, confidential data elements, and securities available to loan and securities on loan.

³⁰ See, *e.g.*, proposed Rules 10c–1(b) and (d).

³¹ See Proposing Release, 86 FR 69807 n.60.

³² See proposed Rule 10c–1(a)(1)(i)(A).

³³ See proposed Rule 10c–1(a)(1)(i)(B).

³⁴ See proposed Rule 10c–1(a)(1)(iii)(A).

³⁵ See proposed Rules 10c–1(a)(2)(i) and (2)(iv).

³⁶ See proposed Rule 10c–1(a)(2)(iii).

³⁷ See proposed Rule 10c–1(e).

³⁸ See proposed Rule 10c–1(b).

³⁹ See proposed Rule 10c–1(c).

⁴⁰ See proposed Rule 10c–1(c).

⁴¹ See proposed Rule 10c–1(e).

⁴² See proposed Rule 10c–1(e)(3).

⁴³ See Proposing Release, 86 FR 69816.

⁴⁴ See proposed Rules 10c–1(d) and (e)(3).

⁴⁵ See proposed Rule 10c–1(g)(3).

perspectives,⁴⁶ which are discussed in detail below. Many commenters supported enhanced transparency of information about securities loans.⁴⁷

⁴⁶ Comment letters to the proposed rule are available at <https://www.sec.gov/comments/s7-18-21/s71821.htm>.

⁴⁷ See, e.g., Letter from Jaime Klima, Chief Regulatory Officer, NYSE Group, Inc. (Jan. 7, 2022) (“NYSE Letter 2”), at 1 (stating that “regulatory oversight of the securities lending market will be meaningfully enhanced if Rule 10c–1 is adopted”); Letter from Marcia E. Asquith, Executive Vice President, FINRA, (Jan. 7, 2022) (“FINRA Letter”), at 1 (stating that “the public dissemination of securities lending information under the Proposal will, among other benefits, improve price discovery in the securities lending market, reduce information asymmetries, close data gaps, and increase market efficiency”); Letter from Kevin Kennedy, Senior Vice President, Nasdaq, Inc. (Jan. 11, 2022) (“Nasdaq Letter”), at 3 (supporting the proposal to make “certain data elements publicly available, thereby increasing the transparency of the securities lending market and reducing competitive advantages that may exist in the marketplace”); Letter from Andrew Park, Americans for Financial Reform Education Fund (Jan. 7, 2022) (“AFREF Letter 1”), at 1, 3 (stating “there is an urgent need to require securities lenders to provide greater details of their loans to a registered national securities association (RNSA) . . . [m]arket participants and regulators alike will greatly benefit from the greater transparency that comes from reporting every securities lending transaction as a result of the proposed changes to Rule 10c–1 . . .”); Letter from Stephen W. Hall, Legal Director and Securities Specialist, and Jason Grimes, Senior Counsel, Better Markets, Inc. (Jan. 7, 2022) (“Better Markets Letter”), at 5 (stating that “increasing transparency into the securities lending market, as the Proposal would do, is sound public policy. It will increase the transparency that investors, other market participants, and regulators (including the SEC) have into the opaque securities lending market.”); Letter from James J. Angel, Ph.D., CFP, CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University (Jan. 4, 2022) (“James J. Angel Letter”), at 2 (stating that “increasing transparency in the securities lending market will reduce the price dispersion seen in the market. Better information about the price and availability of securities lending will allow asset owners . . . to make sure that they are getting proper value for their securities lending.”); Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P. (Jan. 31, 2022) (“Bloomberg L.P. Letter”), at 1 (stating “[w]e appreciate the Commission’s endeavor to improve the transparency and efficiency of the securities lending market by increasing the availability of information regarding securities lending transactions.”); see also Letter from Brian Lamb, CEO, Equilend Holdings, LLC (Mar. 29, 2022) (“Equilend Letter”) (expressing general support for the proposed rule); Letter from Chris Iacovella, Chief Executive Officer, American Securities Association (Jan. 7, 2022) (“ASA Letter”), at 1 (stating “investors, especially retail investors, have no idea what the cost to borrow a security in the market is at any given time. The SEC and the public need transparency into what a loan costs . . .”); Letter from Aron Szapiro, Head of Retirement Studies and Public Policy, Morningstar, Inc. (Jan. 7, 2022) (“Morningstar Letter”), at 4 (expressing general support for increasing transparency in the securities lending market and that the public will obtain a “well-informed view” of the securities lending market from the proposed data publication); Letter from Joseph P. Kamnik, Chief Regulatory Counsel, Options Clearing Corp. (Jan. 7, 2022) (“OCC Letter”); Form Letter from John Burkle, et al. (Aug. 16, 2022) (expressing support for

Other commenters did not support the rule.⁴⁸ Certain commenters addressed the scope of the proposed rule and the timing for reporting information to an RNSA as discussed below, in Parts VII.A through VII.G.

V. Overview of Final Rule

The final rule requires covered persons⁴⁹ to provide securities loan information concerning reportable securities⁵⁰ to an RNSA,⁵¹ in the format and manner required by an RNSA,⁵² and within specified time periods⁵³ (“Rule 10c–1a information”).⁵⁴ The term “covered person” is defined to mean: (1) any person that agrees to a covered securities loan on behalf of a lender (“intermediary”); (2) any person that agrees to a covered securities loan as a lender when an intermediary is not used unless 17 CFR 240.10c–1a(j)(1)(iii) (“final Rule 10c–1a(j)(1)(iii)”) applies to a broker or dealer borrowing fully paid or excess margin securities;⁵⁵ or (3) a broker or dealer when borrowing fully paid or excess margin securities.⁵⁶ In addition, 17 CFR 240.10c–1a(a) (“final

increased transparency in the securities lending market); Letter from Aaron Swaney (Jan. 4, 2022) (“Requiring entities with significant involvement in the markets to report their activities . . . is quite reasonable and very necessary.”); Letter from Peter Antosh, Lawyer (Jan. 4, 2022) (“ . . . the information received and shared via this proposed rule would also . . . increase the public’s access to reliable pertinent market information, improving overall market efficiency”); Letter from Tim DG (Aug. 16, 2022) (“This rule is essential to give retail and more importantly, the regulators more insight to keep fraudulent behaviors at bay.”); Letter from Adam Slee (Aug. 16, 2022) (“We need greater transparency in the market to help ordinary people be able to better understand what is going on[.] this is a good step in the right direction.”); Letter from Tim R. (Aug. 16, 2022) (“This proposal will help true price discovery.”); Letter from Don M. Cromer (Oct. 31, 2022) (“I believe strongly in the transparency of our markets, and I feel that this rule is a strong step in the right direction, and I hope to see many more like it.”).

⁴⁸ See, e.g., Letter from Kevin To, Data Boiler Technologies, LLC (Jan. 7, 2022) (“Data Boiler Technologies Letter”), at 4; Letter from Stephen John Berger, Managing Director, Global Head of Government & Regulatory Policy, Citadel (Apr. 4, 2022) (“Citadel Letter”).

⁴⁹ See *infra* Part VII.A (discussing the definition of the term “covered person”).

⁵⁰ See 17 CFR 240.10c–1a(j)(3) (“final Rule 10c–1a(j)(3)”).

⁵¹ See 17 CFR 240.10c–1a(j)(5) (“final Rule 10c–1a(j)(5)”).

⁵² See 17 CFR 240.10c–1a(f) (“final Rule 10c–1a(f)”).

⁵³ See 17 CFR 240.10c–1a(c) (“final Rule 10c–1a(c)”); 17 CFR 240.10c–1a(d) (“final Rule 10c–1a(d)”); 17 CFR 240.10c–1a(e) (“final Rule 10c–1a(e)”).

⁵⁴ The change in designation from proposed Rule 10c–1 to final Rule 10c–1a conforms with **Federal Register** requirements for rule designations.

⁵⁵ See Proposing Release, 86 FR 69803 n.9.

⁵⁶ See 17 CFR 240.10c–1a(j)(1)(i) (“final Rule 10c–1a(j)(1)(i)”); 17 CFR 240.10c–1a(j)(1)(ii) (“final Rule 10c–1a(j)(1)(ii)”); final Rule 10c–1a(j)(1)(iii).

Rule 10c–1a(a)”) specifies that any covered person that agrees to a covered securities loan must comply with the rule.⁵⁷

If any person agrees to a covered securities loan on behalf of the lender (an “intermediary”), the intermediary has the obligation to provide Rule 10c–1a information to an RNSA.⁵⁸ If an intermediary is not used, the lender is required to provide Rule 10c–1a information to an RNSA.⁵⁹ If a covered securities loan consists of a broker or dealer borrowing fully paid or excess margin securities, only the broker or dealer is required to provide the Rule 10c–1a information to an RNSA, not the lender.⁶⁰

However, in a change from the proposed rule, as discussed below, in Part VII.A, the final rule excludes from the definition of the term “covered person” a clearing agency when providing only the functions of a central counterparty as defined pursuant to 17 CFR 240.17Ad–22(a)(3) (“Rule 17Ad–22(a)(2)”) of the Exchange Act or a central securities depository as defined pursuant to 17 CFR 240.17Ad–22(a)(3) (“Rule 17Ad–22(a)(3)”) of the Exchange Act.⁶¹ Thus, a clearing agency is not required to report Rule 10c–1a information to an RNSA for a covered securities loan when acting in the capacity or engaged in activities as a central counterparty or a central securities depository in connection with a covered securities loan.

The final rule permits a covered person to rely on a reporting agent that is a broker, dealer, or registered clearing agency to provide Rule 10c–1a information to an RNSA to fulfill such covered person’s reporting obligation.⁶² To do so, the covered person must enter into a written agreement with a reporting agent, that agrees to provide Rule 10c–1a information to an RNSA, and provide such reporting agent with timely access to such information.⁶³ If the reporting agent receives the Rule 10c–1a information from the covered person on a timely basis, the reporting agent assumes responsibility for

⁵⁷ In addition, as discussed below, in Part VII.E, the use of the term “agrees to a covered securities loan” clarifies that the Rule 10c–1a information is not limited to securities loans that have been settled. If there are multiple lenders to the same loan, to avoid duplicative reporting, the parties could coordinate to file a single, combined report.

⁵⁸ See final Rule 10c–1a(j)(1)(i).

⁵⁹ See final Rule 10c–1a(j)(1)(ii).

⁶⁰ See final Rule 10c–1a(j)(1)(iii).

⁶¹ See final Rule 10c–1a(j)(1)(i).

⁶² See 17 CFR 240.10c–1a(a)(2) (“final Rule 10c–1a(a)(2)”).

⁶³ See 17 CFR 240.10c–1a(a)(2)(i) (“final Rule 10c–1a(a)(2)(i)”); 17 CFR 240.10c–1a(a)(2)(ii) (“final Rule 10c–1a(a)(2)(ii)”).

compliance with the reporting requirements under the final rule.

The final rule defines a “covered securities loan” as a transaction in which any person on behalf of itself or one or more other persons, lends a “reportable security” to another person (except for a position at a clearing agency that results from certain central counterparty or central securities depository services).⁶⁴ In addition, the use of margin securities, as defined in 17 CFR 240.15c3–3(a)(4) (“Rule 15c3–3(a)(4)”), by a broker or dealer is not a covered securities loan for purposes of the final rule unless the broker or dealer lends such margin securities to another person.⁶⁵

The term “reportable security” is defined as any security or class of an issuer’s securities for which information is reported or required to be reported to the consolidated audit trail as required by Rule 613 of the Exchange Act and the CAT NMS Plan (“CAT”), the Financial Industry Regulatory Authority’s Trade Reporting and Compliance Engine (“TRACE”), or the Municipal Securities Rulemaking Board’s (“MSRB”) Real-Time Transaction Reporting System (“RTRS”), or any reporting system that replaces one of these systems.⁶⁶

The final rule requires a covered person, directly or indirectly through a reporting agent, to report three types of data, which together comprise the Rule 10c–1a information. The first type of data concerns the material terms of the covered securities loan and must be provided to an RNSA by the end of the day on which the covered securities loan is effected (“data elements”).⁶⁷ The second type of data concerns modifications to a covered securities loan and must be provided to an RNSA by the end of the day on which a covered securities loan is modified, if the modification occurs after other information about the covered securities loan has already been provided to an RNSA, and results in a change to such information.⁶⁸ The third type of data concerns confidential information in connection with a covered securities loan and must be provided to an RNSA by the end of the day on which a covered securities loan is effected.⁶⁹ The final rule requires that an RNSA keep the third type of information

confidential subject to applicable law.⁷⁰ The final rule also requires an RNSA to make the Rule 10c–1a information available to the Commission; or other persons as the Commission may designate by order upon a demonstrated regulatory need.⁷¹

An RNSA is required to make publicly available the following information not later than the morning of the business day⁷² after the covered securities loan is effected:⁷³ (1) the unique identifier assigned to a covered securities loan by an RNSA⁷⁴ and the security identifier;⁷⁵ (2) the data elements, except for loan amount;⁷⁶ and (3) information pertaining to the aggregate transaction activity and the distribution of rates among loans and lenders (“distribution of loan rates”) ⁷⁷ for each reportable security and related unique identifier.⁷⁸ An RNSA is also required to make publicly available the loan amount on the twentieth business day after the covered securities loan is effected along with loan and security identifying information.⁷⁹

In addition, an RNSA is required to make publicly available any modification to the data elements, except for modification to the loan amount, not later than the morning of the business day after the covered securities loan is modified.⁸⁰ An RNSA is also required to make publicly

available modifications to the loan amount on the twentieth business day after the loan amount is modified along with loan and security identifying information.⁸¹

The final rule requires an RNSA to implement rules regarding the format and manner of its collection of information and make publicly available such information in accordance with rules promulgated pursuant to 15 U.S.C. 78s(b) (“section 19(b)”) and 17 CFR 240.19b–4 (“Rule 19b–4”) of the Exchange Act.⁸² The final rule also contains requirements regarding an RNSA’s data retention and availability.⁸³ Specifically, an RNSA must maintain the information on its website or a similar means of electronic distribution, without use restrictions, for a period of at least five years.⁸⁴ In addition, the final rule permits an RNSA to establish and collect reasonable fees pursuant to rules promulgated pursuant to section 19(b) and Rule 19b–4.⁸⁵

Final Rule 10c–1a is designed to provide access to timely, comprehensive securities loan information to market participants, the public, and regulators, which will help provide borrowers and lenders with better tools to assess the terms of their securities loans and enhance the ability of regulators to oversee the securities lending market. In addition, the final rule will result in the public availability of new information for investors and other market participants to consider in the mix of information about the securities lending market and the securities markets generally to better inform their decisions.⁸⁶ The final rule will also provide regulators with information that may be used in conjunction with other

⁷⁰ See 17 CFR 240.10c–1a(g)(4) (“final Rule 10c–1a(g)(4)”).

⁷¹ See 17 CFR 240.10c–1a(h)(2) (“final Rule 10c–1a(h)(2)”).

⁷² Similar to the proposed rule, the final rule does not specify, for purposes of compliance with the final rule, exactly what time is the “end of the business day,” “morning of the business day,” or what holidays should not be considered a “business day,” to give an RNSA the discretion to structure its systems and processes as it sees fit and implement its rules accordingly. See, e.g., *Proposing Release*, 86 FR 69816 n.104. The Commission did not receive any comments addressing this point. As an example, for times set by an RNSA for other reporting regimes, an RNSA has set reporting for 6 p.m. (see, e.g., <https://www.finra.org/filing-reporting/regulatory-filing-systems/short-interest>) or times depending on whether transactions are executed during or after system hours or on non-business days (see, e.g., <https://www.finra.org/rules-guidance/rulebooks/finra-rules/6730>).

⁷³ See 17 CFR 240.10c–1a(g)(1) (“final Rule 10c–1a(g)(1)”).

⁷⁴ See 17 CFR 240.10c–1a(g)(1)(i)(A) (“final Rule 10c–1a(g)(1)(i)(A)”).

⁷⁵ See 17 CFR 240.10c–1a(g)(1)(i)(C) (“final Rule 10c–1a(g)(1)(i)(C)”) and 17 CFR 240.10c–1a(g)(5) (“final Rule 10c–1a(g)(5)”).

⁷⁶ See 17 CFR 240.10c–1a(g)(1)(i)(B) (“final Rule 10c–1a(g)(1)(i)(B)”).

⁷⁷ See *infra* Part IX.C.1 (Benefits of Increased Transparency in the Securities Lending Market).

⁷⁸ See final Rule 10c–1a(g)(5).

⁷⁹ See 17 CFR 240.10c–1a(g)(2) (“final Rule 10c–1a(g)(2)”).

⁸⁰ See 17 CFR 240.10c–1a(g)(3)(i) (“final Rule 10c–1a(g)(3)(i)”).

⁸¹ See 17 CFR 240.10c–1a(g)(3)(ii) (“final Rule 10c–1a(g)(3)(ii)”).

⁸² See final Rule 10c–1a(f).

⁸³ See 17 CFR 240.10c–1a(h) (“final Rule 10c–1a(h)”).

⁸⁴ See 17 CFR 240.10c–1a(h)(3) (“final Rule 10c–1a(h)(3)”).

⁸⁵ See 17 CFR 240.10c–1a(i) (“final Rule 10c–1a(i)”) and section 19(b). See also 15 U.S.C. 78o–3 (“section 15A”).

⁸⁶ As discussed in the *Proposing Release*, currently available data on the securities lending market are incomplete, as private vendors do not have access to pricing information that reflects all transactions. This, in part, reflects the voluntary submission of transaction information by subscribers to vendors and is compounded by the uncertain comparability of data due to, among other things, the variability of the transaction terms disseminated, as well as how those terms are defined. As no single vendor has information for all securities lending transactions that take place, some persons pay to subscribe to multiple vendors’ systems in order to capture as much of the currently available data as they determine to purchase, which can be expensive. See *Proposing Release*, 86 FR 69807 (citing Beneficial Owners Demand Independent Benchmarking, Global Inv., 2017 WLNR 5380098 (Feb. 2, 2017)).

⁶⁴ See 17 CFR 240.10c–1a(j)(2)(i) (“final Rule 10c–1a(j)(2)(i)”); 17 CFR 240.10c–1a(j)(2)(ii) (“final Rule 10c–1a(j)(2)(ii)”).

⁶⁵ See 17 CFR 240.10c–1a(j)(2)(iii) (“final Rule 10c–1a(j)(2)(iii)”).

⁶⁶ See final Rule 10c–1a(j)(2)(ii).

⁶⁷ See final Rule 10c–1a(c).

⁶⁸ See 17 CFR 240.10c–1a(d) (“final Rule 10c–1a(d)”).

⁶⁹ See final Rule 10c–1a(e).

information that is currently available to regulators to help assess market events.

VI. Overview of Changes From Proposed Rule

The Commission is adopting final Rule 10c-1a with certain modifications from the proposed rule made in response to comments. The final rule:

- Modifies the scope of persons required to report by:
 - Specifying the persons who have a reporting obligation with a new definition of “covered person” to distinguish persons who have a reporting obligation from those persons who do not;⁸⁷ specifically, requiring reporting by any person that agrees to a covered securities loan on behalf of the lender, any person that agrees to a covered securities loan as a lender if an intermediary is not used, or a broker or dealer when borrowing fully paid or excess margin securities, and providing that an intermediary need not be a certain type of entity;
 - Excluding clearing agencies from the new definition of “covered person” when engaged only in certain central counterparty or central securities depository activities;
 - Separating the requirements for covered persons and reporting agents into distinct paragraphs;⁸⁸ and
 - Adding a new definition for “reporting agent” to specify that a covered person may rely on a reporting agent that is a broker, dealer, or registered clearing agency⁸⁹ provided there is a written agreement between the covered person and the reporting agent under which the reporting agent agrees to establish, maintain, and enforce policies and procedures to ensure compliance with the final rule and if the covered person provides timely information to the reporting agent.⁹⁰
 - Modifies the scope of securities for which loans must be reported by adding a new definition for “reportable security” to mean any security or class of an issuer’s securities for which information is reported or required to be reported to the CAT, TRACE, or RTRS, or any reporting system that replaces one of these systems;⁹¹ and
 - Specifies the type of loan transaction to which the final rule applies by defining a new term “covered securities loan,” which excludes the use of margin securities by a broker or

dealer (e.g., rehypothecation) other than the lending of such margin securities by a broker or dealer, as well as a position at a clearing agency that results from certain central counterparty or central securities depository services.⁹²

- Streamlines information required to be reported by:
 - Removing the requirements in paragraph (e) of the proposed rule to provide securities “available to loan” and securities “on loan” information to an RNSA and the requirement for an RNSA to make such information public;⁹³ and
 - Replacing the requirement to report a description of the loan modification with a requirement to report the specific modification and the specific data element being modified.⁹⁴
 - Specifies that all data elements for covered securities loans that were not required to be reported on the date agreed to or on the date last modified, but which subsequently become covered securities loans, must be reported when the covered securities loan is modified.⁹⁵
 - Modifies the timing of reporting by:
 - Replacing the requirements to report data elements and confidential data elements to an RNSA within 15 minutes after each loan is effected with requirements to report such elements by the end of the day on which a covered securities loan is effected;⁹⁶ and
 - Replacing the requirement to report loan modification data elements to an RNSA within 15 minutes after each loan is modified with a requirement to report such elements by the end of the day on which a covered securities loan is modified.⁹⁷
 - Specifies the treatment of open-ended loans in existence prior to the final rule.⁹⁸
 - Modifies the responsibilities of an RNSA by:
 - Defining the term “RNSA” to specify that such term refers to an association of brokers and dealers that is registered as a national securities association pursuant to 15 U.S.C. 78o-3 (“section 15A”) of the Exchange Act;⁹⁹
 - Separating an RNSA’s data publication requirements into new paragraph (g) of the final rule to more

clearly delineate an RNSA’s requirements from the reporting requirements applicable to covered persons and reporting agents;¹⁰⁰

- Replacing the requirement for an RNSA to publish the loan amount (as well as any modifications to loan amount) as soon as practicable and instead: (1) make the loan amount public on the twentieth business day after the covered security loan is effected (or modified), and (2) make specified loan and security identifying information public on the twentieth business day after the covered security loan is effected (or modified);¹⁰¹
- Adding a new requirement to paragraph (g) of the final rule for an RNSA to publish, on a daily basis, information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security in order to provide market participants with timely access to loan rate information that incorporates information about loan sizes;¹⁰² and
- Removing the requirement in paragraph (g) of the proposed rule that collected information be made available to the public “without charge,” and removing the requirement in paragraph (h) of the proposed rule that fees only be paid from persons who provide Rule 10c-1a information directly to an RNSA.¹⁰³

In addition, the final rule includes some technical modifications, such as modifying the rule designation to conform with **Federal Register** requirements as well as additional technical or conforming modifications that are minor and not substantive. Responses to comments requesting clarification about the cross-border scope of the rule are also provided below, in Part VII.M. Further, the Commission is providing compliance dates requiring that: (1) RNSAs propose rules pursuant to final Rule 10c-1a(f) within four months of the effective date of final Rule 10c-1a; (2) the proposed RNSA rules are effective no later than 12 months after the effective date of final Rule 10c-1a; (3) covered persons report Rule 10c-1a information to an RNSA starting on the first business day 24 months after the effective date of final Rule 10c-1a (the “reporting date”); and (4) RNSAs publicly report Rule 10c-1a information pursuant to final Rules 10c-1a(g) and (h)(3) within 90 calendar days of the reporting date.

⁸⁷ See 17 CFR 240.10c-1a(j)(1) (“final Rule 10c-1a(j)(1)”).

⁸⁸ See final Rules 10c-1a(a) and 17 CFR 240.10c-1a(b) (“final Rule 10c-1a(b)”).

⁸⁹ See 17 CFR 240.10c-1a(j)(4) (“final Rule 10c-1a(j)(4)”).

⁹⁰ See final Rule 10c-1a(a)(2).

⁹¹ See final Rule 10c-1a(j)(3).

⁹² See 17 CFR 240.10c-1a(j)(2) (“final Rule 10c-1a(j)(2)”).

⁹³ See proposed Rule 10c-1(e).

⁹⁴ See 17 CFR 240.10c-1a(d)(1)(ii) (“final Rule 10c-1a(d)(1)(ii)”).

⁹⁵ See 17 CFR 240.10c-1a(d)(2) (“final Rule 10c-1a(d)(2)”).

⁹⁶ See final Rules 10c-1a(c) and 10c-1a(e).

⁹⁷ See final Rule 10c-1a(d).

⁹⁸ See final Rule 10c-1a(d)(2).

⁹⁹ See final Rule 10c-1a(j)(5).

¹⁰⁰ See 17 CFR 240.10c-1a(g) (“final Rule 10c-1a(g)”).

¹⁰¹ See final Rule 10c-1a(g)(2).

¹⁰² See final Rule 10c-1a(g)(5).

¹⁰³ See proposed Rule 10c-1(h).

VII. Discussion of the Final Rule

A. Scope of Persons With Reporting Obligations—10c–1a(j)(1)

Proposed Rule

The proposed rule would have required that any person that loans a security on behalf of itself or another person shall provide Rule 10c–1 information to an RNSA.¹⁰⁴ The Proposing Release stated that the term “person,” for purposes of the Exchange Act, means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.¹⁰⁵

The proposed rule also stated that “a bank, clearing agency, broker, or dealer, that acts as an intermediary to a loan of securities (lending agent) on behalf of a person that owns the loaned securities (beneficial owner) shall . . . provide the Rule 10c–1 information to an RNSA”¹⁰⁶ However, if a person loaned a security on behalf of itself, and an intermediary did not act on its behalf, such person would be the one required to provide the Rule 10c–1 information to an RNSA.¹⁰⁷

The Commission proposed that when “a bank, clearing agency, broker, or dealer” acts as an intermediary (or “lending agent”) on behalf of a person that owns loaned securities the lending agent would have the reporting obligation.¹⁰⁸ When discussing the rationale for this requirement, the Commission stated that lending agents are in the best position to know when securities have been loaned from the portfolios that the lending agent represents, and that the owner may not know that the lending agent has lent securities from their portfolio until after the time prescribed by proposed Rule 10c–1 to provide Rule 10c–1 information to an RNSA.¹⁰⁹ The Proposing Release also stated that custodian banks have traditionally been the primary lending agent or intermediary and lend securities on behalf of their customers.¹¹⁰

The Commission proposed a single-sided approach of only applying the rule’s reporting requirements to

securities lenders and intermediaries acting on behalf of lenders, and not to borrowers. The Proposing Release explained that such an approach could avoid the potential double counting of transactions.¹¹¹ It also explained that lenders are more likely to have access to the Rule 10c–1 information, but a borrower may not be privy to all of the information required to be provided to an RNSA under the proposed rule.¹¹² The Commission also stated that to the extent smaller entities engage in securities lending, they generally employ lending agent intermediaries, which would relieve them from having to provide proposed Rule 10c–1 information to an RNSA.¹¹³ Accordingly, the Commission stated its preliminary belief that requiring only securities lenders or intermediaries to a loan of securities to provide the proposed Rule 10c–1 information will alleviate the potential for the double counting of transactions and limit the burdens of proposed Rule 10c–1 to larger institutions.¹¹⁴

Final Rule

Many commenters requested additional clarity regarding the market participants that would be required to provide the proposed Rule 10c–1 information to an RNSA.¹¹⁵ As

discussed below in this part, to address commenter concerns, and to specify which persons are required to provide Rule 10c–1a information to an RNSA, the final rule defines the term “covered person” to mean: (1) any person that agrees to a covered securities loan on behalf of a lender (“intermediary”) other than a clearing agency when providing only the functions of a central counterparty or central securities depository; (2) any person that agrees to a covered securities loan as a lender when an intermediary is not used, unless the borrower is a broker or dealer borrowing fully paid or excess margin securities; or (3) a broker or dealer when borrowing fully paid or excess margin securities.¹¹⁶ Accordingly, if a person uses an intermediary, such as a lending agent that is a custodian bank, to run its lending program to lend securities to other persons on its behalf, the custodian bank is the covered person for purposes of the final rule.¹¹⁷ If,

However, the final rule allows persons other than banks, brokers, dealers, and clearing agencies to act as intermediaries (*i.e.*, lending agents), which could increase competition among such entities. The final rule also permits covered persons to use third party vendors to help facilitate the fulfillment of their reporting obligation. These elements of the final rule should address some of the implementation costs raised by the commenter. As the Commission stated in the Proposing Release, lending agents are in the best position to know when securities have been loaned from the portfolios that the lending agent represents. Indeed, a beneficial owner might not know that the lending agent has lent securities from the portfolio until after the time prescribed by final Rule 10c–1a to provide Rule 10c–1a information to an RNSA. *See* Proposing Release, 86 FR 69809. Expanding reporting requirements further, as the commenter suggests, could reduce the timeliness of the information required to be reported.

¹¹⁶ *See* final Rule 10c–1a(j)(1). The final rule’s approach of requiring reporting by an intermediary if one is used, and by the lender if an intermediary is not used, is comparable to one commenter’s recommendation “to include a set reporting hierarchy . . . to determine the counterparty that will be responsible to report the required information.” *See* Letter from Linklaters LLP (Apr. 1, 2022) (“Linklaters Letter”), at 5.

¹¹⁷ One commenter recommended that “[lending] agents should not be liable for the failure to report any information that they do not control as the intermediary unless such information has been provided to them by the principal in a timely manner. The rule should also reflect that a lending agent should not be liable for the content of information provided to it by a principal unless the agent has actual knowledge that the information is inaccurate.” *See* Letter from Briget Polichene, Chief Executive Officer, Institute of International Bankers (Jan. 7, 2022) (“IIB Letter”), at 10. However, the Commission continues to believe that lending agents, as parties to the loan, are well positioned to provide the required Rule 10c–1a information and often are in possession of more information concerning the loan than the principal (or beneficial owner). *See* Proposing Release, 86 FR 69109–10 (“responsibility for failing to provide 10c–1 information to an RNSA should be on the lending agent and not the beneficial owners because the lending agent is directly responsible for the loan of securities”).

¹⁰⁴ *See* proposed Rule 10c–1(a). *See also* Proposing Release, 86 FR 69807.

¹⁰⁵ *See* Proposing Release, 86 FR 69807 (citing 15 U.S.C. 78c(a)(9)).

¹⁰⁶ *See* proposed Rules 10c–1(a)(1)(i)(A)(1) and 10c–1(a)(1)(i)(B) (stating that “[a] beneficial owner is not required to provide the Rule 10c–1 information to an RNSA if a lending agent acts as an intermediary to the loan of securities on behalf of the beneficial owner”).

¹⁰⁷ *See* proposed Rule 10c–1(a)(1).

¹⁰⁸ *See* proposed Rule 10c–1(a)(1)(i)(A).

¹⁰⁹ *See* Proposing Release, 86 FR 69809.

¹¹⁰ *See* Proposing Release, 86 FR 69805.

¹¹¹ *See* Proposing Release, 86 FR 69807.

¹¹² *See* Proposing Release, 86 FR 69807.

¹¹³ *See* Proposing Release, 86 FR 69808.

¹¹⁴ *See* Proposing Release, 86 FR 69808.

¹¹⁵ *See* Letter from Susan Olson, General Counsel, and Sarah A. Bessin, Associate General Counsel, Investment Company Institute (Jan. 7, 2022) (“ICI Letter 1”), at 8 (“there is a lack of clarity in the Proposal regarding the concepts of ‘lender,’ ‘beneficial owner,’ ‘lending agent,’ and ‘reporting agent’”); Letter from Peter J. Germain, Chief Legal Officer, Federated Hermes, Inc. (Jan. 7, 2022) (“Federated Hermes Letter”), at 2; Letter from Elizabeth Kent, Managing Director, Global Public Policy Group, and Roland Villacorta, Managing Director, Securities Lending, BlackRock (Jan. 7, 2022) (“BlackRock Letter”), at 2 (“We recommend the Commission provide more clarity on the scope of lenders and loans subject to the proposed requirements.”). In addition, one commenter stated that empowering the owner of the securities to determine the manner of reporting would reduce the implementation costs for lenders and mitigate the risk of inaccurate data being reported. The commenter further stated that responsibility for reporting obligations would then be included in either the master securities lending agreement between lender and borrower or in the securities lending agent agreement between lender and lending agent, or both. *See* Letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, Managed Funds Association (Aug. 4, 2023) (“MFA Letter 3”), at 7. The final rule permits covered persons to contract with reporting agents that are brokers, dealers, or registered clearing agencies under certain conditions intended to ensure that the reporting obligations are met. A beneficial owner cannot assign the reporting obligation when an intermediary is used, as the intermediary has the reporting obligation under final Rule 10c–1a(j)(1)(i).

however, a person does not use an intermediary to lend securities on their behalf, such person is the covered person for purposes of the final rule. For example, a fund is a covered person for purposes of the final rule if that fund runs its own lending program and lends securities to other persons without the use of an intermediary, such as custodian bank. Further, a broker or dealer who borrows fully paid or excess margin securities from its customer is the covered person for purposes of the final rule, and the customer of the broker or dealer is not a covered person.

The definition of “covered person” uses the term “agrees to” instead of “loans a security” as proposed to make clear that a customer of a broker or dealer that loans a reportable security to the broker or dealer in a fully paid lending arrangement is not required to comply with the final rule. Instead, the broker or dealer that borrows the reportable security is required to comply with the final rule and must report Rule 10c–1a information on the covered securities loan. Further, as discussed below, in Part VII.E, the term “agrees to a covered securities loan” also provides that Rule 10c–1a information is not limited to covered securities loans that have been settled.

One commenter recommended that the Commission not “limit permitted ‘lending agents’ for purposes of the rule to banks, clearing agencies, brokers, or dealers, as proposed,” but instead “permit any lending agent that acts as an intermediary to a loan of securities to report on behalf of a beneficial owner.”¹¹⁸ The commenter stated that as long as a lending agent could meet the requirements of the proposed rule, such an expansion would “reflect the variety of lending agents that funds use” and “would facilitate reporting by beneficial owners that prefer to use non-broker-dealer lending agents to report their securities loans.”¹¹⁹ The Commission agrees, and has modified the final rule to define “covered person” to encompass “[a]ny person that agrees to a covered securities loan on behalf of the lender.”¹²⁰

One commenter sought clarification of whether a “branch or the entity” would be responsible for proposed Rule 10c–1 information reporting if the branch

enters into a covered securities loan, although the commenter did not define the terms “branch” or “entity.”¹²¹ Determining the “person” required to report in complex organizational structures will depend on the facts and circumstances. A branch or office of a covered person, as opposed to a subsidiary or affiliate, may not constitute a distinct covered person, but rather different parts of the same covered person.¹²² The designation of a business unit as a branch, office, or otherwise, is not dispositive of whether such business unit has the obligation to report Rule 10c–1a information.¹²³ One commenter sought confirmation that a clearing agency’s provision of depository or central clearing services, including novation, processing, settlement, netting, and incidental services, do not make the clearing agency an intermediary to a loan of securities.¹²⁴ The Commission agrees that a clearing agency’s provision of depository or central clearing services¹²⁵ to securities lending transactions is not the type of activity that final Rule 10c–1a is designed to cover. By acting as a central counterparty, including by novating a loan, a clearing agency steps into the shoes of the parties to the loan and technically may become a person that

agrees to a loan on its own behalf or on behalf of another person. However, requiring reporting by a registered clearing agency providing such central counterparty or securities depository services would not provide additional transparency and would be duplicative of the reporting requirements that apply to the loan’s lender or intermediary prior to it being cleared. Accordingly, the final rule specifically excludes from the “covered person” definition a clearing agency when providing only the functions of a central counterparty pursuant to 17 CFR 240.17Ad–22(a)(2) (“Rule 17Ad–22(a)(2)”) or a central securities depository pursuant to 17 CFR 240.17Ad–22(a)(3) (“Rule 17Ad–22(a)(3)”).¹²⁶ The exclusion would not apply when the clearing agency is acting in a different capacity (e.g., as an intermediary providing the services of a lending agent).¹²⁷

Certain commenters supported the proposed single-sided reporting structure (i.e., requiring reporting by any person that loans a security on behalf of itself or another person, but not requiring reporting by the borrower) to alleviate concerns about double counting loans of securities.¹²⁸ One

¹²¹ See Letter from Mary Jane Schuessler, Canadian Securities Lending Association (Jan. 12, 2022) (“CASLA Letter”), at 3.

¹²² See Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Release No. 34–74244 (Feb. 11, 2015), 80 FR 14564, 14652 n.813 (Mar. 19, 2015) (discussing foreign branches and stating that “because a branch or office has no separate legal existence under corporate law, the branch or office would be an integral part of the U.S. person itself”). See also *infra* Part VII.M (discussing the cross-border application of final Rule 10c–1a).

¹²³ See *infra* Part VII.M.

¹²⁴ See Letter from Michele Hillery, Managing Director, General Manager of Equity Clearing and DTC Settlement Service, DTCC (Jan. 7, 2022) (“DTCC Letter”), at 3–4. See also DTCC Letter, at 1 (stating that “requiring the clearing agency to assume the obligations of traditional lending agents for providing [traditional securities depository, central counterparty, or incidental services] would misplace the burden of responsibility and result in double reporting.”); OCC Letter, at 9 (recommending that a clearing agency should not assume the reporting obligations as an intermediary to a loan of securities under the proposed rule when it is not actively involved with the lending of securities of beneficial owners or for their own account, but providing only central counterparty services).

¹²⁵ See DTCC Letter, at 2–3 (stating that it is “a central securities depository that . . . holds securities on behalf of its participants and effects transfers between participant accounts by book entry, including to facilitate the settlement of securities lending transactions.” Also, that “depository activities and related incidental services do not affect supply or demand in the securities lending market, the pricing of securities lending transactions, or other relevant data regarding the securities lending market”).

¹²⁶ See final Rule 10c–1a(j)(1)(i). Rule 17Ad–22(a)(2) of the Exchange Act defines “central counterparty” to mean a clearing agency that interposes itself between the counterparties to securities transactions, acting functionally as the buyer to every seller and the seller to every buyer. Rule 17Ad–22(a)(3) of the Exchange Act defines “central securities depository” to mean a clearing agency that is a securities depository as described in section 3(a)(23)(A) of the Exchange Act. Section 3(a)(23)(A) describes a securities depository as a person who: (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates; or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.

¹²⁷ The Commission understands that clearing agencies do not currently provide services related to securities loans beyond acting as a central counterparty or central securities depository. Registered clearing agencies that wish in the future to expand services relating to securities loans, will be required to submit rule filings under section 19(b) and Rule 19b–4 in which they will be required to describe how the proposed changes would comply with existing federal securities laws, including the final rule. Clearing agencies that are operating under an exemption from registration will be required to seek modifications to their exemptions that are compliant with the final rule in order to expand the services they provide in relation to securities loans. See section 19(b) and Rule 19b–4 of the Exchange Act.

¹²⁸ See, e.g., ICI Letter 1, at 5; Letter from Phoebe Papageorgiou, Vice President, Trust Policy, American Bankers Association (Jan. 7, 2023) (“ABA Letter”), at 2–3; Letter from Thomas Deinet, Executive Director, The Standards Board of

¹¹⁸ See ICI Letter 1, at 5.

¹¹⁹ See ICI Letter 1, at 5.

¹²⁰ See final Rule 10c–1a(j)(1)(i). Although the Commission is not limiting who can act as an intermediary for the purposes of this rule, other regulatory requirements may apply to persons who intermediate transactions such as loans of securities. See, e.g., 15 U.S.C. 240.78o (section 15(b) of the Exchange Act) (registration requirements); 15 U.S.C. 240.78c (sections 3(a)(4) and (5) of the Exchange Act) (definitions of broker and dealer).

commenter stated that “we strongly support the Proposal’s approach of requiring single-sided reporting . . . the approach would reduce the potential for double counting of securities lending transactions and limit the burden on lenders. A single-sided reporting regime avoids problems with reconciling reports by each party to a transaction.”¹²⁹ Other commenters supported the application of the final rule’s reporting requirements to all lenders to facilitate a comprehensive view of the securities lending market.¹³⁰ In consideration of these comments, the final rule generally employs a single-sided approach to reporting, with the Rule 10c–1a information reporting obligations placed on either an intermediary that agrees to a covered securities loan on behalf of the lender, or any person that agrees to a covered securities loan as a lender when an intermediary is not used.¹³¹ Consistent with the proposed rule, this approach is designed to avoid the potential for the double counting of transactions that could arise if both sides, borrowers and lenders, were required to report final Rule 10c–1a information to an RNSA.¹³²

However, one commenter opposed the proposed single-sided reporting approach, and recommended that the final rule require reporting by SEC-registered brokers or dealers only and for transactions in which they act as borrowers, lenders, or lending agents.¹³³ The commenter stated that “whether

acting as borrower or lender acting in a principal or agency capacity, [requiring SEC-registered broker-dealers to report] would substantially reduce overall implementation costs, would not impose costs on a single side of the market and would still provide for sufficient market data.”¹³⁴ The commenter reasoned that reporting costs would be lower, due to brokers or dealers having existing reporting infrastructure and connectivity.¹³⁵ The commenter cited to the Office of the Financial Research Pilot Survey (“OFR Pilot Survey”)¹³⁶ to support the view that although such a structure would be “less comprehensive than lender reporting, the data loss entailed should not be substantial” and “would be substantially captured” and “sufficient.”¹³⁷ The commenter also stated that its proposed structure “would also provide better data integrity as broker-dealers are better positioned than beneficial owners and Lending Agents to evaluate whether a securities loan is made for the purpose of facilitating short sales or settlement of fails rather than some other purpose.”¹³⁸

The Commission is not adopting the commenter’s recommended reporting structure. Requiring reporting by brokers or dealers acting as borrowers, lenders, or lending agents introduces the same double counting problem that the final rule’s single-sided reporting approach is designed to address.¹³⁹ Additionally, under the final rule brokers or dealers are permitted to act as reporting agents provided specified requirements are met. The Commission also does not agree with the commenter that the data lost if its recommended reporting structure were adopted would not be substantial. The OFR Pilot Survey cited by the commenter states that banks, credit unions, pension funds, and hedge funds, all of whom

would not be required to report covered securities loans under the commenter’s proposed structure, are the borrowers of nearly 15 percent of the value of all outstanding securities loans.¹⁴⁰ Based on the survey, the Commission estimated that brokers or dealers facilitate between 60 percent and 90 percent of transactions in the equity lending market.¹⁴¹ Accordingly, while the Commission acknowledges that the precise percentage of broker or dealer facilitated transactions is unknown, the survey indicates that a significant percentage of transactions in the equity lending market, between 10 percent and 40 percent, are facilitated by non-brokers or dealers.¹⁴² Therefore, the commenter’s recommended approach would exclude a significant percentage of securities lending transactions from being reported. Any improved “data integrity” achieved by the commenter’s proposed structure would be undermined by its exclusion of securities loans that do not involve an SEC-registered broker or dealer acting as borrower, lender, or lending agent. Additionally, excluding certain types of entities from reporting would create incentives for market participants to agree to covered securities loans through such excluded entities, which would further diminish the comprehensiveness of the reported information. Instead, the Commission agrees with one commenter’s statement that, “all lenders (or their lending or reporting agents) should be required to report, whether or not they are registered with the Commission. Otherwise, the data will be incomplete.”¹⁴³ As such, the final rule’s definition of “covered person” is not limited to brokers or dealers.

One possible alternative to address double counting under the commenter’s

Alternative Investments (Jan. 21, 2022) (“SBAI Letter”), at 1 (“We support single-sided reporting, i.e., requiring the lenders (or their agents) to report, but not duplicating the framework by requiring borrowers to report as well.”); Letter from Joseph J. Barry, Senior Vice President and Global Head of Regulatory Affairs, State Street Corp. (Apr. 1, 2022) (“State Street Letter”), at 3 (stating that “we do not object to the imposition of a single-sided reporting obligation on the lender of a security (or its agent)”).

¹²⁹ See ICI Letter 1, at 5.

¹³⁰ See Morningstar Letter, at 3–4 (stating that “we recommend that all persons who lend should be required to report. As some lenders may not be registrants, the public will not have a comprehensive picture of securities lending transactions if only those registered with the Commission are required to report to an RNSA.”); Nasdaq Letter, at 2 (stating that “the inclusion of all market participants who lend provides investors with comprehensive information from which to formulate investing strategies”).

¹³¹ See final Rules 10c–1a(j)(1)(i) and (ii). Final Rule 10c–1a(j)(1)(ii) includes a technical change from the proposed rule to add the phrase “unless paragraph (j)(1)(iii) of this section applies” to clarify that only the broker or dealer when borrowing fully paid or excess margin securities, and not the lender, has the obligation to report in that instance.

¹³² See Proposing Release, 86 FR 69808.

¹³³ See Letter from Fran Garritt, Director, Securities Lending & Market Risk, and Mark Whipple, Chairman, Committee on Securities Lending, Risk Management Association (Jan. 7, 2022) (“RMA Letter”), at 3.

¹³⁴ See RMA Letter, at 3.

¹³⁵ See RMA Letter, at 13 n.19.

¹³⁶ See *A Pilot Survey of Agent Securities Lending Activity*, Off. of Fin. Research, Working Paper No. 16–08, 2016 at 7–8, available at <https://www.financialresearch.gov/working-papers/2016/08/23/pilot-survey-of-agent-securities-lending-activity/> (In its annual reports, the FSOC identified a lack of data about securities lending activity as a priority for the Council. This pilot data collection was a step toward addressing this critical data need. The voluntary pilot collection included end-of-day loan-level data for three non-consecutive business days from seven securities lending agents. Most but not all participating lending agents were subsidiaries of banks.).

¹³⁷ See RMA Letter, at 13 (stating that “roughly 85% of loans made by Lending Agents are to registered broker-dealer borrowers”) (citing the OFR Pilot Survey, at 8).

¹³⁸ See RMA Letter, at 14.

¹³⁹ See Proposing Release, 86 FR 69807.

¹⁴⁰ See OFR Pilot Survey, at 7–8.

¹⁴¹ See Proposing Release, 86 FR 69807 n.68.

¹⁴² See Proposing Release, 86 FR 69807 n.68 (stating that, “[w]hile the Commission preliminarily believes that the majority of transactions involve broker-dealers the precise percentage is currently unknown. Based on 2015 survey data the Commission stated that it estimated that broker-dealers facilitate between 60% and 90% of transactions in the equity lending market.”), citing the OFR Pilot Survey, at 7–8. Further, custodian banks have traditionally been the primary lending agent or intermediary and lend securities on behalf of their customers for a fee. See, e.g., Proposing Release, 86 FR 69805 (citing *Comptroller’s Handbook: Custody Services/Asset Management*, Off. of the Comptroller of the Currency, at 27 (Jan. 2002), available at <https://www.occ.treas.gov/publications-and-resources/files/publications/comptrollers-handbook/files/custody-services/index-custody-services.html>).

¹⁴³ See Letter from Howard Myerson, Managing Director, Financial Information Forum (Jan. 19, 2022) (“FIF Letter”), at 7. See also Letter from JD Cumpson (Mar. 14, 2022).

suggestion of requiring only brokers or dealers to report as lenders and borrowers would be to require identification (such as using a flag) of loans reported by borrowers and loans reported by lenders. However, this would not address the lack of securities loan data from persons that are not brokers or dealers, or the incentives to avoid reporting by migrating to such persons. Further, expanding the reporting obligation generally to all lenders and borrowers, and requiring each to identify whether they are reporting as a lender or borrower, would increase burdens unnecessarily, resulting in the collection of duplicative (albeit identified) data by more persons.

One commenter suggested that “it would be appropriate for the borrower broker-dealer (not the lender customer) to provide the Rule 10c–1 information to an RNSA where such broker-dealer borrows a customer’s fully paid securities.”¹⁴⁴ The Commission agrees with this recommendation. Such an approach would help avoid placing a reporting obligation on customers who, upon lending fully paid or excess margin securities, may not have timely access to the required information and less familiarity with reporting information to RNSAs than their broker or dealer.¹⁴⁵ Therefore, the definition of the term “covered person” under the final rule generally does not apply to a borrower,¹⁴⁶ except in the instance of a broker or dealer borrowing fully paid or excess margin securities from a customer.¹⁴⁷ The definition specifically includes a broker or dealer when borrowing fully paid or excess margin securities pursuant to 17 CFR 240.15c3–3(b)(3) (“Rule 15c3–3(b)(3)”).¹⁴⁸ This

definition will result in a broker or dealer (as opposed to the customer) being responsible for reporting Rule 10c–1a information to an RNSA if it borrows fully paid or excess margin shares from one of its customers. Pursuant to final Rule 10c–1a, the broker or dealer would also be responsible for reporting Rule 10c–1a information to an RNSA should the broker or dealer act as a lender of those shares to a third-party.¹⁴⁹

B. Reporting Agent Overview

1. Use of a Reporting Agent—Rule 10c–1a(2)

Proposed Rule

The Commission proposed that “[a] person required to provide Rule 10c–1 information . . . including a lending agent, may enter into a written agreement with a broker or dealer that agrees to provide the Rule 10c–1 information to an RNSA (reporting agent).”¹⁵⁰ The proposed rule stated that a “reporting agent is required to provide the Rule 10c–1 information to an RNSA if it has entered into [the required] written agreement . . . and is provided timely access to the Rule 10c–1 information.”¹⁵¹ The proposed rule also stated that “[a]ny person that enters into [the required] written agreement . . . with a reporting agent is not required to provide the Rule 10c–1 information to an RNSA if the reporting agent is provided timely access to the Rule 10c–1 information.”¹⁵² Therefore, under the proposed rule, only when a person fulfilled the requirements of: (i) entering into a written agreement with a broker or dealer that agrees to provide the Rule 10c–1 information;¹⁵³ and (ii)

providing the reporting agent with timely access to the Rule 10c–1 information,¹⁵⁴ would the person shift its Rule 10c–1 information reporting obligation for a loan of securities from itself to a reporting agent.

The Commission in the Proposing Release stated its preliminary belief that it is appropriate that lenders, including a lending agent, be able to enter into a written agreement with a broker or dealer acting as a reporting agent to provide Rule 10c–1 information to an RNSA on behalf of the lender because such an arrangement would ease burdens on lenders, including lending agents, that do not have and do not want to establish connectivity to an RNSA.¹⁵⁵ The Commission also stated that the use of reporting agents could reduce the costs for non-RNSA-members, because rather than incurring the costs associated with directly reporting Rule 10c–1 information, such persons would have the option to use a third-party to provide the Rule 10c–1 information to an RNSA.¹⁵⁶

Final Rule

The Commission received broad support from commenters for the proposed rule’s provisions permitting covered persons to use a reporting agent if certain conditions are met.¹⁵⁷ One commenter stated that it “agree[s] with the Commission that permitting the use of reporting agents to report 10c–1 information will ‘ease burdens on Lenders, including lending agents, that do not have or do not want to establish connectivity to an RNSA.’”¹⁵⁸ The Commission continues to believe it is appropriate to permit a covered person to use a reporting agent to help fulfill Rule 10c–1a information reporting obligations. Furthermore, many entities that may act as reporting agents may have existing RNSA connectivity, experience with reporting information to an RNSA, and economies of scale that could benefit covered persons with final Rule 10c–1a reporting obligations.

Thus, consistent with the proposed rule, the final rule requires that, in order to use a reporting agent to fulfill its Rule 10c–1a information reporting obligations, a covered person must: (1) enter into a written agreement with the reporting agent, and (2) provide the reporting agent with timely access to the

¹⁴⁴ See Letter from Kenneth E. Bentsen, Jr., President and CEO, SIFMA (Jan. 7, 2022) (“SIFMA Letter 1”), at 18 n.66 (stating that it “understands this would apply where a broker-dealer borrows securities it carries in a customer’s account”).

¹⁴⁵ For example, a lender may not necessarily know when a broker or dealer has borrowed securities from its fully paid or excess margin account if it has not reviewed the schedule of borrowed securities provided to it pursuant to 17 CFR 240.15c3–3(b)(3)(ii) (“Rule 15c3–3(b)(3)(ii)”) or if the collateral for the securities loan is not provided to the lender before the close of the business day pursuant to 17 CFR 240.15c3–3(b)(3)(iii)(A) (“Rule 15c3–3(b)(3)(iii)(A)”), whereas the broker or dealer will know that such securities have been lent by the customer upon the broker or dealer borrowing them. See 17 CFR 240.15c3–3 (“Rule 15c3–3”). See also SIFMA Letter 1, at 13 (stating that “in fully paid lending arrangements, collateral is not required to be delivered until the end of the business day on which the loan is entered into”).

¹⁴⁶ See final Rules 10c–1a(j)(1)(i) and (ii).

¹⁴⁷ See final Rule 10c–1a(j)(1)(iii).

¹⁴⁸ See final Rule 10c–1a(j)(1)(iii). Paragraph (b)(3) of Rule 15c3–3 under the Exchange Act addresses a broker-dealer’s borrowing of fully paid or excess margin securities of a customer. This rule

requires, among other things, that a broker-dealer borrowing fully paid or excess margin securities from a customer to enter into a written agreement with the customer that, among other things, specifies that the broker-dealer must undertake to: (1) provide the lender collateral that fully secures the loan consisting of cash, U.S. Treasuries, an irrevocable letter of credit issued by a bank, or such other collateral as the Commission designates as permissible; (2) mark the loan to market not less than daily and provide additional collateral as necessary to fully collateralize the loan; and (3) notify the lender that the provisions of the Securities Investor Protection Act may not protect the lender and that, therefore, the collateral delivered to the lender may constitute the only source of satisfaction of the broker-dealer’s obligation to return the securities. In the adopting release for these requirements, the Commission stated that the rule will “compel the firm to turn over the collateral physically to the lender.” See *Net Capital Requirements for Brokers and Dealers*, Release No. 34–18737 (May 13, 1982), 47 FR 21759, 21768 (May 20, 1982).

¹⁴⁹ See final Rule 10c–1a(j)(1)(ii).

¹⁵⁰ See proposed Rule 10c–1a(1)(ii)(A).

¹⁵¹ See proposed Rule 10c–1a(1)(ii)(B).

¹⁵² See proposed Rule 10c–1a(1)(ii)(C).

¹⁵³ See proposed Rule 10c–1a(1)(ii)(C).

¹⁵⁴ See proposed Rule 10c–1a(1)(ii)(C).

¹⁵⁵ See Proposing Release, 86 FR 69810.

¹⁵⁶ See Proposing Release, 86 FR 69809.

¹⁵⁷ See, e.g., *infra* note 173 (listing commenters that requested an expansion of the types of entities that could act as reporting agents under the final rule).

¹⁵⁸ See DTCC Letter, at 4.

required Rule 10c–1a information.¹⁵⁹ Requiring a written agreement between the covered person and the reporting agent will memorialize the contractual obligations for the reporting agent to provide the Rule 10c–1a information to an RNSA.¹⁶⁰ Consistent with the Proposing Release, for purposes of final Rule 10c–1a, “timely access” means that the reporting agent has access to the Rule 10c–1a information with sufficient time to provide such information to an RNSA (*i.e.*, in the format and manner required by the rules of an RNSA and within the time periods specified in paragraphs (c) through (e) of the final rule). However, this definition of “timely access” differs from the Proposing Release in that the timing of the required reporting of certain securities loan information to an RNSA has changed (*i.e.*, to no longer require reporting “within the fifteen minutes after the securities loan is effected or the terms of the loan are modified”).¹⁶¹ As discussed below, in Part VII.G, the required timing for the reporting of data elements pursuant to final Rules 10c–1a(c), (d), and (e) is now by the end of the day on which a covered securities loan is effected or modified.¹⁶²

If the reporting agent is unable to provide Rule 10c–1a information to an RNSA because it lacks timely access to it, the covered person who enters into the written agreement with the reporting agent is responsible for providing such information to an RNSA.¹⁶³ Ultimately, responsibility for non-compliance will be a facts and circumstances determination. For instance, if the covered person fails to provide the reporting agent with access to accurate Rule 10c–1a information, then the covered person remains responsible for compliance with Rule 10c–1a.¹⁶⁴ However, if the reporting agent that receives timely and accurate information from the covered person provides late or inaccurate information to an RNSA, as discussed below in Part VII.C.1, the reporting agent is

responsible for compliance with final Rule 10c–1a.¹⁶⁵

2. Reporting Agent Definition—Rule 10c–1a(j)(4)

Proposed Rule

The Commission proposed that, “[a] person required to provide Rule 10c–1 information . . . may enter into a written agreement with a broker or dealer that agrees to provide the Rule 10c–1 information to an RNSA (reporting agent) within the time periods specified in Rule 10c–1.”¹⁶⁶ The Proposing Release stated that limiting who can act as a reporting agent to a broker or dealer that is regulated directly by the Commission, would aid the Commission in overseeing compliance with proposed Rule 10c–1 and provide RNSAs with the ability to oversee the activity of its members that perform a reporting agent function.¹⁶⁷ The Proposing Release also stated that if reporting agents were to include other, non-broker or dealer entities, the Commission might lack an efficient way to oversee how the entity is complying with its responsibility to provide Rule 10c–1 information to an RNSA.¹⁶⁸

Final Rule

The Commission received numerous comments discussing what types of entities should be permitted to act as a reporting agent, including differing views on the proposed rule’s restriction to only brokers or dealers.¹⁶⁹ The Commission also received comment stating that there was a lack of clarity in the Proposing Release around the term “reporting agent.”¹⁷⁰

The Commission received a comment supporting the requirement that reporting agents be registered brokers or dealers and stating that it “would allow an RNSA to oversee the activity of reporting agents and enable it to fulfill an essential regulatory function that promotes just and equitable principles of trade.”¹⁷¹ Another commenter

expressed support for permitting brokers or dealers to act as reporting agents.¹⁷² However, other commenters recommended that entities other than brokers or dealers should be eligible to act as reporting agents.¹⁷³

One commenter recommended that registered clearing agencies should be eligible to serve as a reporting agent because such agencies are subject to regulation and examination by the Commission and have experience providing the infrastructure that would be used by, and function as, a reporting agent.¹⁷⁴ Another commenter suggested that reporting agents should include clearing agencies that operate stock lending platforms.¹⁷⁵ Having considered the commenters’ recommendations, the Commission agrees that registered clearing agencies should be permitted to act as reporting agents on behalf of covered persons, and therefore be included under the final rule’s definition of the term “reporting agent.”¹⁷⁶ Allowing registered clearing agencies to act as reporting agents will facilitate cost-effective and efficient reporting.¹⁷⁷ Additionally, like brokers and dealers, registered clearing agencies are subject to the Commission’s direct oversight and examination functions.¹⁷⁸

¹⁷² See Equilend Letter, at 1 (stating that it “maintains two FINRA registered and SEC registered broker-dealers . . . and welcomes the opportunity to act as a reporting agent for the Proposed Rule”).

¹⁷³ See, e.g., FIF Letter, at 7 (stating that “[f]or other reporting systems established by the Commission (such as CAT), vendors that are not broker-dealers are permitted to submit reports on behalf of reporting parties. The same approach should apply for the proposed securities loan reporting system”); James J. Angel Letter, at 6; IIB Letter, at 10; IHS Markit Letter, at 4–5; Sharegain Letter, at 2 (stating that “the qualification criteria and application process to become a broker-dealer go far beyond the scope of reporting services under the proposed Rule and would unfairly restrict the market”); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association (Mar. 2, 2022) (“HMA Letter”), at 8 (stating that “by opening up the reporting agent role to non-broker entities, the Proposal could promote more competition amongst intermediaries—including lending agents—in the securities lending marketplace”); DTCC Letter, at 4 (“we do not believe it is necessary to limit the scope of entities that may be reporting agents exclusively to broker-dealers”).

¹⁷⁴ See DTCC Letter, at 4.

¹⁷⁵ See James J. Angel Letter, at 6 (stating that lending platforms operated by clearing agencies “could provide low-cost reporting solutions to market participants”).

¹⁷⁶ See final Rule 10c–1a(j)(4).

¹⁷⁷ See IHS Markit Letter, at 15 (stating that “[a]llowing entities other than FINRA-registered broker-dealers to facilitate reporting is a cost-effective and efficient way to achieve the SEC’s objectives The Commission should encourage a variety of organizations to provide innovative and cost-effective solutions to meet this regulation.”)

¹⁷⁸ See, e.g., 15 U.S.C. 240.78q(b) (section 17(b) of the Exchange Act).

¹⁵⁹ See final Rule 10c–1a(a)(2).

¹⁶⁰ See Proposing Release, 86 FR 69822 n.129.

¹⁶¹ See Proposing Release, 86 FR 69810.

¹⁶² See final Rules 10c–1a(c), (d), and (e).

¹⁶³ For example, if a reporting agent establishes an automated system that pulls Rule 10c–1a information directly from the records management system of a beneficial owner, but the beneficial owner disables the connectivity to the automated system for any reason, the reporting agent would not have access to the Rule 10c–1a information. As a result, the beneficial owner is required to provide Rule 10c–1a information to an RNSA under final Rule 10c–1a(a)(2).

¹⁶⁴ See 17 CFR 240.10c–1a(a)(1) (“final Rule 10c–1a(a)(1)”).

¹⁶⁵ See 17 CFR 240.10c–1a(b) (“final Rule 10c–1a(b)”).

¹⁶⁶ See proposed Rule 10c–1(a)(1)(ii)(A).

¹⁶⁷ See Proposing Release, 86 FR 69810–11.

¹⁶⁸ See Proposing Release, 86 FR 69811.

¹⁶⁹ See, e.g., ICI Letter 1, at 4–5; DTCC Letter, at 4; FIF Letter, at 7; James J. Angel Letter, at 6; IIB Letter, at 10; Letter from Edward M. Marhefka, Managing Director, Global Head of Equities Data and Analytics, IHS Markit (Jan. 4, 2022) (“IHS Markit Letter”), at 4; Letter from Robert Zekraus, COO & Head of Americas, Pirum Systems Limited (Jan. 7, 2022) (“Pirum Letter”), at 4–5; Letter from Robert Sloan, Managing Partner, S3 Partners, LLC (Apr. 1, 2022) (“S3 Partners Letter”), at 12; Letter from Boaz Yaari, CEO, Sharegain Ltd. (Jan. 7, 2022) (“Sharegain Letter”), at 2. *But see* RMA Letter, at 13.

¹⁷⁰ See ICI Letter 1, at 8.

¹⁷¹ See Nasdaq Letter, at 2.

Some commenters stated that allowing non-brokers or dealers to act as reporting agents could facilitate low-cost service providers.¹⁷⁹ Another commenter stated that “by opening up the reporting agent role to non-broker entities, the Proposal could promote more competition amongst intermediaries—including lending agents—in the securities lending marketplace.”¹⁸⁰ One commenter stated that limiting the reporting agents to only brokers or dealers would unfairly restrict the market for such services.¹⁸¹ Other commenters specifically stated that certain non-brokers or dealers have existing technological capability to be able to act as a reporting agent (e.g., data vendors and entities that report information for other regulatory purposes).¹⁸² One such commenter supported leveraging the existing technology of non-broker-dealers to reduce implementation time and staff training costs relating to the implementation of proposed Rule 10c–1.¹⁸³

Allowing clearing agencies, as well as brokers or dealers, to act as reporting agents should help facilitate low-cost service providers, introduce more competition, and not unduly restrict the market for reporting agent services to only brokers or dealers.¹⁸⁴ Expanding the definition of reporting agent to include registered clearing agencies strikes a balance between increasing participation and competition in the marketplace for such services, while only applying the definition to entities over which the Commission has direct oversight.¹⁸⁵ Limiting who can act as a

reporting agent to brokers, dealers, and registered clearing agencies, all of which are regulated directly by the Commission, will assist the Commission in overseeing compliance with final Rule 10c–1a. Including other entities would leave the Commission without an efficient way to oversee how the entity is complying with its responsibility to provide Rule 10c–1a information to an RNSA on behalf of a covered person. Two commenters stated that some non-brokers or dealers should be eligible to serve as reporting agents because they are already permitted to report information in connection with other Commission reporting regimes and have experience doing so.¹⁸⁶ The commenters identified the CAT, TRACE, and FINRA’s Large Options Positions Report (“LOPR”) as examples of reporting regimes that allow brokers or dealers to use non-brokers or dealers as reporting agents. In each of the reporting regimes identified by the commenters, the reporting requirements apply to entities that are registered with the Commission or are a member of an RNSA or an exchange,¹⁸⁷ and that retain legal liability for compliance notwithstanding the existence of an agreement for a third party to provide connectivity services on behalf of the registrant.¹⁸⁸

The Commission is also clarifying that the ability to use a reporting agent does not prevent covered persons from contracting privately with third-party vendors to assist in reporting. The

regulatory organizations (“SROs”) and on-site examinations by Commission staff. The Commission also oversees registered clearing agencies through regular contact, including onsite visits, by Commission staff with clearing agency senior management and other personnel and ongoing interactions of Commission staff with the registered clearing agencies regarding current and expected proposed rule changes under section 19(b) of the Exchange Act.”).

¹⁸⁶ See FIF Letter, at 7–8; S3 Partners Letter, at 12.

¹⁸⁷ See FINRA Rule 6810(u) (“‘Industry Member’ means a member of a national securities exchange or a member of a national securities association that is required to record and report information pursuant to the CAT NMS Plan and this Rule 6800 Series”); FINRA Rule 6730(a) (applying the TRACE reporting obligations to FINRA members); FINRA Rule 2360(b)(5)(A)(i)b (“FINRA member firms that conduct a business in standardized options but are not themselves members of the options exchange on which such options are listed and traded . . . are required under FINRA Rule 2360(b)(5)(A)(i)b to report to the LOPR system positions in standardized options covering the same underlying security or index that meet the 200 contract reporting threshold.”).

¹⁸⁸ See, e.g., Nasdaq Rulebook, General Equity and Options Rules—General 7: Consolidated Audit Trail Compliance, at section 8(c)(3), available at, <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>. See also FINRA Regulatory Notice 21–29 (Aug. 13, 2021), available at, <https://www.finra.org/rules-guidance/notices/21-29> (FINRA guidance on outsourcing to third party vendors and the retention of responsibility by the FINRA member).

proposed rule required that “[a]ny person that loans a security on behalf of itself . . . shall provide to a [RNSA] the [Rule 10c–1 information].”¹⁸⁹ However, the proposed rule did not address the use of a third-party vendor by a lender to help facilitate its reporting obligations. The rule as adopted does not prohibit the use of third-party vendors by covered persons. The use of third-party vendors by covered persons to help facilitate the reporting of Rule 10c–1a information should allow covered persons flexibility and decrease costs,¹⁹⁰ and help address a commenter’s concerns with the ability of certain covered persons to report.¹⁹¹ The difference between a covered person relying on a reporting agent to fulfill its Rule 10c–1a reporting requirements and using a third-party vendor to help facilitate its Rule 10c–1a reporting is solely with respect to liability and responsibility under final Rule 10c–1a. When a covered person uses a reporting agent and meets the conditions of the rule, the covered person may rely on a reporting agent to fulfill its reporting obligations.¹⁹² However, the use of other third-party vendors that are not reporting agents would not relieve a covered person of its obligation to report Rule 10c–1a information to an RNSA, as reliance on a reporting agent would.¹⁹³

Some commenters stated that providing the proposed Rule 10c–1 information to a reporting agent that is a broker or dealer could reveal confidential information to such broker or dealer relating to covered securities loans.¹⁹⁴ One such commenter stated that “[w]ithout an alternative, beneficial owners would either be forced to build their own direct reporting to RNSAs to mitigate these concerns, thereby significantly increasing their costs, or to exit the market entirely, thereby

¹⁸⁹ See proposed Rule 10c–1(a)(1). See also Proposing Release, 86 FR 69809 (stating that a lender that did not use a lending agent or reporting agent to provide Rule 10c–1 information to an RNSA must directly provide such information to an RNSA).

¹⁹⁰ See *infra* Parts IX.C.3 and IX.E.6. Additionally, the use of third party vendors by covered persons could enable the innovation and development of novel reporting services, such as the data trusts described by one commenter. See Advanced Securities Consulting Letter, at 1–3.

¹⁹¹ See ICI Letter 1, at 12 (stating that “beneficial owners will not have the infrastructure to report”).

¹⁹² See final Rule 10c–1a(a)(1).

¹⁹³ See final Rule 10c–1a(a)(2) (stating that “a covered person may rely on a reporting agent to fulfill its reporting obligations under paragraph (a)(1)” of the final rule, if certain conditions are met).

¹⁹⁴ See S3 Partners Letter, at 12; IHS Markit Letter, at 4; Advanced Securities Consulting Letter, at 1–3.

¹⁷⁹ See IIB Letter, at 10 (stating that many lenders already rely on non-broker or dealer third-party vendors to “perform similar functions, and such vendors would likely be willing to provide securities lending reporting services and be low-cost providers”). See also Letter from Edmon Blount, Executive Director, Advanced Securities Consulting (Jan. 7, 2022) (“Advanced Securities Consulting Letter”), at 1.

¹⁸⁰ See HMA Letter, at 8.

¹⁸¹ See Sharegain Letter, at 2.

¹⁸² See S3 Partners Letter, at 12; Sharegain Letter, at 2; IIB Letter, at 10.

¹⁸³ See S3 Partners Letter, at 12.

¹⁸⁴ See *infra* Part IX.E.6 (stating that “expanding reporting agents to entities other than broker-dealers would serve to increase the number of entities that would compete to provide lenders and lending agents with reporting services. Thus, expanding the eligibility of reporting agents would serve to promote more competition in this market, potentially leading to lower fees for lenders and lending agents that would rely on these reporting agents for these services.”).

¹⁸⁵ See *Standards for Covered Clearing Agencies*, Release No. 34–71699 (Mar. 12, 2014), 79 FR 29508, 29510 (May 22, 2014) (“If the Commission registers a clearing agency, the Commission oversees the clearing agency to facilitate compliance with the Exchange Act using various tools that include, among other things, the rule filing process for self-

reducing overall liquidity.”¹⁹⁵ Another commenter mentioned operational and confidentiality considerations involved with appointing a reporting agent.¹⁹⁶

Brokers, dealers, and clearing agencies, like all persons, are subject to prohibitions on misuse of material non-public information. Brokers, dealers, and clearing agencies are subject to Commission examination for compliance with this,¹⁹⁷ and other, requirements. To the extent that a covered person may, nonetheless, be concerned about providing sensitive information to another person, it may elect to hire third party vendors for specific tasks to help with compliance obligations. As noted above, the covered person would retain legal responsibility for reporting.

One commenter appeared to believe that all reporting required by the proposed rule must be done through members of FINRA (the only currently existing RNSA).¹⁹⁸ The final rule does not require that all covered persons that are required to report Rule 10c-1a information to an RNSA be members of that RNSA.¹⁹⁹ The final rule requires only that reporting agents, if relied upon by a covered person to fulfill its reporting obligations, must be a broker, dealer, or registered clearing agency.²⁰⁰ Covered persons, including persons that are not RNSA members, that elect not to use a reporting agent, are responsible for providing the Rule 10c-1a information to an RNSA directly and may do so without becoming RNSA members.²⁰¹

Having considered the commenters' recommendations discussed above, in this part, and for the foregoing reasons, the final rule defines the term “reporting agent” to mean “a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under paragraph (a)(2) of [the final rule].”²⁰² Therefore, the final rule adds “registered clearing agencies” to the proposed rule's scope of entities that are permitted to act as reporting agents, which was limited to brokers or dealers.²⁰³

C. Reporting Agent Requirements—Rule 10c-1a(b)

1. Reporting Agent Reporting Requirements—Rule 10c-1a(b)

Proposed Rule

As discussed above, in Part VII.B, paragraph (a)(1)(ii)(B) of the proposed rule required the reporting agent to provide the Rule 10c-1 information to an RNSA if the reporting agent had entered into a written agreement (with the covered person) to provide the Rule 10c-1 information to an RNSA pursuant to paragraph (a)(1)(ii)(A).²⁰⁴ of the proposed rule and the reporting agent had been provided timely access to such Rule 10c-1 information by the covered person. The proposed rule, in paragraphs (a)(2)(i) through (a)(2)(iv),²⁰⁵ also included requirements for the reporting agent to assist both an RNSA and the Commission with surveillance and compliance with RNSA requirements and proposed Rule 10c-1.²⁰⁶ In proposing the specific requirements for reporting agents, the Commission preliminarily believed it was appropriate for a reporting agent to be responsible for providing Rule 10c-1 information to an RNSA, provided the reporting agent has contractually agreed to provide such information to an RNSA and the reporting agent has also been provided with timely access to such information.²⁰⁷

In addition, the proposed rule's requirement that the reporting agent enter into a written agreement with an RNSA was intended to evidence the explicit permission the reporting agent has to provide Rule 10c-1 information on behalf of the covered person.²⁰⁸ Similarly, the reporting agent would also have been required to provide an RNSA with a list of each covered person on whose behalf the reporting agent would be providing the Rule 10c-1 information (and also to update the list by the end of the day when the list

changes).²⁰⁹ As the Commission explained in the Proposing Release, requiring the reporting agent to provide the identities of each covered person on whose behalf the reporting agent is providing Rule 10c-1 information to an RNSA is intended to provide the Commission with the ability to obtain the identities of the covered persons from an RNSA in order to aid the Commission with its oversight of the covered persons that have entered into agreements with reporting agents, including with their compliance with the proposed rule.²¹⁰ In addition, the proposed requirement for a reporting agent to have written policies and procedures was intended to provide regulators with a means to examine and enforce a reporting agent's compliance with proposed Rule 10c-1. Moreover, the proposed recordkeeping requirements were intended to help facilitate the Commission's oversight of reporting agents and to review the reporting agents' compliance with the requirements to provide the Rule 10c-1 information to an RNSA.²¹¹

Final Rule

The Commission sought specific comment regarding the role and requirements of a reporting agent. The Commission received a number of reporting agent-related comments in response; however, most of these comments focused primarily on a covered person's use of a reporting agent or the eligibility requirements for a reporting agent, as discussed above, in Part VII.B.2, rather than the requirements of an already eligible reporting agent, as relevant here.²¹² The Commission is adopting the specific reporting agent requirements, substantially as proposed, but with some non-substantive modifications.

First, the requirements are relocated into a separate paragraph (b) under the final rule.²¹³ This non-substantive, technical modification is intended to streamline and simplify the proposed rule text, by combining into one paragraph, the requirements specific to a reporting agent (as distinguished from the requirements applicable to the covered person) in order to help clarify which party is ultimately responsible

¹⁹⁵ See Pirum Letter, at 5.

¹⁹⁶ See BlackRock Letter, at 3, 9.

¹⁹⁷ See, e.g., 15 U.S.C. 240.78q(b) (section 17(b) of the Exchange Act).

¹⁹⁸ See James J. Angel Letter, at 6.

¹⁹⁹ See final Rule 10c-1a(j)(1).

²⁰⁰ See final Rule 10c-1a(j)(4).

²⁰¹ See final Rule 10c-1a(a)(1).

²⁰² See final Rule 10c-1a(j)(4).

²⁰³ See proposed Rule 10c-1a(1)(ii)(A).

²⁰⁴ See Proposing Release, 86 FR 69810 (stating “[s]uch written agreements under proposed Rule 10c-1(a)(1)(ii)(A) would memorialize and provide proof of the contractual obligations for the reporting agent to provide the Rule 10c-1 information to an RNSA.”).

²⁰⁵ The reporting-related requirements specific to the reporting agent, as proposed, included: paragraph (a)(2)(i) of the proposed rule's policies and procedures requirement; paragraph (a)(2)(ii) of the proposed rule's written agreement with an RNSA requirement; and, paragraph (a)(2)(iii) of the proposed rule's list of names requirement. See proposed Rules 10c-1(a)(2)(i) through (a)(2)(iii). Proposed paragraph (a)(2)(iv) is discussed below, in Part VII.C.2, regarding a reporting agent's recordkeeping requirements.

²⁰⁶ See Proposing Release, 86 FR 69809.

²⁰⁷ See Proposing Release, 86 FR 69810.

²⁰⁸ See Proposing Release, 86 FR 69810.

²⁰⁹ See Proposing Release, 86 FR 69810.

²¹⁰ See Proposing Release, 86 FR 69810–11.

²¹¹ See Proposing Release, 86 FR 69811.

²¹² One commenter, however, stated that it is clearer and more efficient to impose the obligation directly on the lending and reporting entities when the conditions of the proposed rule are satisfied. See ICI Letter 1, at 4 (discussing a reporting agent's role in terms of its obligation to report for purposes of compliance with the requirements of the proposed rule).

²¹³ See final Rules 10c-1a(b) through (b)(5).

for providing the Rule 10c–1a information to an RNSA.

Second, to reduce redundancy and complexity in the proposed rule text, paragraph (b) of the final rule requires that “any reporting agent” that assumes the reporting obligation on behalf of the covered person, pursuant to paragraph (a)(2) of the final rule, comply with the specific requirements in paragraph (b) of the final rule.²¹⁴ A covered person that enters into a written agreement with a reporting agent to provide the Rule 10c–1a information to an RNSA on behalf of the covered person as required by the final rule, and that provides the reporting agent with timely access to the Rule 10c–1a information, may rely on the reporting agent to fulfill the covered person’s reporting obligations under paragraph (a)(1) of the final rule.

Lastly, the final rule combines the reporting-related requirements that were previously located in paragraphs (a)(1)(ii)(B) and (a)(2) of the proposed rule with the proposed reporting agent recordkeeping requirements in paragraphs (a)(1)(ii)(A) and (a)(1)(ii)(B), into paragraph (b) in the final rule.²¹⁵

Paragraph (b) of the final rule’s specific inclusion of the term “reporting agent,” which is defined in final Rule 10c–1a(j)(4) to mean a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under paragraph (a)(2) of the final rule, as well as inclusion of the “assumes the reporting obligation” language, sets forth the reporting agent’s ultimate responsibility for reporting Rule 10c–1a information to an RNSA. The final rule provides that a reporting agent will be required to provide the Rule 10c–1a information to an RNSA under the new reporting regime only when the covered person has both: (1) entered into the required written agreement with the reporting agent, and (2) provided the reporting agent with timely access to the Rule 10c–1a information.²¹⁶ Thus, if a reporting agent is unable to provide the Rule 10c–1a information to an RNSA because it lacks timely access to it, the covered person who enters into the written agreement with the reporting agent

under paragraph (a)(2)(i) of the final rule remains responsible for providing the required Rule 10c–1a information to an RNSA, consistent with the proposed rule.

Additionally, the Commission is adopting: 17 CFR 240.10c–1a(b)(1) (“final Rule 10c–1a(b)(1)”; 17 CFR 240.10c–1a(b)(2) (“final Rule 10c–1a(b)(2)”; and 17 CFR 240.10c–1a(b)(3) (“final Rule 10c–1a(b)(3)”) as new paragraphs (b)(1) through (b)(3) of the final rule, the specific reporting-related requirements²¹⁷ of a reporting agent, substantially as they were proposed in paragraphs (a)(2)(i) through (a)(2)(iii) of the proposed rule.²¹⁸ Paragraph (b)(2) of final Rule 10c–1a will require a reporting agent to establish, maintain, and enforce written policies and procedures that are reasonably designed to provide Rule 10c–1a information to an RNSA. However, in the final rule, as modified with non-substantive, technical, or clarifying changes to the rule text consistent with the other changes made to the overall final rule text, such Rule 10c–1a information is provided (by the reporting agent) to an RNSA on behalf of a “covered person” (which is a newly defined term in the final rule, rather than the term “another person,” as was used in the proposed rule); and, also consistent with the proposed rule, such information is to be provided “in the format and manner required by the applicable rule(s) of an RNSA, and within the time periods specified in paragraphs (c) through (e)”²¹⁹ (which is designed to clarify the proposed rule text, “in the manner, format, and time consistent with Rule 10c–1”²²⁰). Apart from the aforementioned changes, the policies and procedures requirement of the reporting agent remains unchanged from the proposed rule.

Additionally, consistent with the proposed rule, paragraph (b)(3) of the final rule requires the reporting agent to enter into a written agreement with an

RNSA that permits the reporting agent to provide the required Rule 10c–1a information to an RNSA (e.g., establish the required connectivity with such RNSA) on behalf of a covered person. More specifically, the final rule provides that a reporting agent shall “[e]nter into a written agreement with an RNSA that permits the reporting agent to provide Rule 10c–1a information to an RNSA on behalf of a covered person.”²²¹ Other than replacing the proposed term “another person” with the newly defined term “covered person” in the final rule, the written agreement requirement of the reporting agent remains unchanged from the proposed rule.

Moreover, the Commission is adopting 17 CFR 240.10c–1a(b)(4) (“final Rule 10c–1a(b)(4)”), which requires the reporting agent to “provide an RNSA with a list naming each covered person on whose behalf the reporting agent is providing Rule 10c–1a information to an RNSA,” consistent with the proposed rule, although paragraph (b)(4) of final Rule 10c–1a adds the term “naming” to replace the less-descriptive term “of,” as was used in the proposed rule. For consistency, the final rule also includes the newly defined term “covered person” in place of “person and lending agent,” as was used in paragraph (a)(2)(iii) of the proposed rule. Moreover, paragraph (b)(4) of the final rule clarifies the proposed rule by streamlining the text, “provide an RNSA with any updates to the list of such persons by the end of the day such list changes,” by removing the extra “on the day” in the sentence. Also, the final rule slightly modifies the rule text “an updated list” to read instead “any updates to the list” to clarify that any updates (or changes) to the list (and the updated list itself) must be provided to an RNSA “by the end of the day such list changes.”²²² A reporting agent’s written policies and procedures will need to address the above requirements.

2. Recordkeeping Requirements of a Reporting Agent—Rule 10c–1a(b)(5)

Proposed Rule

Paragraph (a)(2)(iv) of the proposed rule would have required that the reporting agent maintain certain information for a period of three years, the first two in an easily accessible place.²²³ The information required to be maintained included the Rule 10c–1 information provided by the covered

²¹⁴ See final Rule 10c–1a(j)(4), defining “reporting agent” to mean a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under paragraph (a)(2) of final Rule 10c–1a.

²¹⁵ See final Rule 10c–1a(b). Paragraph (b)(1) of the final rule clarifies that the reporting agent is required to comply with the rules of an RNSA in terms of the format and manner of reporting the required information to an RNSA and comply with the specific time periods set forth in paragraphs (c) through (e) of final Rule 10c–1a.

²¹⁶ See final Rule 10c–1a(b)(1). See also final Rule 10c–1a(a)(2).

²¹⁷ See *supra* note 205 regarding paragraph (a)(2)(i) of the proposed rule’s policies and procedures requirement; paragraph (a)(2)(ii) of the proposed rule’s written agreement with an RNSA requirement; and paragraph (a)(2)(iii) of the proposed rule’s list of names requirement.

²¹⁸ Specifically, once the covered person enters into the required written agreement with the reporting agent, and the covered person provides the reporting agent with timely access to the Rule 10c–1a information, paragraph (b)(1) of the final rule specifically requires the reporting agent to provide the Rule 10c–1a information to an RNSA on behalf of a covered person (in the format and manner required by the rule(s) of such RNSA and within the time periods specified in paragraphs (c) through (e) of final Rule 10c–1a). See final Rule 10c–1a(b)(1).

²¹⁹ See final Rule 10c–1a(b)(2).

²²⁰ See proposed Rule 10c–1(a)(2)(i).

²²¹ See final Rule 10c–1a(b)(3) (replacing term “another person” from paragraph (a)(2)(ii) of the proposed rule with the term “covered person”).

²²² See final Rule 10c–1a(b)(4).

²²³ See proposed Rule 10c–1(a)(2)(iv).

person to the reporting agent, including the time of receipt, as well as the Rule 10c-1 information that the reporting agent provided to an RNSA, and time of transmission. Additionally, under the proposed rule, the reporting agent would have to retain the written agreements between the reporting agents and beneficial owners, lending agents, and an RNSA.²²⁴ As the Commission explained, the proposed recordkeeping requirements were designed to help facilitate the Commission's oversight of reporting agents and review the reporting agents' compliance with the requirement to provide the Rule 10c-1 information to an RNSA.²²⁵

Final Rule

One commenter stated that it was redundant and unnecessary for the reporting agent to retain data, as FINRA already has the data.²²⁶ However, pursuant to 17 CFR 240.10c-1a(b)(5) ("final Rule 10c-1a(b)(5)"), the reporting agent would not only be required to retain data that it submitted to an RNSA (including time of transmission), but would also be required to retain the data it received from the covered person (including time of receipt), which would demonstrate compliance with the timeliness requirements of the rule or whether the reporting agent itself received the data in an untimely manner from the covered person, as well as the written agreements required in order to be eligible as a reporting agent. Such records would be helpful to regulators in identifying and reconstructing the reasons for missing, incomplete, or untimely data (e.g., whether it was the result of untimely receipt by the reporting agent or issues with the reporting agent's operations). The data would also help reporting agents respond to Commission inquiries as to whether the reporting agent or the covered person appropriately complied with the final rule. The records of data submitted to an RNSA would provide context for such inquiries, as well as allow for a comparison of data received (by the reporting agent) and submitted to an RNSA, to the data published by an RNSA, allowing regulators to determine whether there are issues with an RNSA's processing of data received.

Accordingly, the Commission is adopting, in paragraph (b)(5) of final Rule 10c-1a without substantive changes, the proposed recordkeeping requirements contained in paragraphs (a)(2)(iv)(A) and (B) of the proposed rule

that provide for the reporting agent to preserve for a period of not less than three years, the first two years in an easily accessible place, both the Rule 10c-1a information obtained by the reporting agent from the covered person pursuant to paragraph (a)(2) of the final rule, including the time of receipt, and the corresponding Rule 10c-1a information provided by the reporting agent to an RNSA, including the time of transmission to an RNSA²²⁷; and, the written agreements as required under paragraphs (a)(2) and (b)(3) of the final rule.²²⁸

D. Scope of Securities Required To Be Reported—Rule 10c-1a(j)(3)

Proposed Rule

In the Proposing Release, the Commission stated its preliminary belief that proposed Rule 10c-1 should apply to all securities "to ensure that a complete picture of transactions involving the loan of securities is provided to the RNSA."²²⁹ Accordingly, the proposed rule would have required the reporting of loans of any security (e.g., both equity and debt).²³⁰

Specifically, the Commission stated that, "if the Commission were to limit the scope of the proposed Rule (e.g., to only equity securities) then a significant number of securities lending transactions would be excluded and the market efficiencies and reduction of information asymmetry that the Commission anticipates will result from proposed Rule 10c-1 would not accrue to non-equity securities."²³¹

Final Rule

In response to proposed Rule 10c-1, some commenters expressed general support for increased transparency and price discovery in the securities lending market by increasing the amount and availability of data in the market.²³²

²²⁷ See final Rule 10c-1a(b)(5); 17 CFR 240.10c-1a(b)(5)(i) ("final Rule 10c-1a(b)(5)(i)"); 17 CFR 240.10c-1a(b)(5)(ii) ("final Rule 10c-1a(b)(5)(ii)").

²²⁸ While the term "Rule 10c-1a information" has stayed the same in the final rule, as also explained below, in Part VII.F, the scope of the information required by the final rule has been modified with the deletion of the proposed requirement to provide information regarding the total amount of "securities on loan" and "available to lend" data, as was originally proposed.

²²⁹ See Proposing Release, 86 FR 69808.

²³⁰ See proposed Rule 10c-1(a)(1). See also Proposing Release, 86 FR 69808. See, e.g., 17 CFR 230.902 (defining "Debt securities" as "any security other than an equity security" and an "equity security" as defined in 17 CFR 230.405).

²³¹ See Proposing Release, 86 FR 69808 (citing *A Pilot Survey of Agent Securities Lending Activity*, Off. Of Fin. Research, Working Paper No. 16-08, 2016, at 8, available at https://www.financialresearch.gov/working-papers/files/OFRwp-2016-08_Pilot-Survey-of-Securities-Lending.pdf).

²³² See *supra* note 47.

Other commenters offered support for the inclusion of all loans of securities.²³³ Another commenter expressed the view that "[t]here is an urgent need to require securities lenders to provide greater details of their loans to a RNSA as outlined by the proposed changes to Rule 10c-1 . . . [m]arket participants and regulators alike will greatly benefit from the greater transparency that comes from reporting every securities lending transaction as a result of the proposed changes to Rule 10c-1, just as they have from the trade-by-trade reporting that was instituted in the corporate bond market since TRACE was introduced."²³⁴

One commenter recommended that the Commission make explicit "the types of securities loans to which Rule 10c-1 applies so that market participants have clarity as to which types of securities loans must be reported."²³⁵ The final rule makes explicit the types of transactions to which the final rule applies and the securities that are within the scope of the final rule through two newly defined terms: "covered securities loan" and "reportable security." The definition of the term "covered securities loan" in paragraph (j)(2) of the final rule makes explicit the types of loans to which the final rule applies, as discussed below, in Part VII.E. The definition of the term "covered securities loan" refers to a transaction in which any person on behalf of itself or one or more other persons, lends a "reportable security" to another person.²³⁶ The final rule defines the term "reportable security" as "any security or class of an issuer's securities for which information is reported or required to be reported to the consolidated audit trail as required by § 242.613 ("Rule 613") of the Exchange Act and the CAT NMS Plan ("CAT"), the Financial Industry Regulatory Authority's Trade Reporting and Compliance Engine ("TRACE"), or the Municipal Securities Rulemaking Board's Real Time Reporting System ("RTRS"), or any reporting system that replaces one of these systems."²³⁷ The definition of the term "reportable security" aligns the securities for which loans must be reported with securities for which transactions are currently being reported to existing reporting regimes, specifically, the CAT, TRACE, and RTRS. At this time, data on

²³³ See Nasdaq Letter, at 2; Morningstar Letter, at 4.

²³⁴ See AFREF Letter 1, at 3.

²³⁵ ICI Letter 1, at 7.

²³⁶ Final Rule 10c-1a(j)(2).

²³⁷ Final Rule 10c-1a(j)(3).

²²⁴ See Proposing Release, 86 FR 69811.

²²⁵ See Proposing Release, 86 FR 69811.

²²⁶ See James J. Angel Letter, at 7.

securities loans should be consistent with existing reporting regimes for other transactions in the same securities.

Aligning the scope of securities for covered securities loans with existing transaction reporting systems will provide a number of benefits. For instance, such alignment will allow regulators to obtain a more complete view across the different types of transactions for the same securities. In addition, many market participants are already familiar with the existing systems, either as reporting entities or, in the case of TRACE and RTRS, as users of the data.

Presently, securities that fall outside of the existing reporting regimes include: (1) for TRACE: fixed-income transactions in securities with a maturity of one calendar year or less, such as money market instruments,²³⁸ and non-U.S. dollar-denominated debt are excluded from reporting requirements in TRACE;²³⁹ (2) for the CAT: equity transactions in “restricted securities,” as that term is defined in 17 CFR 230.144(a)(3) (“Rule 144”) of the Securities Act,²⁴⁰ are generally not reportable to the CAT because they are not subject to prompt last sale reporting rules;²⁴¹ and (3) for RTRS: municipal securities transactions excepted under

MSRB Rule G–14,²⁴² including a small number of transactions for securities without assigned Committee on Uniform Securities Identification Procedure (“CUSIP”) numbers, municipal fund securities (*i.e.*, 529 Plans, ABLE programs, local government investment pools), and inter-dealer transactions ineligible for comparison of trade settlement date at a clearing agency.²⁴³ To provide consistency with existing reporting regimes, final Rule 10c–1a also incorporates these exclusions.

The Commission also received comments with suggestions to limit the scope of securities for which loans must be reported under the proposed rule.²⁴⁴ One commenter favored narrowing the proposed scope of securities to only equity securities that transact in significant volume in the U.S., namely equity securities listed or traded on a national securities exchange “to avoid uncertainty for non-U.S. borrowers and lenders transacting in securities that are primarily relevant in non-U.S. markets and to provide for a measured approach in introducing data reporting and dissemination into the marketplace.”²⁴⁵ Investors will also benefit from the increased transparency into loans of equity securities that are not listed or

traded on a national securities exchange (*i.e.*, loans of equities that are traded over-the-counter (“OTC”)) provided by the final rule. The Commission understands that existing lending transparency systems currently include information about loans of exchange-listed and OTC securities. Thus, lenders should generally already be accustomed to providing and receiving such data. Further, OTC securities tend to be less liquid and publicly available information about an issuer of an OTC security may be limited or nonexistent,²⁴⁶ and thus such securities may be harder to borrow. Accordingly, data concerning loans of less liquid securities, such as OTC securities, will be beneficial to market participants by reducing information asymmetries and improving pricing efficiency by facilitating benchmarking for the loans of less liquid securities.²⁴⁷

Commenters also requested clarification regarding which types of securities would be reportable,²⁴⁸ and some suggested limiting the scope of reportable securities. For example, one commenter suggested limiting the scope to equities for a period of time while the Commission evaluates whether to expand the scope of reporting to additional asset classes.²⁴⁹ Another commenter stated that the final rule should “capture the most relevant and appropriate securities for the reporting regime [referring to equity securities] while not precluding the inclusion of other securities over time as the SEC and market participants gain more experience with the reporting regime.”²⁵⁰ The definition of the term “reportable security” in the final rule is not limited to equities for the reasons discussed below, in this part. The definition of the term “reportable

²³⁸ See, e.g., FAQ 3.1.43, available at <https://www.finra.org/filing-reporting/trace/faq> (“[a]s stated in Rule 6710(a), the definition of TRACE-Eligible Security does not include a Money Market Instrument. Under recent amendments to Rule 6710(o) pertaining to discount notes, “Money Market Instrument” means a debt security that at issuance has a maturity of one calendar year or less, or, if a discount note issued by an Agency, as defined in Rule 6710(k), or a Government-Sponsored Enterprise, as defined in Rule 6710(n), a maturity of one calendar year and one day or less (*i.e.*, not later than 366 days from the date of issuance, or if a leap year, not later than 367 days from the date of issuance).”).

²³⁹ See, e.g., <https://www.finra.org/filing-reporting/trace/trace-foreign-sovereign-debt>.

²⁴⁰ See, e.g., <https://www.catsnmsplan.com/faq> (see FAQ B11 describing the types of products in scope for reporting to the CAT).

²⁴¹ Under the CAT NMS Plan, “Eligible Security” includes: (i) all NMS Securities, meaning “any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in Listed Options,” and (ii) all OTC Equity Securities, meaning “any equity security, other than an NMS Security, subject to prompt last sale reporting rules of a registered national securities association and reported to one of such association’s equity trade reporting facilities.” Further, while the CAT NMS Plan does not define “prompt last sale reporting rules,” the Operating Committee has determined that transactions in “restricted securities” (as defined by Rule 144(a)(3)) are not reportable to the CAT because they are not subject to prompt last sale reporting rules. However, transactions in direct participation programs must be reported to the CAT in Phase 2c of Industry Member reporting.

²⁴² Brokers, dealers, and municipal securities dealers (“municipal dealers”) must report transactions in municipal securities pursuant to MSRB Rule G–14. Pursuant to Rule G–14, each municipal dealer reports to the MSRB or its designee information about each purchase and sale transaction effected in municipal securities to RTRS in the manner prescribed by Rule G–14, available at <https://www.sec.gov/rules/sro/msrb/2018/34-83038-ex5.pdf>.

²⁴³ See, e.g., Specifications for Real-Time Reporting of Municipal Securities Transactions (Nov. 2022), at 15 (“1.2.1 Securities that Must be Reported[:] In the real-time environment, all customer trades in municipal securities issues that have CUSIP numbers assigned by the CUSIP Service Bureau of Standard & Poor’s must be reported, except municipal fund securities. Dealers should not report (a) customer transactions in issues ineligible for CUSIP number assignment and (b) municipal fund securities. For inter-dealer trades, transactions must be reported in all municipal securities issues eligible for comparison in RTTM [the National Securities Clearing Corporation’s (“NSCC”) Real-Time Trade Matching (“RTTM”) web-based trade input method]. In addition, Rule G–14 requires that the role of a clearing broker in RTTM-eligible agency transactions effected by an introducing broker against the principal positions of the clearing broker shall be reported If an issue is not RTTM-eligible (because of the lack of a CUSIP number for the security or other reasons), inter-dealer trades in the issue are not subject to the reporting requirement.”) (footnotes omitted), available at <https://www.msrb.org/sites/default/files/RTRS-Specifications.pdf>.

²⁴⁴ See, e.g., Federated Hermes Letter, at 2; Letter from Jiří Křel, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association (Jan. 7, 2022) (“AIMA Letter 1”), at 5; RMA Letter, at 5; ICI Letter 1, at 7; ABA Letter, at 4.

²⁴⁵ See, e.g., RMA Letter, at 15.

²⁴⁶ See, e.g., *Publication or Submission of Quotations Without Specified Information*, Release No. 34–89891 (Sept. 16, 2020), 85 FR 68124 at 68125 (Oct. 27, 2020) (Adopting Release) (“However, in other cases, there is no or limited current public information available about certain issuers of quoted OTC securities to allow investors or other market participants to make informed investment decisions.”).

²⁴⁷ See *infra* Part IX.C.1 (discussing the benefits of increased transparency in less liquid lending markets).

²⁴⁸ See, e.g., BlackRock Letter, at 2 (“as securities lending market dynamics differ by the asset class, we recommend the Commission provide further clarity on which asset classes are in scope”); ICI Letter 1, at 6.

²⁴⁹ See ICI Letter 1, at 7.

²⁵⁰ See RMA Letter, at 17 (supporting an initial definition of “securities” to include “equity securities that are part of the national market system” because that definition “captures the most relevant and appropriate securities for the reporting regime while not precluding the inclusion of other securities over time as the SEC and market participants gain more experience with the reporting regime”).

security” in paragraph (j)(3) of the final rule will help provide certainty to non-U.S. borrowers and lenders regarding the securities that are within the scope of the final rule (*i.e.*, securities or any class of an issuer’s securities for which information is reported or required to be reported to the CAT, TRACE, or RTRS, or any reporting system that replaces one of these systems). In addition, Part VII.M below discusses the domestic application of the final rule, which should also help provide certainty to non-U.S. borrowers and lenders transacting in securities that are primarily relevant in non-U.S. markets about the application of the final rule. With respect to taking a measured approach in introducing data reporting and dissemination into the marketplace, the Commission is establishing the specific compliance dates discussed below in Part VIII. Such compliance dates should provide adequate time for covered persons to implement systems for data reporting and for RNSAs to implement data dissemination systems. Another commenter recommended that the Commission begin with reporting requirements for loans of U.S. equity securities because such loans “mostly occur on electronic trading platforms, making the generation of trade data for these loans more straightforward than loans of other asset classes.”²⁵¹ As discussed above, the Commission has provided a compliance date that will provide adequate time for covered persons to comply with the final rule, even for loans of securities that may not occur on an electronic trading platform, and will not further delay transparency for OTC investors, which are primarily retail.²⁵²

Some commenters requested a phased approach to the overall implementation of the final rule, which is discussed below, in Part VIII, including a recommendation that implementation of the final rule begin with loans of equity securities.²⁵³ However, current lending systems include data on loans of fixed income securities.²⁵⁴ Thus, lenders should generally be accustomed to providing and analyzing data on loans of fixed income securities. Further, as discussed below, in Part VIII, such a phased approach is not provided for in

the final rule because it would unduly delay the public availability of Rule 10c–1a information and limit the initial benefits of the final rule.

One commenter suggested excluding debt from the proposed rule, particularly corporate debt and asset-backed securities, which the commenter described as having small issuance sizes, diverse characteristics, and a small number of lending transactions.²⁵⁵ However, information about loans on such securities will be beneficial to lenders, investors, and regulators precisely because of such characteristics. Data on such loans may be useful for lenders to assess rates and for regulators and investors to understand the lending market for such securities. For example, market participants will be able to use the information made publicly available by the final rule and pool such information across debt securities to help market participants compare the terms of a loan of one debt security with loans of other debt securities that have similar characteristics or time horizons. Thus, including debt securities in the final rule will help improve the ability of market participants to benchmark their loans of debt securities.

The Commission also received comment regarding the size of the debt market. One commenter stated that “[w]hile the number of publicly traded equity securities of U.S. issuers is around 3,600, there are over two million unique issuances of corporate and government bonds and asset-backed securities in circulation.”²⁵⁶ The same commenter stated that utilization rates decrease as products become more individualized and there is only a small market for shorting bonds.²⁵⁷ Less liquid markets should benefit from the increased transparency provided by the final rule because improving securities lending transparency, even in the debt market, can lead to reduced information asymmetry and increased pricing efficiency.²⁵⁸

One commenter suggested excluding government securities from the proposed rule because “there is sufficient liquidity and demand for these securities on platforms and venues that have a high degree of transparency,” but did not provide details regarding the transparency of the platforms and venues.²⁵⁹ As discussed below, in Part IX.B.2, there is some

transparency in the government securities lending market, but some information may not be as timely or as robust (*i.e.*, the data may contain aggregated volume information) as under the final rule. The final rule includes loans of U.S. Government securities between market participants to help ensure that comprehensive and timely information about these loans is made publicly available so that market participants in the government securities lending market benefit from increased transparency.

Some commenters requested clarification on whether “crypto assets” or as some commenters referred to them, “cryptocurrencies” would be covered by proposed Rule 10c–1.²⁶⁰ A crypto asset, which is also sometimes referred to as a “digital asset,” may meet the definition of a “security” under the federal securities laws.²⁶¹ As defined in the final rule, paragraph 10c–1a(j)(3) applies to reportable securities, which are securities for which transactions are reported to the CAT, TRACE, and RTRS. Accordingly, if a crypto asset is a security that meets one of these same criteria, the crypto asset is a reportable security.

One commenter believed that infrequent lending of debt securities could result in a “far greater risk of loss of anonymity and the use of such data to anticipate or reverse engineer the trading of competitors.”²⁶² The final rule’s requirements for end-of-day reporting of data elements and loan modification data elements in paragraphs (c) and (d) and delaying the publication of loan amount and modifications to loan amount in paragraph (g) should help reduce the potential to anticipate and reverse engineer the trading of competitors. In addition, paragraph (g)(4) of the final rule requires that following the receipt of confidential information pursuant to paragraph (e) “an RNSA shall keep such information confidential, in accordance with the provisions of paragraph (h) of this section and applicable law.”²⁶³ Further, 17 CFR 240.10c–1a(h)(4) (“final Rule 10c–1a(h)(4)”) requires that an RNSA “[e]stablish, maintain, and enforce reasonably designed written

²⁶⁰ See, e.g., James J. Angel Letter, at 5; Letter from Jay Rivera (Mar. 2, 2022); Letter from Treveri Capital LLC (Dec. 22, 2021) (“Treveri Capital Letter”), at 1.

²⁶¹ See, e.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Release No. 34–81207 (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).

²⁶² RMA Letter, at 16.

²⁶³ Final Rule 10c–1a(g)(4).

²⁵¹ BlackRock Letter, at 9.

²⁵² See Andrew Ang et al., *Asset Pricing in the Dark: The Cross-Section of OTC Stocks*, 26 Rev. Fin. Stud. 2985–3028 (2013).

²⁵³ See *infra* note 688 and accompanying text.

²⁵⁴ See Equilend Letter, at 1 (Data Explorers was acquired by S&P Global and manages a dataset of over \$37 trillion of global securities from 20,000 institutional funds, and over three million intraday transactions), available at <https://www.spglobal.com/marketingintelligence/en/mi/products/securities-finance.html>.

²⁵⁵ See RMA Letter, at 16.

²⁵⁶ RMA Letter, at 16.

²⁵⁷ See RMA Letter, at 16.

²⁵⁸ See *infra* Part IX.C.1 (discussing how the final rule will affect markets with low lending volume such as corporate bonds).

²⁵⁹ RMA Letter, at 16.

policies and procedures to maintain the security and confidentiality of confidential information required by paragraph (e) of this section.”²⁶⁴ Thus, the only existing RNSA’s experience with managing nonpublic information, coupled with the explicit requirements for protecting confidential information in paragraphs (g)(4) and (h)(4) of the final rule, will help ensure that an RNSA implements data security measures that will protect anonymity.

E. Scope of Transactions Required To Be Reported—Rule 10c-1a(j)(2)

Proposed Rule

The Commission proposed that any person that “loans a security” on behalf of itself or another person shall provide Rule 10c-1 information to an RNSA.²⁶⁵ The Commission did not define the term “loans a security,” but requested comment on whether a definition was necessary.²⁶⁶ In the Proposing Release, the Commission stated its preliminary belief that any person that loans a security on behalf of itself or another person should be required to provide the material terms to an RNSA to ensure that proposed Rule 10c-1 is appropriately “designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities.”²⁶⁷

Final Rule

Many commenters requested clarification of the scope of securities loan transactions to which the rule’s reporting requirements would apply.²⁶⁸ One commenter stated that the proposed rule sought to regulate “a host of transactions that do not involve the ‘loan or borrowing of securities.’”²⁶⁹ Other commenters recommended that a definition of the term “loans a security” refer only to lending for a particular purpose.²⁷⁰ Some of those commenters expressed concerns about including data for loans that were not considered traditional loans in the industry, particularly loans for which the parties did not enter into a written contract or transfer collateral, and that such loans

might “skew the data and negatively impact the utility of the information provided.”²⁷¹ Other commenters recommended that the final rule include a defined term for the types of transactions that are covered by the rule.²⁷²

To address commenters seeking greater clarity and commenters recommending a definition as to what types of transactions are required to be reported, the final rule includes a definition of the term “covered securities loan” to mean “a transaction in which any person on behalf of itself or one or more other persons, lends a reportable security to another person,” with certain exceptions.²⁷³ As discussed below, in this part, the exceptions remove from the scope of the final rule’s reporting requirements certain clearing agency positions²⁷⁴ and certain uses of margin securities by a broker or dealer²⁷⁵ that are not consistent with, or traditionally recognized as, securities lending transactions.

The Commission received a comment recommending that the term “loans a security” be limited to lending to unaffiliated borrowers.²⁷⁶ Other commenters suggested that information on securities lending transactions between affiliates not be disseminated under the rule,²⁷⁷ with one stating that, “loans between a broker-dealer and its affiliates, may not represent the actual rates available in the securities lending market and therefore could cause confusion and lead to misinterpretation if published.”²⁷⁸ The Commission does not agree that it would be appropriate to exclude loans to affiliated borrowers from the scope of the final rule. Inter-affiliate loans may be arms-length transactions and excepting such loans

would result in the loss of data relevant to the lending market.²⁷⁹

In addition, an exclusion for inter-affiliate loans could result in market practices to circumvent reporting obligations. For instance, in arranged financing, a broker or dealer “may offer arranged financing programs (sometimes called ‘enhanced lending’ or ‘short arranging products’) through which a customer can borrow shares from the firm’s domestic or foreign affiliate and use those shares to close out a short position in the customer’s account.”²⁸⁰ In describing arranged financing, a market participant has stated that “[w]ith respect to . . . arranged financing/enhanced lending models at member firms, certain ones may involve the loan of shares to customers from domestic affiliates and others may involve the loan of shares to customers from foreign affiliates.”²⁸¹ Thus, if the broker or dealer agrees to provide a customer the covered securities loan through an affiliate, such as a foreign affiliate, an exclusion for inter-affiliate loans could exclude the securities loan entirely. Moreover, one researcher has observed that “owners of large portfolios . . . often conduct their own lending programs with an affiliated agent lender”²⁸² An exclusion for inter-affiliate loans would not capture such loans. Therefore, under the final rule a covered person is required to report covered securities loans with affiliates.

Certain commenters recommended that a definition of the term “loans a security” refer only to transactions made pursuant to a written lending agreement²⁸³ or documented as a securities loan on the lender’s books

²⁷¹ See, e.g., BlackRock Letter, at 6–7.

²⁷² See, e.g., Fidelity Letter, at 2; Sharegain Letter, at 3; Letter from Kenneth E. Bentsen, Jr., President and CEO, SIFMA (Apr. 1, 2022) (“SIFMA Letter 2”), at 3; Letter from Lindsey Weber Keljo, Asset Management Group—Acting Head, SIFMA Asset Management Group (Jan. 7, 2022) (“SIFMA AMG Letter”), at 9; CASLA Letter, at 2; EBF Letter, at 1; RMA Letter, at 14–15; IIB Letter, at 9; FIF Letter, at 2–3.

²⁷³ See final Rule 10c-1a(j)(2).

²⁷⁴ See final Rule 10c-1a(j)(2)(ii).

²⁷⁵ See final Rule 10c-1a(j)(2)(iii).

²⁷⁶ See SIFMA AMG Letter, at 9 (recommending a definition of the term “loans a security” to mean to “enter into a transaction in which one person, on behalf of itself or another person . . . will temporarily lend to an unaffiliated person,” among other things).

²⁷⁷ See, e.g., SIFMA Letter 1, at 15; RMA Letter, at 15; CASLA Letter, at 2; IIB Letter, at 10.

²⁷⁸ See SIFMA Letter 1, at 15. See also RMA Letter, at 15 (stating that “inter-affiliate loans frequently do not represent market prices and should be excluded from such dissemination”).

²⁷⁹ To reduce any potential confusion and misinterpretation of the data, an RNSA could determine to, if it is able, develop methodologies to separate or identify such loans.

²⁸⁰ See FINRA Regulatory Notice 21-19 (June 4, 2021), available at <https://www.finra.org/rules-guidance/notices/21-19>.

²⁸¹ See, e.g., Robert Toomey, Managing Director, and Joseph Corcoran, Managing Director, SIFMA, SIFMA Comment on Short Interest Position Reporting Enhancements and Other Changes Related to Short Sale Reporting (FINRA Regulatory Notice 21-19) (Sept. 30, 2010), available at <https://www.sifma.org/wp-content/uploads/2021/10/SIFMA-Comments-on-FINRA-RN-21-19-Final.pdf>.

²⁸² See, e.g., BIS Working Papers No. 768: *Over-the-Counter Market Liquidity and Securities Lending*, Nathan Foley-Fisher, et al., Bank of International Settlement (Feb. 2019), available at <https://www.bis.org/publ/work768.pdf>.

²⁸³ See, e.g., SIFMA Letter 1, at 10; SIFMA AMG Letter, at 9; RMA Letter, at 15; Federated Hermes Letter, at 2 (recommending to “limit reporting only to traditional lending agreements made pursuant to the Master Securities Loan Agreement”); S3 Partners Letter, at 10–11.

²⁶⁴ Final Rule 10c-1a(h)(4).

²⁶⁵ See proposed Rule 10c-1(a).

²⁶⁶ See Proposing Release, 86 FR 69808 (Question 8).

²⁶⁷ See Proposing Release, 86 FR 69807. See also Public Law 111-203, sec. 984(b), 124 Stat. 1376 (2010).

²⁶⁸ See, e.g., Fidelity Letter, at 2; SIFMA Letter 1, at 9; Letter from Wim Mijs, CEO, European Banking Federation (Jan. 17, 2022) (“EBF Letter”), at 1; Citadel Letter, at 4.

²⁶⁹ See Citadel Letter, at 12.

²⁷⁰ See, e.g., CASLA Letter, at 2 (recommending “a definition of ‘securities loan’ . . . based on the purpose of a loan”).

and records.²⁸⁴ One commenter stated that such an approach would “ensure consistent reporting and avoid confusion and misinterpretation of data by the public.”²⁸⁵ Another commenter stated that it could avoid “the public dissemination of incomplete, inaccurate, and misleading information that could have an adverse impact on the securities lending market.”²⁸⁶ The Commission disagrees that the definition of the term “covered securities loan” should require that the transaction be agreed to pursuant to a written securities lending agreement such as the Master Securities Loan Agreement, or a transaction documented as a securities loan on a lender’s books and records. Such a requirement could provide an easy way to avoid the requirement, particularly for unregulated entities not otherwise subject to documentation and books and records requirements. Moreover, such a requirement could cause competitive harm to entities that are subject to such requirements or who follow such practices as risk management tools. Requiring the reporting of only securities loans made pursuant to a written agreement or subject to a covered person’s books and records requirements would create confusion by introducing such distinctions, which may be interpreted or applied differently across the different types of persons that meet the definition of “covered person.” Additionally, such requirements would result in data that excludes reporting by covered persons that do not use written agreements or have books and records requirements. Such gaps in the data could contribute to the misinterpretation of data by the public, instead of ameliorating it as the commenter suggests.²⁸⁷ Thus, the final rule covers a wide variety of loans without limitation as to a particular loan’s design or structure by including all loans that occur when a covered person “agrees to a covered securities loan.”²⁸⁸

²⁸⁴ See, e.g., SIFMA Letter 1, at 3; SIFMA AMG Letter, at 9.

²⁸⁵ See SIFMA Letter 1, at 3.

²⁸⁶ SIFMA AMG Letter, at 2.

²⁸⁷ See SIFMA Letter 1, at 3.

²⁸⁸ See final Rule 10c–1a(a). The final rule’s requirement that a covered person who “agrees to” a covered securities loan must report Rule 10c–1a information to an RNSA (or rely on a reporting agent to do so) is designed to be broad regarding when a securities loan is required to be reported. This is designed to ensure that differently structured securities loans are captured by the final rule to prevent evasion (e.g., by not including specific characteristics, like a written agreement, that can be easily avoided), and to prevent undue delay of reporting (e.g., by not requiring that the loan be settled, which may take days or longer after

Some commenters recommended that the term “loans a security” specifically refer to the temporary lending of securities against a transfer of collateral.²⁸⁹ One of the commenters stated that such a provision would help “ensure consistent reporting and avoid confusion and misinterpretation of data by the public.”²⁹⁰ Another stated that defining the term “loan of securities” to include a transfer of collateral would “better achieve the Commission’s goals” by avoiding “the public dissemination of incomplete, inaccurate, and misleading information.”²⁹¹ Such a definition would have been consistent with the Proposing Release’s statement that a securities loan is typically a fully collateralized transaction.²⁹² However, the proposed rule did not limit the application of its reporting requirements to securities loans that were fully collateralized, as it was designed to capture all loans of securities and provide a more complete and timely picture of trading for securities loans.²⁹³ While the provision of collateral is currently a common industry practice for securities loans, it is not necessarily a characteristic of all securities loans. For example, some lenders may structure securities loans to include a bank guaranty, insurance policy, or other credit enhancement in lieu of collateral.²⁹⁴ Therefore, limiting the scope of loans covered by the final rule to only include lending against a transfer of collateral could leave certain loans out of the scope of the final rule’s reporting requirements. The exclusion of uncollateralized loans could decrease the availability of pricing and activity information in the securities lending market, resulting in the reporting and dissemination of incomplete, inaccurate, and misleading information for which the commenters voiced concern.²⁹⁵ Furthermore, the reporting of uncollateralized loans would provide additional data to market participants,

the material terms of a securities loan have been agreed to).

²⁸⁹ See, e.g., SIFMA Letter 1, at 16; SIFMA AMG Letter, at 9; RMA Letter, at 15.

²⁹⁰ See SIFMA Letter 1, at 3.

²⁹¹ See SIFMA AMG Letter, at 2.

²⁹² See Proposing Release, 86 FR 69804.

²⁹³ See Proposing Release, 86 FR 69812.

²⁹⁴ See, e.g., 17 CFR 240.15c3–3(b)(3)(iii) (“Rule 15c3–3(b)(3)(iii)”) (stating that a broker or dealer borrowing fully paid or excess margin securities “[m]ust provide to the lender, upon the execution of the agreement or by the close of the business day of the loan if the loan occurs subsequent to the execution of the agreement, collateral, which fully secures the loan of securities, consisting exclusively of cash or United States Treasury bills and Treasury notes or an irrevocable letter of credit issued by a bank”).

²⁹⁵ See SIFMA AMG Letter, at 2; SIFMA Letter 1, at 3.

and would not result in misleading duplicative information like other types of transactions that are discussed below in this part (e.g., loans arising from certain clearing agency services). Additionally, such a restriction could incentivize market participants to use credit enhancement mechanisms that differ from collateral (e.g., bank guaranties or insurance policies) in order to avoid the final rule’s reporting requirements. Therefore, the scope of final Rule 10c–1a’s reporting requirements is not limited to only include loans against a transfer of collateral.²⁹⁶

One commenter recommended that the Commission limit the scope of the rule’s reporting requirements to securities loans where a lender seeks to earn compensation or a return from the transaction.²⁹⁷ The commenter stated that, “[l]imiting the scope in such a way would help focus reporting on primary transactions of interest, where the borrower is seeking to ‘gain access to the security itself,’ and distinguish it from repurchase and other agreements, which are ‘typically used for short-term financing.’”²⁹⁸ Another commenter proposed limiting the scope of securities loans to transactions in which a borrower obtains use of the securities for a fee.²⁹⁹ However, a limitation of the final rule’s reporting requirements to only securities loans made by a lender seeking to earn compensation or a return from the transaction, or for a fee could potentially result in evasion, as securities loans could be structured (e.g., via over-collateralization, haircuts, or use of non-cash collateral with varying maturities, credit ratings, or income characteristics) to avoid the identification of a fee. At the very least, such a requirement could result in confusion or inconsistent reporting as market participants may interpret differently the loan structures that incorporate a fee or are made by lenders

²⁹⁶ But see *supra* note 148 (discussing requirements for the provision of collateral by borrowers in the instance of fully paid and excess margin securities).

²⁹⁷ See, e.g., ABA Letter, at 3 (recommending “[t]he SEC should define covered securities lending transactions to those where the lender is seeking to earn compensation from the transaction”).

²⁹⁸ See ABA Letter, at 3–4 (quoting the Proposing Release, 86 FR 69844 n.246). See also *infra* in this part, a discussion of final Rules 10c–1a(f)(2)(iii) and (j)(2)(iii)(A) and the exclusion from the final rule’s reporting requirements of certain uses of margin securities by a broker or dealer, which can include “funding trades,” repurchase agreements, and uses of margin securities that are not a loan to another person (e.g., rehypothecation).

²⁹⁹ See BlackRock Letter, at 7 (recommending “the SEC should limit the scope to traditional securities lending transactions where the parties have entered into the loan transaction in order for a borrower to obtain use of the securities for a fee”).

seeking to earn compensation or a return from the transaction. If the final rule only applied to securities loans agreed to for compensation, a fee, or for the purpose of earning a return, securities loans made to affiliates could be structured to fall outside the final rule's reporting requirement (*i.e.*, made without an expectation of return or for no fee), while a loan still would have occurred, and the affiliate would still benefit from possession of the loaned securities. Further, the final rule does not exclude securities loans based on the purpose or duration of the loan, such as for "short-term financing," in order to capture a wide variety of loans regardless of purpose or duration. Finally, the final rule provides that a covered securities loan is a transaction in which a person *lends* a reportable security, which distinguishes covered securities loans from other agreements.

Multiple commenters were concerned that the proposed rule would require that short sales or short positions be reported as securities loans. Such commenters requested clarification of whether the proposed rule would treat short sales as loans of securities.³⁰⁰ To provide such clarification, under the final rule covered persons will not be required to report short sales as defined

by 17 CFR 242.200(a) ("Rule 200(a)"),³⁰¹ but will be required to report loans that are used for short sales.

The Commission stated in the Proposing Release that it was not proposing to include repurchase and sale agreements (commonly known as "repos") within the scope of the proposed rule because section 984 of the Dodd-Frank Act focuses on the loan or borrowing of securities.³⁰² The Proposing Release detailed distinctions between the typical securities lending and repo markets, including that repos typically are primarily used for short-term financing while other securities loans typically are used to gain access to the security itself, and that loans generally allow the lender to recall the security on demand while repos do not.³⁰³ Some commenters agreed with the Commission, recommending that repos should not fall within the meaning of the term "loans a security" in the proposed rule.³⁰⁴ One commenter suggested that loans of a security should be distinguished from repos.³⁰⁵ However, one commenter stated that there is "significant overlap in the functionality between repos and securities lending transactions."³⁰⁶ The commenter also suggested "a broad anti-evasion provision that prohibits any person from engaging in any practice intended to evade the rule's reporting requirements."³⁰⁷ The same commenter recommended defining the term "securities loan" to include repos.³⁰⁸

³⁰¹ Rule 200(a) provides, "The term short sale shall mean any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller."

³⁰² See Proposing Release, 86 FR 69803 n.2.

³⁰³ See Proposing Release, 86 FR 69843 n.246.

³⁰⁴ See, e.g., SIFMA Letter 1, at 9 (noting that "the Commission is not intending to include within the scope of the Proposed Rule the entry into repurchase agreements, which we believe is the proper approach"); SIFMA Letter 2, at 3; BlackRock Letter, at 2 (describing securities lending market trades as "transactions whereby a lender lends securities to a borrower in exchange for collateral but excluding repurchase transactions where the purpose of the trade is to provide cash financing in exchange for non-cash collateral").

³⁰⁵ See ABA Letter, at 3–4 (stating that "[t]he SEC should define covered securities lending transactions . . . and distinguish it from repurchase and other agreements").

³⁰⁶ See Better Markets Letter, at 10. See also James J. Angel Letter, at 6–7.

³⁰⁷ See Better Markets Letter, at 10. See also S3 Partners Letter, at 11 (expressing concern with securities lending transactions being repapered as repos); James J. Angel Letter, at 7 (stating that "[t]he final rule needs to define securities lending in such a way that it deters such evasion, while not ensnaring normal repo in the reporting requirements").

³⁰⁸ See Better Markets Letter, at 10 ("Accordingly the SEC should consider . . . a definition of 'securities loan' or 'securities lending' that will ensure sufficient coverage of relevant transactions,

The Office of Financial Research ("OFR") recently proposed a rule to collect data on repos.³⁰⁹ Accordingly, at this time, it is not necessary to include repos within the scope of the final rule's information reporting requirements, as a potential OFR rule, if adopted, could address any potential reporting gaps, thereby reducing the incentives to evade final Rule 10c–1a.

The Commission also received comment requesting that the final rule "make clear that the novation and processing of a securities lending transaction by a registered clearing agency does not give rise to a new loan or the modification of an existing loan subject to reporting under Rule 10c–1."³¹⁰ The same commenter also stated that "[n]ovation is . . . the legal mechanism through which NSCC guarantees to each counterparty the performance of the obligations under a transaction that the counterparties already negotiated and executed away from the NSCC and that was already subject to a reporting obligation."³¹¹ Another commenter directly responded to the Proposing Release's request for comment asking whether the Commission should define what it means to "loan a security."³¹² The commenter stated that the definition should "expressly exclude loan positions that result from the central counterparty novation function that a clearing agency like OCC provides to securities loans."³¹³ The commenter, which is an SEC-registered clearing agency, also stated that it "does not have access to the majority of information sought under proposed Rule 10c–1 . . . and, therefore could not report such information to an RNA." ³¹⁴ The Commission agrees with the commenters' recommendations that positions that result from central counterparty services by a clearing agency, including the novation and processing of a securities lending transaction, should not give rise to any

i.e., those where securities are temporarily transferred from one party to another, for compensation, with a commitment to return those securities in the future").

³⁰⁹ See, e.g., OFR Factsheet: OFR's Proposed Data Collection (Mar. 2023), available at https://www.financialresearch.gov/data/files/NCCBR_factsheet.pdf; Office of Financial Research Releases Proposal to Collect Data on Certain Repo Transactions (Jan. 5, 2023), available at <https://www.financialresearch.gov/press-releases/2023/01/05/office-of-financial-research-releases-proposal-to-collect-data-on-certain-repo-transactions>.

³¹⁰ See DTCC Letter, at 3; See also OCC Letter, at 10.

³¹¹ See DTCC Letter, at 4.

³¹² See Proposing Release, 86 FR 69808 (Question 8).

³¹³ See OCC Letter, at 12.

³¹⁴ See OCC Letter, at 12.

³⁰⁰ See Citadel Letter, at 4 (stating that "[t]he scope of the Commission's proposal is unclear" and that "[c]ustomer short sales . . . are not typically documented under securities lending agreements, booked as securities loans, or treated as securities loans for financial reporting purposes"); See also Fidelity Letter, at 3 (stating that "inclusion of short positions in the required reporting . . . would be inappropriate from a securities lending market perspective, as well as potentially misleading, as it could result in inaccurate double counting of loans"); IHS Markit Letter, at 3 (stating that securities loans and short sales "are two separate and distinct markets with different drivers, participants, and data points and should not be conflated"); SIFMA Letter 1, at 9–12 (recommending that the Commission exclude short positions from the scope of loans required to be reported to an RNA); AIMA Letter 1, at 3–4; Letter from Jiri Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association (Apr. 1, 2022) ("AIMA Letter 2"), at 3 (short positions would be reported under the rule proposed by the Commission pursuant to section 929X of the Dodd-Frank Act); Letter from Richard Karoly, Managing Director, Legal, Charles Schwab & Co., Inc. (Jan. 7, 2022) ("Charles Schwab Letter"), at 1–2 (short positions are already reported under other reporting regimes such as FINRA's Rule 4560. Short-Interest Reporting); MFA Letter 3, at 4 (stating that the Commission should "distinguish short positions from stock loans"). The Commission agrees with commenters who stated that short positions are not subject to a written securities lending agreement, nor carried on a firm's books and records as securities loans, nor treated as securities loans for financial reporting purposes. See, e.g., FIF Letter, at 2–3; See also SIFMA AMG Letter, at 5 (stating that short positions are "similar in some respects but are outside of the securities lending activity" targeted by the proposed rule).

reporting obligation under the final rule, including the requirement to report loan modification data elements under paragraph (d) of the final rule. As discussed above, in Part VII.A, clearing agencies providing the functions of a central counterparty or central securities depository do not lend or borrow shares on their own behalf, but instead novate or process the loans of lenders and borrowers (*i.e.*, central counterparty or central securities depository services) for the purpose of efficient clearance and settlement.³¹⁵ Although novation of the loan by the clearing agency technically creates a new loan in which the clearing agency would step into the shoes of the counterparties,³¹⁶ the clearing agency would not be modifying the key terms of the loan (other than changing the identities of the counterparties to that of the clearing agency), such as the rate or size, and requiring clearing agencies to report such loans would result in the misleading appearance of additional loan volume containing otherwise duplicative loan information.³¹⁷ Therefore, the final rule excludes from the “covered securities loan” definition “a position at a clearing agency that results from central counterparty services pursuant to Rule 17Ad-22(a)(2) of the Exchange Act or central securities depository services pursuant to Rule 17Ad-22(a)(3) of the Exchange Act.”³¹⁸

The Commission also received a comment stating that “it is not uncommon for a lending agent to pool together available supply of a given security across multiple lenders in their lending program” to satisfy a large loan of securities and reallocate such loan among the lenders in the program, as the inventory of individual lenders changes, to avoid recalling a loan.³¹⁹

³¹⁵ See DTCC Letter, at 1 (stating that the “processing of a securities loan transaction, including through novation and netting, does not constitute a modification or a new transaction for reporting purposes. Such processing does not constitute new market activity or modify the material economic terms of the transaction, which the parties will have already reported” and that “[n]ovation is simply the legal mechanism through which NSCC guarantees to each counterparty the performance of the obligations under a transaction that the counterparties already negotiated and executed away from NSCC and that was already subject to a reporting obligation”).

³¹⁶ Under Rule 17Ad-22(a)(2), a clearing agency performs the functions of a central counterparty when it interposes itself between the counterparties to securities transactions, acting functionally as the buyer to every seller and the seller to every buyer.

³¹⁷ See final Rule 10c-1a(j)(2)(ii). If a clearing agency acted on behalf of the beneficial owner of the loaned security to effect a covered securities loan, then the clearing agency would be a “covered person” under paragraph (j)(1)(i) of the final rule.

³¹⁸ See final Rule 10c-1a(j)(2)(ii).

³¹⁹ See BlackRock Letter, at 7. See also, SIFMA AMG Letter, at 10 (stating that “for bulk loans,

The commenter also stated that, in such instances, “[g]iven no change in the economics of the trade or any physical movement of securities, these intraday record entries are not market trades and should not be reported as such.”³²⁰ However, the proposed rule did not limit its information reporting requirements to securities loans arising from “market trades” or the “physical movement of securities,” neither of which the commenter has defined or described in the context of the securities lending market. Changing the party or parties to a covered securities loan, which is required to be confidentially reported under 17 CFR 240.10c-1(e)(1) (“final Rule 10c-1a(e)(1)”), creates a new covered securities loan that would require reporting as a new covered securities loan to an RNSA under final Rule 10c-1a(a)(1), and not as a modification under final Rule 10c-1a(d). The identity of the lender or lenders is a material term of a covered securities loan.³²¹ The identity of the lender is not made public, but is important information for regulatory purposes, such as surveillance of activity pertaining to the individual loan.³²² Whether the parties to a covered securities loan change for purposes of the reporting requirements under final Rule 10c-1a(e)(1) depends on how a pool³²³ or lending program is structured (*e.g.*, whether the pool or lending program itself or the individual underlying participants are the party or parties identified as the lender for the loan). For example, if a lending program as an individual entity is the party that is the lender of the covered securities loan, changes to the underlying participants, inventory providers, or customers of that lending program will not constitute a change to the parties of the covered securities loan. In that instance, unlike the lending program, the individual participants will not be

reporting at the lending agent level rather than the beneficial owner would reflect the actual market loan and would avoid the reporting of loan components which may shift throughout the allocation process”).

³²⁰ BlackRock Letter, at 7.

³²¹ See final Rule 10c-1a(e)(1).

³²² If the covered person is a pool (and thus is a lender of covered securities), it is the pool that is required to be confidentially reported as the party to the covered securities loan pursuant to final Rule 10c-1a(e)(1). See also Proposing Release, 86 FR 69804 (“The data elements provided to an RNSA . . . are also designed to provide the RNSA with data that could be used for important regulatory functions, including facilitating and improving its in-depth monitoring of member activity and surveillance of securities markets.”).

³²³ The term “pool” is used here in the same manner it is described by the commenter quoted above in this paragraph. See BlackRock Letter, at 6–7 (also using the term “pooled pass-through account”).

lenders directly to the borrower of the covered securities loan. In that case, where a covered securities loan remains open and the only change that occurs is a reallocation among the pool’s underlying constituents, that is not a change that will require reporting as a new covered securities loan or as a modification under paragraph (d) because there will be no change to a data element in paragraph (c) of the final rule.

However, if the multiple, individual participants are all parties identified as lenders to the loan, with no lending program or other entity interposed between them and the borrower, a change in their composition (the removal or addition of a lender) would constitute an assignment of the loan and therefore would require reporting as a new loan pursuant to final Rule 10c-1a(a)(1). Whether a reallocation of a loan among participants in a lending program requires the reporting of a new covered securities loan depends upon the facts and circumstances, including the structure of such lending program.

One commenter recommended a definition of the term “loans a security” that would apply at a minimum “any time the lender loses the right to vote the securities during the time of the loan.”³²⁴ Voting rights do not provide an adequate criterion to define what a securities loan is because not all reportable securities necessarily carry voting rights (*e.g.*, some preferred stock, options, fixed-income securities, and treasuries). However, the facts and circumstances, including the loss of voting rights, may be an indicator as to whether a transaction is a loan.

The Commission also received comment letters expressing support for limiting the reporting required under the proposed rule to the Wholesale market³²⁵ of the securities lending market.³²⁶ Some commenters

³²⁴ See Morningstar Letter, at 4.

³²⁵ Traditionally, securities lending and borrowing transactions have been conducted on a bilateral basis. Generally, when an end investor wishes to borrow securities, and its broker-dealer does not have those securities available in its own inventory or through customer margin accounts to loan, the broker-dealer will borrow the securities from a lending agent with whom it has a relationship. The broker-dealer will then re-lend the securities to its customer. Loans from lending programs to broker-dealers occur in what is referred to by market participants as the Wholesale market, while loans from a broker-dealer to the end borrower occur in what is referred to by market participants as the Customer market (also known as the “retail market”). See Proposing Release, 86 FR 69805. For purposes of this release, this market is referred to as the Customer market. See *supra* Part II.

³²⁶ See AIMA Letter 1, at 2; AIMA Letter 2, at 3; Citadel Letter, at 11; SBAI Letter, at 2; Letter from John L. Thornton, Co-Chair, Hal S. Scott, President,

recommended narrowing the scope of loans to the Wholesale market due to what they characterized as potential negative effects on short selling from data that could be revealed through loans in the Customer market.³²⁷ One of the commenters stated that “immediately publicly disclosing short selling activity would signal to all other market participants that a short position is being established.”³²⁸ Such concerns are largely addressed by requiring that an RNSA delay public disclosure of the loan amount by 20 business days. This modification should significantly reduce the novelty of the information disseminated under the final rule regarding short sellers’ positions, such that it is less timely than pre-existing sources of short selling transparency, such as FINRA’s bimonthly short interest data.

Another commenter suggested that retail loans may not be structured as securities lending, but rather structured as brokerage agreements, and thus may not be suitable for standardized data collection.³²⁹ This commenter may be referring to the use of margin securities by a broker or dealer in which the broker or dealer does not lend such margin securities to another person (*e.g.*, a rehypothecation).³³⁰ The final rule’s exclusion of such uses from the definition of “covered securities loan,” as discussed below, in this part, should address the commenter’s concern.

A commenter stated that the Commission had not fully explained why greater transparency, or transaction-by-transaction data, in the Customer market would be valuable.³³¹

More broadly, limiting data to Wholesale market loans would significantly reduce the benefits of the rule stemming from increased transparency into the securities lending market. In the Proposing Release, the Commission stated that the rule “is designed to address . . . inefficiencies in the securities lending market by making more comprehensive information regarding securities lending transactions publicly available, which could better protect investors by eliminating certain information asymmetries.”³³² Data regarding Customer market loans will, for example, provide end-borrowers with valuable information as to the competitiveness of the rates they are being charged for their loans. Such data will also provide information to customers that have agreed to loan their fully paid securities as to the competitiveness of the rates they are receiving from brokers or dealers borrowing such securities. Excluding such a fundamental part of the securities lending market from the scope of transactions to which the rule’s reporting requirements apply is inconsistent with the Commission’s stated goal of making comprehensive information regarding securities loans publicly available. Therefore, the definition of “covered securities loan” in the final rule does not distinguish between the Wholesale market and Customer market and is not limited to Wholesale market transactions.

One commenter recommended that the term “loans a security” specifically refer to securities loaned “for a permitted purpose pursuant to Regulation T of the Board of Governors of the Federal Reserve System.”³³³ However, limiting the final rule’s reporting requirements to only securities loans made for permitted purposes pursuant to Regulation T of the Board of Governors of the Federal Reserve System, would be overly narrow as the principal purpose of Regulation T is to regulate extensions of credit by brokers and dealers.³³⁴ As the commenter states, the “permitted purposes” contemplated under section 220.10(a) of Regulation T are limited to “allowing the borrower to make delivery of the borrowed securities in the case of short sales, failure to receive securities required to be delivered, or other similar situations.”³³⁵ Regulation T states that “[i]ts principal purpose is to regulate

extensions of credit by brokers and dealers; it also covers related transactions within the Board’s authority under the Act. It imposes, among other obligations, initial margin requirements and payment rules on certain securities transactions.”³³⁶ However, the securities loan market includes lenders other than brokers and dealers and may involve loans of securities for purposes other than short sales, failures to receive securities required to be delivered, and similar situations.³³⁷ Furthermore, the purpose of final Rule 10c–1a is to increase the transparency of information available to broker, dealers, and investors, with respect to the loan and borrowing of securities without limitation to the purpose of the loan or borrow, whereas the stated purpose of Regulation T is regulating extensions of credit. Thus, Regulation T does not provide an appropriate framework to limit final Rule 10c–1a’s information reporting requirements.

The Commission also received comment expressing support for a *de minimis* threshold for reporting loans of securities.³³⁸ In some contexts, reporting thresholds may be useful to reduce burdens on persons required to report, or to reduce the possibility that strategies or identities of reporters will be revealed. However, a *de minimis* reporting threshold is not necessary in light of modifications from the proposed rule to require end-of-day³³⁹ (versus 15 minute) reporting, as well as the delay³⁴⁰ in publication of size information,³⁴¹ which are expected to reduce the possibility that strategies or identities of reporting entities will be revealed. Including a *de minimis* threshold, which would primarily affect data for smaller securities loans, could provide the public with a distorted view of securities loan activity. For example, a large volume of relatively small securities loans could constitute a significant amount of the overall lending activity for an individual security. Alternatively, a single, small securities loan could constitute the only outstanding loan for an issuer, and its

R. Glenn Hubbard, Co-Chair, Committee on Capital Markets Regulation (Jan. 6, 2022) (“CCMR Letter”), at 2.

³²⁷ See CCMR Letter, at 2; AIMA Letter 1, at 2.

³²⁸ See AIMA Letter 1, at 2. See also Letter from Jiří Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association (Aug. 11, 2023) (“AIMA Letter 3”), at 4 (stating that “[b]y including loans used to effect short sales in the Securities Lending Proposal, the Commission will be making it more expensive to engage in short selling”).

³²⁹ See SBAI Letter, at 2.

³³⁰ See also James J. Angel Letter, at 4 (asking “when and how are loans from customer margin accounts to be reported?”).

³³¹ See Citadel Letter, at 9 (using the term “Retail Market” in place of Customer market). But see Better Markets Letter, at 4 (stating that “high short interest can lead to a destabilizing short squeeze, which can in turn lead to significant volatility in the price of the shorted stock, if not the broader markets . . . If regulators and the public had better and more timely information about the amount of shares of . . . meme stocks that had been lent and borrowed, they may have been able to proactively head off or mitigate the impact of the destabilizing events of January 2021 before they occurred”). See also *infra* Part IX.C.2 (discussing the potential implications of the provision of securities lending activity to market participants in and around the market events of January 2021).

³³² See Proposing Release, 86 FR 69807.

³³³ See SIFMA AMG Letter, at 9.

³³⁴ 12 CFR 220.10(a) (“Regulation T”).

³³⁵ See SIFMA AMG Letter, at 9 (quoting section 220.10(a) of Regulation T).

³³⁶ 12 CFR 220.10(a).

³³⁷ For example, it is the Commission’s understanding that securities are borrowed by banks managing liquidity on their balance sheet and financial entities obtaining the type of collateral required by other agreements they are trying to enter into, and that some investors may lend and borrow securities to obtain certain tax treatment for dividends and dividend substitutes. See Proposing Release, 86 FR 69831.

³³⁸ See Federated Hermes Letter, at 2.

³³⁹ See, *e.g.*, 17 CFR 240.10c–1a(c)(6) (“final Rule 10c–1a(c)(6)”).

³⁴⁰ See final Rule 10c–1a(g)(2).

³⁴¹ See final Rule 10c–1a(c).

exclusion would leave market participants without information about the lending market for the security. The Proposing Release stated that “granular information about certain material terms of securities lending transactions would allow investors, including borrowers and lenders, to evaluate not only the rates for such transactions, but also any signals that such rates provide.”³⁴² The public disclosure of information for securities lending transactions of all sizes will help improve price discovery in the securities lending market.³⁴³ Additionally, providing a de minimis threshold could result in avoidance of the final rule’s reporting requirements if industry participants structure otherwise reportable securities loans into smaller tranches in order to fit below a reporting threshold.

The Commission received a comment recommending that the final rule not capture a “broker-dealer hypothecation of customer margin³⁴⁴ securities.”³⁴⁵ Another commenter stated that it understood the proposed rule to exclude rehypothecation of a customer’s margin securities.³⁴⁶ When a broker or dealer hypothecates (or uses) customer margin securities, the customer is not loaning them to the broker or dealer as the customer has already pledged the securities in a margin account to the broker or dealer, as collateral for a margin loan.³⁴⁷ Accordingly, the final rule excludes hypothecation of securities, but provides that the loan of such customer margin securities by a broker or dealer to another person is a covered securities loan.³⁴⁸ Specifically, the definition of the term “covered securities loan” under the final rule includes the provision that, “the use of margin securities, as defined in Rule 15c3–3(a)(4) of the Exchange Act, by a broker or dealer will not be a covered

securities loan for purposes of this rule.”³⁴⁹ It also provides that “if a broker or dealer lends such margin securities to another person, the loan to the other person is a covered securities loan” for purposes of the final rule.³⁵⁰ Therefore, should a broker or dealer use a customer’s margin securities for purposes other than to lend them to another person, such a transaction would not fall within the definition of the term “covered securities loan” under the final rule. Additionally, if a broker or dealer borrows fully paid or excess margin securities from a customer, that loan is a covered securities loan,³⁵¹ and the broker or dealer borrowing the fully paid securities is responsible for reporting the loan to an RNSA.³⁵²

The Commission also received comment recommending that the final rule not apply to “funding trades.”³⁵³ The commenter further stated its belief that such transactions, which are defined as loans of cash against securities being pledged as collateral, are not the type of activity that should be captured through the proposed rule.³⁵⁴ To the extent that such funding transactions constitute a use of margin securities by a broker or dealer pursuant to paragraph (j)(2)(iii), they would not fall within the final rule’s definition of “covered securities loan.” Otherwise, commenters were not specific as to whether there would be variations of transactions used to “fund trades.” The final rule does not specifically exclude transactions to “fund trades.” Whether a transaction to “fund trades” is a

covered securities loan will depend on the facts and circumstances of each transaction.³⁵⁵

After considering commenters’ concerns and perspectives regarding the proposed scope of transactions for which proposed Rule 10c–1 reporting would have been required, the final rule defines the term “covered securities loan” to mean “[a] transaction in which any person on behalf of itself or one or more other persons, lends a reportable security to another person.”³⁵⁶ Further, in paragraph (a) of the final rule, the term “loans a security” is replaced with the phrase “agrees to a covered securities loan” in its reporting requirement for covered persons.³⁵⁷ In response to commenters’ request for clarification as to whether a loan should be reported before or after it is settled, the term “agrees to” clarifies that covered securities loans are required to be reported after the parties agree to the loan, which is before settlement.³⁵⁸

For the reasons described above, in this part, the definition of the term “covered securities loan” in the final rule further provides that “a position at a clearing agency that results from central counterparty services pursuant to Rule 17Ad–22(a)(2) of the Exchange Act or central securities depository services pursuant to Rule 17Ad–22(a)(3) of the Exchange Act will not be a covered securities loan for purposes of this rule.”³⁵⁹ The final rule also provides that “the use of margin securities, as defined in Rule 15c3–3(a)(4) of the Exchange Act, by a broker or dealer, will not be considered a covered securities loan for purposes of this rule,” provided, however, that “if a broker or dealer loans such margin securities, such loan will be considered a covered securities loan for purposes of this rule.”³⁶⁰

The definition of the term “covered securities loan,” in conjunction with the definition of the term “reportable security,” discussed above, in Part VII.D,³⁶¹ sets forth the scope of the final

³⁴² See also Proposing Release, 86 FR 69804.

³⁴³ See *infra* Part IX.C.1 (stating that “increased information will result in benefits in the form of . . . improved market stability and price discovery both in the securities lending market and the market for the underlying security”). See also Proposing Release, 86 FR 69804.

³⁴⁴ Margin securities are securities carried for the account of a customer in a margin account, as well as securities carried in any other account other than securities that are fully paid securities. See 17 CFR 240.15c3–3(a)(3) (“Rule 15c3–3(a)(3)”) and Rule 15c3–3(a)(4) of the Exchange Act defining the terms “fully paid securities” and “margin securities.”

³⁴⁵ See SIFMA AMG Letter, at 5.

³⁴⁶ See SIFMA Letter 1, at 9 n.39.

³⁴⁷ This distinction is made only within the context of a broker or dealer’s hypothecation (or rehypothecation) of customer margin securities. It does not imply that a hypothecation or use of securities in a different context could not constitute a loan of securities.

³⁴⁸ See final Rule 10c–1a(j)(2)(iii); 17 CFR 240.10c–1a(j)(2)(iii)(A) (“final Rule 10c–1a(j)(2)(iii)(A)”).

³⁴⁹ See final Rule 10c–1a(j)(2)(iii).

³⁵⁰ See final Rule 10c–1a(j)(2)(iii)(A).

³⁵¹ A broker or dealer must maintain the physical possession or control of all fully paid securities and excess margin securities carried by the broker or dealer for the accounts of customers. See 17 CFR 240.15c3–3(b)(1) (“Rule 15c3–3(b)(1)”). Additionally, a broker or dealer must enter into a written agreement pursuant to Rule 15c3–3(b)(3) in order to not be deemed to be in violation of the provisions of Rule 15c3–3(b)(1) when borrowing fully paid or excess margin securities from any person. See Rule 15c3–3(b)(3).

³⁵² See final Rule 10c–1a(j)(1)(iii).

³⁵³ See SIFMA AMG Letter, at 5. See also SIFMA Letter, at 15; BlackRock Letter, at 7 (stating that “the SEC should limit the scope to traditional securities lending transactions where the parties have entered into the loan transaction in order for a borrower to obtain use of the securities for a fee, rather than to provide a lender with cash financing that is collateralized with non-cash collateral”).

³⁵⁴ See SIFMA AMG Letter, at 9 (stating that “[a] ‘non-purpose’ transfer of securities against cash collateral, economically resembles a borrowing of cash by the security’s ‘lender’ against a pledge of securities collateral to the securities ‘borrower.’ However, such transactions are more properly categorized as ‘funding’ transactions (as loans of cash against securities being pledged as collateral) and, therefore, are not the type of activity SIFMA AMG believes the SEC is, or should be, seeking to capture through the Proposed Rule.”).

³⁵⁵ See final Rule 10c–1a(j)(2)(i).

³⁵⁶ See final Rule 10c–1a(j)(2)(i).

³⁵⁷ See final Rule 10c–1a(a).

³⁵⁸ See HMA Letter, at 9 (recommending that reporting should include effected, but not-yet-settled loans, and stating that “the Commission and FINRA rules have long required reporting of securities orders, modification, and trades, not just settled transactions, because all of that information is relevant to understanding the markets”). But see Fidelity Letter, at 2 (requesting that the Commission clarify when a loan can be considered “effected” for purposes of report, and stating that “in the marketplace, a securities loan is not considered ‘effected’ by the parties until the loan has been contractually booked and settled”).

³⁵⁹ See final Rule 10c–1a(j)(2)(ii).

³⁶⁰ See final Rule 10c–1a(j)(2)(iii).

³⁶¹ See final Rule 10c–1a(j)(3).

rule and distinguishes “covered securities loans” from other types of transactions that are not required to be disclosed under final Rule 10c–1a. The final rule’s definition of the term “covered securities loan” will facilitate the public availability of information regarding securities lending transactions. The definition’s scope, encompassing transactions in which any person, on behalf of itself or one or more other persons, lends a reportable security to another person, is designed to provide market participants, the public, and regulators with information that broadly captures activity in the securities lending market. The defined scope of transactions required to be reported to an RNSA under final Rule 10c–1a will contribute to better decision-making by investors, reduced costs of business for brokers or dealers, improved performance and reduced costs for lending programs, new business opportunities for data vendors, improvements to shareholder monitoring, and improved market stability and price discovery in the securities lending market.³⁶² Additionally, the exceptions to the definition of “covered securities loan” under the final rule should help prevent the double counting of securities loans and support the integrity of publicly available data by excluding redundant and potentially misleading information.

F. Information To Be Provided to an RNSA

To facilitate transparency of the securities lending market, the Commission proposed Rules 10c–1(b) through (e) to require certain loan-level data elements (*i.e.*, specified material terms of securities loans) to be provided to an RNSA.³⁶³ Because an RNSA would be required to implement rules regarding the format and manner to administer the collection of

information,³⁶⁴ proposed Rule 10c–1 lists the data elements that persons would be required to provide to an RNSA, but does not specify granular instructions for data elements or the formatting required for submission of the information to an RNSA.³⁶⁵

1. Loan Data Elements—Rule 10c–1a(c) Proposed Rule

To facilitate transparency in the securities lending market, the proposed rule required certain loan transaction data elements to be provided to an RNSA, on a transaction-by-transaction basis, within 15 minutes of the loan being effected, followed by an RNSA assigning each loan a unique transaction identifier, and then making such information publicly available as soon as practicable. The proposed rule included twelve transaction data elements required to be provided to an RNSA.³⁶⁶

In proposing the list of loan data elements required to be provided to an RNSA, the Commission explained that the data elements in paragraphs (b)(1) through (b)(5) of the proposed rule, which include the legal name and legal entity identifier (“LEI”) of the issuer; ticker symbol, International Securities Identification Number (“ISIN”), CUSIP, or Financial Instrument Global Identifier (“FIGI”) or other security identifier; date and time loan was effected; and platform or venue loan was effected, identify each loan of securities.³⁶⁷ In particular, the Commission explained, they contain material terms that are not negotiated between the parties but are elements that would provide important

information to allow market participants and regulators to track, understand, and perform analyses on the negotiated terms contained in paragraphs (b)(6) through (b)(12) of the proposed rule, which include the amount of security loaned; securities lending fee or rate (or any other fee or charges); type of collateral used; rebate rate (or any other fee or charges); percentage of collateral to value of loaned securities; termination date of loan; and, whether the borrower is a broker/dealer/customer/clearing agency/bank/custodian/other person.³⁶⁸ The Commission also explained that the proposed data elements in paragraphs (b)(1) through (b)(5) of the proposed rule would provide an RNSA with enough information to create a unique transaction identifier as required by the proposed rule.³⁶⁹

In proposing the negotiated data elements in paragraphs (b)(6) through (b)(12) of the proposed rule, the Commission explained that, because the data elements reflect material terms that are negotiated when securities loans are arranged, increasing the transparency of information will provide market participants with meaningful data that could be used when structuring, pricing, or evaluating loans of securities.³⁷¹ The Commission also explained that increasing transparency would allow market participants to analyze signals obtained from the securities lending market when considering investment or trading decisions for a security; and, would also permit an RNSA to perform in-depth monitoring and surveillance of securities lending transactions to

³⁶² See *infra* Part IX.C.1.

³⁶³ While pricing-related data elements regarding collateralized loans were included in the loan-level data elements proposed to be required to be reported to an RNSA, the proposed rule did not require that securities lenders or their agents report information on how they used collateral. Some commenters stated that because of the potential threats to financial stability arising from collateral re-use, the Commission should consider requiring that securities lenders and their agents report information on how they use collateral. See, e.g., Better Markets Letter, at 7–8. (commenter stating support for requiring disclosure regarding the type of collateral); See Sharegain Letter, at 3 (stating that “[c]ollateral information is essential to understanding fees—e.g., a loan collateralized with equities would typically command a higher fee than a loan collateralized with US treasuries”); see also IHS Markit Letter, at 6–7 (recommending that proposed data elements include reporting of a “trade reference” and “lending agent trade indicator”).

³⁶⁴ See proposed Rule 10c–1(f).

³⁶⁵ See proposed Rule 10c–1(b). See also Proposing Release, 86 FR 69813. This is done in order to allow an RNSA the necessary flexibility to propose and implement rules regarding the format and manner with respect to the collection of information. One commenter stated that the proposed rule does not “provide any details as to the format of such data, whether it would be presented loan-by-loan, the manner in which rates would be presented, whether the loan had its inception as an open-ended loan or a term loan, whether the loan was the subject of a portfolio-based auction, or whether it was part of a conduit lending program.” See Sharegain Letter, at 3. Consistent with the Proposing Release, the Commission is not specifying the details as to the format of the required data, the manner in which rates would be presented, or other detailed information requested, to give an RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly, provided they are consistent with the final rule as adopted as well as other requirements of the Exchange Act applicable to an RNSA. See, e.g., Proposing Release, 86 FR 69816 n.104.

³⁶⁶ See Proposing Release, 86 FR 69813–14, 69851–52 (describing each of the proposed transaction data elements).

³⁶⁷ See Proposing Release, 86 FR 69813.

³⁶⁸ See Proposing Release, 86 FR 69814.

³⁶⁹ See Proposing Release, 86 FR 69813. As stated by the Commission in the Proposing Release, “[p]aragraphs (1) and (2) of proposed Rule 10c–1 identify the particular security being lent. Paragraph (1) is designed to provide information on the issuer, and paragraph (2) is designed to provide information on the particular security. These paragraphs are designed to be flexible and comprehensive so that every security that can be loaned is able to be identified. In particular, with respect to paragraph (b)(1), the Commission preliminarily believes that an issuer that lacks an LEI would have a legal name. With respect to paragraph (b)(2), the Commission preliminarily believes that securities usually would have at least one of the items listed assigned to it. If not, the RNSA could require an “other identifier” for further flexibility under paragraph (2).” *Id.*

³⁷⁰ See Proposing Release, 86 FR 69814. In proposing the data element in paragraph (b)(6) “the amount of the security loaned”—the Commission did not specify the parameters of “the amount of the security” in order to allow an RNSA flexibility to propose rules that identify, for different types of securities, what information constitutes the “amount of the security.”

³⁷¹ See Proposing Release, 86 FR 69814.

identify trends and any anomalous market patterns.³⁷²

Final Rule

The Commission sought comment with respect to each of the proposed transaction data elements.³⁷³ In response, commenters were generally supportive of the Commission's stated goals of increasing transparency and price discovery in the securities lending market by increasing the amount and availability of data in the market.³⁷⁴ For example, one commenter stated in support of the proposed rule that, "certain data elements [should be made] publicly available, thereby increasing transparency of the securities lending market and reducing competitive advantages that may exist in the marketplace."³⁷⁵ Another commenter also stated in support that the proposed public dissemination of securities lending information will, among other things, improve price discovery in the securities lending market, reduce information asymmetries, close data gaps, and increase market efficiency.³⁷⁶ Another commenter stated that, "Proposed Rule 10c-1 represents a properly-tailored way to bring more transparency to this dark area of the market."³⁷⁷ According to this commenter, "[t]he Proposal would establish a system for the reporting and dissemination of the material terms of

securities lending transactions without attribution, providing issuers, investors, and regulators the necessary data . . . while protecting the identity and intellectual property of any individual market participant."³⁷⁸ Another commenter expressed support for the proposed rule's inclusion of standards as part of the proposed data elements to be reported, as well as the Commission's efforts to include the LEI in the data elements for the identification of issuers and parties to a lending transaction.³⁷⁹ Another commenter supported the proposal allowing a choice in use of identifiers, such as the [FIGI], as a possible required data element to be collected and disseminated by an RNSA.³⁸⁰ Another commenter, in response to the Commission's specific request for comment, stated that retail investors/borrowers without LEIs should not be required to obtain a LEI as "[r]egulators can easily identify who we are by going to our brokers."³⁸¹ Another commenter suggested that the Commission should modify the proposal to require "lending agent" be a reported field (instead of requiring the lender's LEI to be disclosed) "to avoid

the potentially confusing appearance of tens or even hundreds of individual loans that are, in reality, part of the same overall loan transaction negotiated between a borrower and a lending agent or third-party intermediary on behalf of the underlying lender(s) for an aggregate notional amount."³⁸²

With regard to the proposed "rebate rate or any other fee or charges" data element for cash collateralized loans,³⁸³ several commenters pointed out that the relevant data point is actually the lending spread to the reference rate (most commonly the Overnight Bank Funding Rate or "OBFR") as the rebate rate will change daily based on the current level of the reference rate, even as the negotiated lending spread remains fixed.³⁸⁴ Thus, commenters requested that the Commission clarify (where applicable) that pricing data may be reported as a spread to a benchmark rate and, as discussed below in Part F.2, that such pricing data element does not need to be updated for changes in the value of the benchmark rate.³⁸⁵

Another commenter expressed concern that fee and rebate data could be misleading in the absence of additional contextual information, stating that "[f]ee/rebate data, without consideration of firm(s) collateral requirements, counterparty/asset exposure(s), applied lending restrictions or jurisdictional obligations, may create an unrealistic and misleading portrayal

³⁷² NYSE Letter 1, at 1–2.

³⁷³ See Letter from Stephen Wolf, CEO, Global Legal Entity Identifier Foundation, at 3 (stating that the Commission and an RNSA may benefit from the data that accompanies an LEI, *i.e.*, company legal name can be retrieved automatically or verified from a LEI record).

³⁷⁴ See Bloomberg L.P. Letter, at 1; *see also* HMA Letter, at 9 (agreeing with using publicly available methods to identify financial instruments beyond CUSIPs). Consistent with the proposed rule, the data elements required in paragraphs (b)(1) and (b)(2) of the proposed rule are designed to be flexible as well as comprehensive so that every loaned security is able to be identified. *See* Proposing Release, 86 FR 69813. In the Proposing Release, the Commission stated with respect to paragraph (b)(1), that it "preliminarily believes that an issuer that lacks an LEI would have a legal name. With respect to paragraph (b)(2), the Commission preliminarily believes that securities usually would have at least one of the items listed assigned to it. If not, the RNSA could require an "other identifier" for further flexibility under paragraph (2)." *See* Proposing Release, 86 FR 69813. Thus, consistent with the Proposing Release, the Commission is not determining whether and how all of the items in paragraph (c)(2) in the final rule must be reported, to give an RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly, provided they are consistent with the final rule as adopted as well as other requirements of the Exchange Act applicable to an RNSA. *See id.*

³⁷⁵ See James J. Angel Letter, at 7 (expressing strong support for the proposed rule but encouraged the Commission not to micromanage the contractual terms between the reporting agents and an RNSA). As this commenter explained, "let FINRA work out the details, as they have the experience, resources, and capability to do a good job and the flexibility to update terms based on experience." *Id.* at 7. In response, the final rule, as modified to streamline and clarify rule text, and the modifications to update or modernize the reporting requirements as needed are responsive to the commenter.

³⁷⁶ *See, e.g.*, BlackRock Letter, at 3–4; *see also* FIF Letter, at 9 (stating that reporting an LEI is duplicative and likely not useful).

³⁷⁷ *See* proposed Rule 10c-1(b)(9).

³⁷⁸ *See* ICI Letter 1, at 5 n.19 (providing this as another example of how the SEC's understanding of the securities lending market structure appears to be inaccurate); *see also* BlackRock Letter, at 2 (recommending that, to improve the transaction level data collected, the transaction record for cash collateralized loans should include the name of the reference rate used and the spread to that reference rate instead of reporting the rebate rate). According to this commenter, while there is a market convention of using the OBFR as the reference rate, this is a negotiable term between the parties to the lending transaction. *See id.* Moreover, according to this commenter, the price negotiation centers on the spread to that reference rate, not the rebate, and the rebate will fluctuate daily as the reference rate value changes. *See id.* *See also* MFA Letter 3, at 5 (recommending that the SEC pare back several of the granular reporting elements that would be difficult to apply and/or misleading, such as pricing, stating that "the Proposed Securities Lending Rule's requirements, for example, requires the rebate rate to be reported in the pricing field, even though the rebate rate will fluctuate potentially daily, as the reference rate—typically the OBFR—changes, and as such would be subject to frequent amendment that could be confusing to market participants").

³⁷⁹ *See, e.g.*, BlackRock Letter, at 2; RMA Letter, at 4; *see also* FIF Letter, at 9 (stating that "[f]or securities loans that are priced based on a spread to a benchmark, the Commission should provide reporting parties the option to report pricing by reference to the benchmark and the spread").

³⁷² *See* Proposing Release, 86 FR 69814. Additionally, the Commission explained that the data element in proposed paragraph (b)(11), regarding termination date, is intended to provide market participants with an understanding of the potential future demand and supply of securities; whereas proposed paragraph (b)(12), which requires the borrower type for each transaction, is intended to provide context for evaluating, and also enhance the transparency provided by, the other data elements.

³⁷³ The language "transaction data elements" in proposed Rule 10c-1(b) has been revised to "covered securities loan data elements" in final Rule 10c-1a(c) to be consistent with the use of the newly defined term "covered securities loan," to which the elements refer, in the final rule.

³⁷⁴ *See, e.g.*, SBAI Letter, at 1 (agreeing with the Commission's assessment of the important role of the securities lending market, as well as supporting the Commission's objective to increase transparency in this area).

³⁷⁵ Nasdaq Letter, at 3.

³⁷⁶ *See* FINRA Letter, at 1 (stating that the proposed rule will provide the Commission and other regulators with data that would be used for important regulatory, *i.e.*, monitoring and surveillance, functions); *see also* AFREF Letter 1, at 1, 3 (stating "[t]here is an urgent need to require securities lenders to provide greater details of their loans to an RNSA as outlined by the proposed changes to Rule 10c-1 . . . market participants and regulators alike will greatly benefit from the greater transparency that comes from reporting every securities lending transaction as a result of the proposed changes to Rule 10c-1").

³⁷⁷ Letter from Hope M. Jarkowski, General Counsel, NYSE Group, Inc. (Jan. 6, 2022) ("NYSE Letter 1"), at 2.

of prevailing rates.”³⁸⁶ The final rule requires pricing information in 17 CFR 240.10c–1a(c)(8) (“final Rule 10c–1a(c)(8)”) and 17 CFR 240.10c–1a(c)(9) (“final Rule 10c–1a(c)(9)”) because pricing is a material term of a covered securities loan. Further, paragraph (g)(5) of the final rule requires that an RNSA will make a distribution of loan rates for each reportable security publicly available to help market participants compare the pricing of their covered securities loan against the pricing of other covered securities loans. Information about the distribution of loan rates recognizes that the cost-to-borrow securities can be influenced by a number of factors and can give market participants information to help compare the pricing of their loan against other loans. Another commenter requested clarification that only one identifier for a security is required to be reported under the rule (*i.e.*, ticker or ISIN or CUSIP or FIGI) rather than all of them.³⁸⁷ The final rule permits a covered person to determine which identifier to report, or if it prefers, it may also report multiple identifiers, but one identifier is required to be reported. Further, the final rule also permits the covered person to report a different identifier than the ticker symbol, ISIN, CUSIP, or FIGI. In addition, this commenter requested further clarification on what type of system would represent a “platform or venue” for purposes of proposed paragraph (b)(5).³⁸⁸ The final rule does not specify

what type of systems are a “platform or venue” for purposes of the data elements required to be reported under 17 CFR 240.10c–1a(c)(5) (“final Rule 10c–1a(c)(5)”). The terms are intended to capture a wide variety of potential vehicles that covered persons might use to transact securities loans. Further, an RNSA has discretion to determine, pursuant to rules that would be subject to the section 19(b) and Rule 19b–4 process, whether to categorize such vehicles (*e.g.*, on-line venue, exchange, OTC).

Many commenters suggested that the proposed transaction-by-transaction reporting requirement be replaced with an aggregated-only requirement (*i.e.*, with some of the commenters wanting both the reporting and publishing of the data elements to be on an aggregated basis only, while other commenters were supportive of reporting to an RNSA on a transaction-by-transaction basis, but then any dissemination to the public must be made by an RNSA on an aggregated-only basis).³⁸⁹ For instance, one commenter recommended “transaction-by-transaction data be

reported to an RNSA and made available to regulators, but that the RNSA analyze and normalize the reported transaction data to provide aggregated and, where appropriate, averaged transaction terms that do not expose firm and customer investment strategies, and that better reflect the transaction terms available to lenders and borrowers in the securities lending market.”³⁹⁰ Another commenter stated that the Commission should narrow the scope of transaction data information to be reported to an RNSA (and thereafter made public by an RNSA) to only aggregated transaction data.³⁹¹ Some of the comments appeared to be focused on an RNSA’s publication or dissemination obligations when they stated that the final rule should require an RNSA to publish aggregated pricing and volume data (rather than transaction-by-transaction data).³⁹² However, this was not always clear as many of the comments received were less specific in that their comments on aggregated disclosure were phrased in reference to the proposed rule’s reporting requirement³⁹³ or “reveal short selling trading strategies”³⁹⁴ or disclosing all individual customer short selling positions on a transaction-by-transaction basis.³⁹⁵

The requirements in paragraph (b) of final Rule 10c–1a are limited in scope to the reporting agent’s obligation to provide certain specified data elements to an RNSA on behalf of a covered person. As such, the discussion in this part is limited to the reporting agent’s provision of the Rule 10c–1a information directly and solely to an RNSA, which does not involve or require any public disclosure or public dissemination of such information. By contrast, the dissemination or disclosure of the required information is the obligation of an RNSA, and paragraph (g) of the final rule, and Part VII.] below, discuss an RNSA’s responsibilities with respect to disseminating certain Rule 10c–1a information to the public.

After considering the comments received recommending that the final rule require only aggregated pricing and volume data to be publicly disclosed (discussed below in Part VII.J), the

³⁸⁶ Letter from Adrian Dale, Head of Regulation, Digital & Market Practice, ISLA (Jan 7, 2022) (“ISLA Letter”), at 2 (suggesting that such fee/rebate data could not be relied upon to support price discovery in the same manner as other markets).

³⁸⁷ See, *e.g.*, FIF Letter, at 9. Consistent with the Proposing Release, paragraph (b)(2) in the final rule states, “securities usually will have at least one of the items listed assigned to it. If not, the RNSA will be able to require an ‘other identifier’ for further flexibility under paragraph (2).” See Proposing Release, 86 FR 69813. As such, the Commission is not providing further details concerning the required data elements in order to give an RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly, provided they are consistent with the rule as adopted as well as other requirements of the Exchange Act applicable to an RNSA. See also *supra* notes 369 and 380. See Letter from Robert Toomey, Head of Capital Markets, Managing Director & Associate General Counsel, SIFMA (May 15, 2023) (“SIFMA Letter 3”), at 4–5 (stating that “[m]any of the granular reporting elements for securities loan transactions proposed by the SEC are not applicable to short positions, or do not apply to short positions in the same way as they apply to securities loans, and would necessarily lead to incomplete, inaccurate, and misleading data (*e.g.*, percentage of collateral to value of loaned securities required to secure the loan, type of collateral, and lending fee/rebate fee)).

³⁸⁸ See FIF Letter, at 10 (stating that FIF members request further clarification on what type of system would represent “a platform or venue” for purposes of proposed paragraph (b)(5)’s data element).

³⁸⁹ Although it seems as though the terms “reporting” and “dissemination” (or “disclosure”) are used interchangeably by some of the commenters, there appears to be agreement by commenters that it is the public disclosure of the data elements by an RNSA that should be required on an aggregated-only basis (rather than requiring disclosure on a transaction-by-transaction basis). See, *e.g.*, ICI Letter 1, at 11 (although the commenter states, for confidentiality reasons, that the Commission should only require “reporting” on an aggregated basis at the end of the day (and to avoid front running risks and other predatory trading practices), from the context of the letter, it appears to be the case that concern is focused on information being disclosed to the public/market); SBAI Letter, at 2; AIMA Letter 1, at 5; RMA Letter, at 18; See also Letter from Matthew R. Cohen, CEO, Provable Markets LLC (Jan. 7, 2022) (“PM Letter 2”) (while highly supportive of the proposal’s objective to increase transparency of information available to brokers, dealers, and investors, commenter expressed concerns that the Commission carefully consider and describe the context of the information provided publicly to the market, and the underlying benefits of each category published to the proposed consolidated tape (similar reproduction of data) to the market). However, one group of commenters disfavored any public dissemination of information (*i.e.*, before a study of the collected data are conducted by the Commission and the Commission consults stakeholders before making any determinations about the specifics of a public dissemination regime) and stated the concern that the “proposals could compromise the [rule’s] objectives by revealing sensitive and potentially misleading information to the public . . . [and that the Commission should] adopt an approach that requires reporting solely for regulatory purposes.” See Letter from Members of the U.S. House of Representatives Frank D. Lucas, David Scott, Blaine Luetkemeyer, Bill Foster, Glenn “GT” Thompson, Alma S. Adams, Ph.D., Bill Huizenga, Vicente Gonzalez, Andy Barr, Josh Gottheimer, Ann Wagner, Wiley Nickel, and Bryan Steil (July 12, 2023) (“Letter from Representative Lucas, et al.”), at 1. See *infra* Part VIII regarding the implementation period for the final rule.

³⁹⁰ See SIFMA Letter 2, at 4.

³⁹¹ See SIFMA AMG Letter, at 6–7.

³⁹² See, *e.g.*, RMA Letter, at 4; IIB Letter, at 10; EBF Letter, at 2 (commenters use the terms “public dissemination” or “publicly disseminating” when referring to aggregated information or transaction data).

³⁹³ See generally Letter from Jennifer Han, Executive Vice President, Chief Counsel & Head of Regulatory Affairs, Managed Funds Association (Apr. 1, 2022) (“MFA Letter 2”).

³⁹⁴ See SIFMA AMG Letter, at 7.

³⁹⁵ See CCMR Letter, at 5.

Commission has determined not to modify the proposed transaction-by-transaction reporting requirement with respect to the provision of Rule 10c-1a information to an RNSA. Such a modification to paragraph (c) of the final rule is unnecessary because the requirement involves reporting of the information directly and only to an RNSA (and not to the public). As such, the reporting requirement does not present the concerns raised by commenters that would warrant requiring the reporting of the data elements on an aggregated-only basis, as was suggested by some commenters.³⁹⁶ Likewise, another commenter suggested that, to decrease the likelihood that published data will be potentially misleading or confusing or that it could reveal short trading strategies that could prompt short sellers to exit the market, the Commission should adjust the information that is made publicly available by an RNSA to be only aggregated securities lending data, including, among other things, a volume-weighted average borrowing fee aggregated across all firms, for each security loaned.³⁹⁷ Similarly, for the same aforementioned reasons, it is unlikely that providing data information directly and solely to an RNSA will reveal such short trading strategies or mislead or confuse the public to warrant such a modification to the final rule. Instead, because paragraph (c) of the final rule only requires the reporting of information to an RNSA (rather than to disclose the information to the public), the risk of revealing short trading strategies or confusing the public is not applicable. Moreover, an RNSA's responsibilities with respect to the subsequent publication of certain Rule 10c-1a information are subject to the requirements and limitations set forth in paragraph (g) of the final rule,³⁹⁸ which are discussed below, in Part VII.J.³⁹⁹

³⁹⁶ See *infra* Part VII.J, for discussion regarding the responsibilities of an RNSA with respect to the dissemination of certain Rule 10c-1a information (particularly with respect to the amount, such as size, volume, or both of the reportable securities loaned) that an RNSA receives.

³⁹⁷ See SIFMA Letter 1, at 18–19. The commenter further stated that it does not object to the proposal to report by the end of the day information on “securities on loan.” See *id.*

³⁹⁸ See final Rule 10c-1a(g).

³⁹⁹ Some commenters stated that requiring public disclosure of securities lending activity on a transaction-by-transaction basis, especially within the proposed 15-minute timeframe, would reduce overall short selling activity by inhibiting and increasing the cost of building short positions and, thus, negatively affect market liquidity and pricing efficiency (*i.e.*, by making it more costly to build short positions and thus inhibit market participants from doing so). See, *e.g.*, SIFMA AMG Letter, at 5–7; see also CCMR Letter, at 5 (stating the disclosure of such activity would increase the costs associated

Thus, the Commission is adopting the proposed requirement to report Rule 10c-1a information, on a transaction-by-transaction basis, directly and solely to an RNSA.⁴⁰⁰

In addition, the Commission is adopting, essentially unchanged, the twelve data elements originally set forth in paragraphs (b)(1) through (b)(12) in the proposed rule, except the Commission is making the following non-substantive changes to the language of some of the proposed data elements.⁴⁰¹ Specifically, the Commission is modifying the language of the “the amount of the security loaned” data element in paragraph (b)(6) of the proposed rule (*i.e.*, by adding the language “such as the size, volume, or both”) so that it instead reads, as adopted, “the amount, such as size, volume, or both, of the reportable securities loaned.”⁴⁰² This change will help ensure the compliance and accuracy of the Rule 10c-1a information submissions to an RNSA, by specifying in the final rule that the term “amount” means “size, volume, or both.”⁴⁰³

with establishing a short position through information leakage and slippage; or lead to copycat short selling activity, which could also increase the cost to borrow the security due to increased demand or could facilitate “short squeezes”). However, as discussed above, modifying the required timeframe for reporting the data elements to an RNSA, and an RNSA's dissemination of such information to the public, as discussed below, in Part VII.J, should help to address the disclosure-related concerns raised by the commenters.

⁴⁰⁰ See also *infra* Part VII.J regarding the responsibilities of an RNSA, particularly with respect to the dissemination of Rule 10c-1a information (including with respect to the amount, such as size, volume, or both, of the reportable security loaned) an RNSA receives, keeping together in the release the various RNSA-related provisions.

⁴⁰¹ The proposed time periods for reporting the specified information to an RNSA are discussed below, in Part VII.G.

⁴⁰² With respect to the covered securities loan data element in paragraph (b)(6) of the final rule, the amount of the security loaned or borrowed, other than to add the clarifying language “such as size, volume, or both” the Commission is not “specifying the parameters of ‘the amount of the security’ to allow an RNSA flexibility to propose rules that identify for different types of securities what information constitutes the ‘amount of the security.’ For example, an RNSA could propose rules that require the number of shares be provided for equity securities and the par value of debt securities to accommodate differences in the markets for these securities.” See *Proposing Release*, 86 FR 69814.

⁴⁰³ See final Rule 10c-1a(c)(6) (requiring reporting of “the amount, such as size, volume, or both, of the reportable security loaned.”). Modifying this loan data element to clarify that the “amount” means “size, volume, or both” helps to address the concern raised by a commenter that had suggested a “unit” field to accompany the proposed “amount” data element in paragraph (b)(6) of the proposed rule so as to allow the “amount” to be defined “unambiguously as a quantity, a notional value or similar as appropriate.” See Letter from Jim Kaye, Americas Regional Director, FIX Trading

The Commission also is modifying proposed paragraph (b)(6) by changing “security” to “securities” (thus, making it plural, consistent with the term “securities” in paragraph (b)(10)); and, also modifying both proposed paragraphs (b)(6) and (b)(10) by adding the term “reportable” to each, so that they are both consistent with the final rule's newly defined term, “reportable securities.” The Commission also is modifying language in proposed paragraph (b)(1) by changing the term “active LEI” to “non-lapsed LEI” for accuracy (*i.e.*, by focusing more precisely on the status of the application for the LEI-indicator, rather than on the entity itself).⁴⁰⁴ The Commission has modified proposed paragraph (b)(2) by providing the full names of specified security identifiers and retaining the corresponding abbreviations within a parenthetical with quotes to 17 CFR 240.10c-1a(c)(2) (“final Rule 10c-1a(c)(2)”).

The required pricing data, “[f]or a loan collateralized by cash, the rebate rate or any other fee or charges,” in paragraph (c)(8) of the final rule generally should include when the pricing data element is negotiated or agreed-to as a spread to an identified benchmark or reference rate.⁴⁰⁵ The Commission recognizes that the pricing data element is a material term of the loan that is often negotiated or agreed to between the parties. Consistent with paragraph (b)(9) of the proposed rule, as well as the final rule, this benchmark type of pricing, as described by the commenter, will be captured by the final rule text language “the rebate rate or any other fee or charges.”⁴⁰⁶ For the aforementioned reasons, negotiated or agreed-to pricing data, including as a spread to an identified benchmark or reference rate, is required to be reported to an RNSA pursuant to the rule as adopted.⁴⁰⁷ This requirement should generally help to address commenters' concerns that may stem from an overly narrow application of the pricing data element in paragraph (b)(9) of the

Community (Jan. 4, 2022) (“FIX Trading Letter”), at 2 (requesting further clarification on and the use of common standards for details of the data to be published, similar to the technical standards used by ESMA and SFTR, and a “security id” filed to accompany “security identifier” as certain crypto assets do not have ISINs so the list of eligible securities identifier types needs to allow for this, *i.e.*, support ISO standards for digital token identifiers).

⁴⁰⁴ See 17 CFR 240.10c-1a(c)(1) (“final Rule 10c-1a(c)(1)”).

⁴⁰⁵ See proposed Rule 10c-1(b)(9).

⁴⁰⁶ See final Rule 10c-1a(c)(8).

⁴⁰⁷ See final Rule 10c-1a(c)(8).

proposed rule.⁴⁰⁸ However, because there are various pricing terms or arrangements that can be negotiated or agreed to by parties to a securities loan, the final rule does not specify or endorse one particular pricing method over another and, thus, is adopting the sufficiently broad pricing data element rule text for purposes of the final rule without modification from the proposed rule text.⁴⁰⁹ An RNSA, nevertheless, could address in its rules details regarding the manner in which pricing data must be reported, such as further clarifying how lending cost information is to be reported. As such, an RNSA has the necessary flexibility and discretion to structure its systems and processes as it determines, consistent with its obligations under the final rule as well as other applicable provisions of the Exchange Act.

2. Loan Modification Data Elements—Rule 10c–1a(d)

Proposed Rule

Subject to terms agreed to by the parties, covered securities loans may be modified after they are made. To ensure that the loan data elements reported pursuant to proposed Rule 10c–1(b) would accurately reflect currently outstanding covered securities loans and to prevent evasion, proposed Rule 10c–1(c) required that certain loan modification data elements be provided to an RNSA within 15 minutes after each loan is modified if the modification resulted in a change to information required to be provided to an RNSA under paragraph (b) of the proposed rule (and then for an RNSA to make such information available to the public as soon as practicable).⁴¹⁰ More specifically, the proposed loan modification data elements in paragraphs (c)(1) through (c)(3) of the proposed rule required the following data elements to be provided to an RNSA: (1) the date and time of the modification; (2) a description of the modification; and (3) the unique transaction identifier of the original loan.⁴¹¹

In the Proposing Release, the Commission explained that it preliminarily believed the proposed

loan modification data elements in proposed paragraph (c) are necessary to allow an RNSA to identify which loan was being modified, categorize the type of modification, and make information about the modification publicly available.⁴¹² In addition, as proposed, the requirement to provide the loan modification information to an RNSA was conditioned on the modification resulting in a change to the Rule 10c–1 information required to be provided to an RNSA under paragraph (b) of the proposed rule.⁴¹³

Final Rule

The Commission is adopting the loan modification data elements substantially as proposed.⁴¹⁴ However, the final rule includes a change to the loan modification data elements requirement in response to commenters.⁴¹⁵ Other commenters sought clarification as to when loan modifications should be reported, which is discussed below. In addition, the final rule has been modified to address comments regarding loans that pre-exist the reporting date.

Paragraphs (d)(1)(i) through (iii) of the final rule set forth the data elements that a covered person must report by the end of the day on which a covered securities loan is modified. Paragraph (d)(1)(i) requires covered persons to report “[t]he date and time of the modification;” paragraph (d)(1)(ii) requires covered persons to report “[t]he specific

modification and the specific data element in paragraph (c) of this section being modified; and paragraph (d)(1)(iii) requires the covered person to report “[t]he unique identifier assigned to the original covered securities loan under paragraphs (g)(1) or (g)(3) of this section.”⁴¹⁶

With respect to paragraph (d)(1)(ii), to help ensure the provision of relevant and useful loan modification reports to an RNSA, the Commission has revised this loan modification data element from the proposed requirement by removing the phrase “[a] description of” and, instead, adding both “the specific modification” as well as “and specific data element in paragraph (c) being modified” (*i.e.*, with respect to the loan modification data element being reported to an RNSA). The revised language “the specific modification” makes explicit that the actual modification must be reported (*e.g.*, the amount of the security loaned increased by 200 shares), not a vague description of the modification (*e.g.*, the amount of the security loaned was increased). The Commission is making this change because it will result in the collection of more accurate and useful information concerning the modification being reported. The Commission is also modifying paragraph (d)(1)(iii) to require the reporting of a previously assigned unique identifier whether assigned at the time of execution of the loan, or, with respect to a pre-existing securities loan as discussed below in this section, at the time of the modification. As a result, the Commission is adopting paragraph (d)(1)(iii) of the final rule, with a slight modification from the proposal such that the rule text of (d)(1)(iii) will require the unique identifier assigned to the original covered securities loan under paragraphs (g)(1) or (g)(3) of this section.”⁴¹⁷

The Commission also received comment seeking clarity regarding how to report various modifications to a loan.⁴¹⁸ Other commenters who discussed the loan modification data elements discussed the different types of modifications that can occur frequently throughout the day,⁴¹⁹ or

⁴¹² See Proposing Release, 86 FR 69815.

⁴¹³ See Proposing Release, 86 FR 69815.

Consistent with the Proposing Release, an example of a modification that will trigger a reporting requirement under paragraph (d) of the final rule includes: the termination of an open-ended loan that results in a reduction of the quantity of the securities initially provided to an RNSA for that loan under paragraph (c)(6)’s data element—*i.e.*, amount of the security loaned. See also Proposing Release, 86 FR 69815. An example of a modification that will not trigger the loan modification data element reporting requirement in paragraph (d) of the final rule is if a borrower posts additional collateral in response to an increase in the value of the loaned securities. *Id.* Under such circumstance, information about this change will not be required to be reported under paragraph (d) because, while paragraph (c)(11) requires the covered person to provide the percentage of collateral to value of loaned securities required to secure such loan, it does not require information about the value of collateral posted in dollar terms. See also *id.* at n.96.

⁴¹⁴ See 17 CFR 240.10c–1a(d)(1)(i) (“final Rule 10c–1a(d)(1)(i)”); 17 CFR 240.10c–1a(d)(1)(ii) (“final Rule 10c–1a(d)(1)(ii)”); 17 CFR 240.10c–1a(d)(1)(iii) (“final Rule 10c–1a(d)(1)(iii)”).

⁴¹⁵ The Commission also received comments that relate to the two loan modification data elements in paragraphs (d)(1)(i) and (d)(1)(iii) of the final rule. These comments are addressed separately below, in Parts VII.G.2 and VII.J, with respect to the timing modifications to paragraph (d) in the proposed rule, and regarding an RNSA’s obligations with respect to assigning the unique identifiers in compliance with the final rule.

⁴¹⁶ See final Rules 10c–1a(d)(1)(i) and (d)(1)(iii).

⁴¹⁷ See final Rules 10c–1a(d)(1)(i) and (d)(1)(iii).

⁴¹⁸ See FIX Trading Letter, at 3. The commenter provided hypotheticals, including: (1) as a result of a corporate action, a loan is closed and two or more loans are created; (2) a consolidation of multiple loans with the same counterparty and for the same security into one loan; and (3) the splitting of a single loan into multiple loans where the lender requires the return of some of the shares.

⁴¹⁹ Comments received by the Commission that focus primarily on the proposed 15-minute timing

⁴⁰⁸ See *supra* note 385 (citing commenters who requested that the Commission clarify, where applicable, that pricing data may be reported as a spread to a benchmark rate).

⁴⁰⁹ See *supra* note 385 and accompanying text (commenters requesting the Commission to clarify, where applicable, that pricing data may be reported as a spread to a benchmark rate, and that such pricing does not need to be updated for changes in the value of the benchmark rate).

⁴¹⁰ See proposed Rule 10c–1(c).

⁴¹¹ Proposed Rule 10c–1(c).

sought further information on what types of modifications would likely trigger a loan modification reporting obligation under the final rule.⁴²⁰ One commenter stated that, in the context of cash collateralized loans, the rebate will fluctuate daily as the reference rate value changes, but suggested that loans where the selected reference rate and spread to that reference rate do not change should be deemed out of scope of the required loan modification reporting.⁴²¹ As an example, this commenter stated that, where a loan is collateralized by cash and the negotiated pricing data element is a spread to a benchmark rate, such pricing does not need to be updated for changes in the value of the benchmark rate (*i.e.*, not a reportable loan modification for purposes of the final rule).⁴²² The same commenter stated more generally that certain modifications to loan information that has already been provided to an RNSA pursuant to proposed Rule 10c–1 should not be required to be provided to an RNSA, claiming that could make data that was already made public potentially misleading.⁴²³ As discussed above, in Part VII.F.1, the pricing data elements required to be reported by paragraph (c)(8) include benchmark pricing, such as a reference to the OBFR in a manner determined by an RNSA. Paragraph (d) of the final rule, requiring reporting of modifications to a paragraph (c) data element, including pricing in paragraph (c)(8), will also capture benchmark pricing. The extent to which the commenter's concern is realized will be

requirement for reporting required loan modification information—including commenters' recommendations with respect to the final rule's timing requirement—are discussed separately, below, in Part VII.G.1.

⁴²⁰ See, *e.g.*, Pirum Letter, at 2 (discussing that for modifications to previously reported loan transactions, a significant number of these will typically happen in “batch” processes at specific times throughout the day, stating one of the most common modifications is the daily marked-to-market exercise whereby the price of the loan (loan value and required collateral value) and potentially the associated collateral amounts are adjusted to reflect market value changes in the underlying security on loan).

⁴²¹ See BlackRock Letter, at 2.

⁴²² See BlackRock Letter, at 2.

⁴²³ See BlackRock Letter, at 7. According to this commenter, open loans are commonly marked-to-market to the closing price of the relevant security from the previous business day, plus margin and rounding. See *id.* As a result, the actual modification of open loans tends to happen across all positions the next day and at relatively common times across the market. See *id.* The Commission recognizes that, subject to terms agreed to by the parties, covered securities loans may be modified after they are made or are often not finalized until the end of the day. The end-of-day timing modifications to the final rule, as discussed below, in Part VII.G, will help to reduce these concerns raised by the commenters.

determined by how an RNSA chooses to structure the reporting of this variable. For instance, if an RNSA chooses to allow market participants to report a spread and a benchmark, then no modifications will be required to be reported from day to day unless there were a change in the negotiated spread or benchmark. However, if an RNSA chooses to require market participants to report the total fee, then market participants will be required to report changes to the fee if the benchmark changes, which can require daily revisions.⁴²⁴ However, the Commission does not expect that this will cause confusion. The Commission understands that market participants know that rebates can change regularly and, thus, revisions would not be unexpected. Further, gathering loan modification data is important to facilitate the accurate computation of statistics regarding the cost to borrow by an RNSA and other market participants.

One commenter suggested that the termination of a loan should be reported based on the return of securities by the borrower.⁴²⁵ Under the final rule, if a borrower returns a portion of loaned shares, the reduction in the amount of shares remaining on loan will be reported as a modification.⁴²⁶ Similarly, under the final rule, a termination of a covered securities loan is a modification for which information, including the termination date and the reduction of the loaned shares (if any), is required to be reported to an RNSA.⁴²⁷

Events such as consolidations and splitting of loans are required to be

reported. A consolidation would be reported as the termination (and therefore modification) of existing loans and entry into a new loan, including the reporting of all required data elements for those modifications and for the new loan. Similarly, the splitting of an existing loan into separate loans could be reported as a modification and termination of the original loan and entry into multiple separate loans.⁴²⁸ However, that there may be certain life-cycle events in the course of an open-ended loan that some market participants may view as a modification to an existing loan that other market participants might view as a termination of an existing loan and the entry into a new loan. For example, when all outstanding loaned securities are returned to the lender and additional (or the same) shares are subsequently lent under an open-ended loan, one lender may view that event as a termination (and therefore a modification) of an existing loan and a creation of a new loan, whereas another lender may view a similar transaction as two modifications (the return of, and subsequent loan of, securities under the same open-ended loan). In such cases, the lender (or lending agent or reporting agent) may elect to report the required information as either a modification (and termination), or as two modifications to an open-ended loan.

Reporting of Data Elements for Pre-Existing Securities Loans

The Commission also received comment seeking clarification on what some commenters called day-one loans, or loans that are agreed to prior to the reporting date of the final rule.⁴²⁹ One commenter described the day-one problem and stated, “we suggest the Commission find a solution to ensure these loans do not go unreported under a new reporting regime.”⁴³⁰ Other commenters stated that the Commission

⁴²⁸ In addition, to help reduce concerns about potential confusion and misinterpretation of the data, an RNSA could determine to develop methodologies to identify events as a consolidation or the splitting of existing covered securities loans.

⁴²⁹ See BlackRock Letter, at 3, 9; AIMA Letter 1, at 5; ICI Letter 1, at 13 n.45 (stating that, given the difficulties the EU faced with “day one” issue regarding implementation of SFTR, ICI recommends that the SEC or FINRA provide clarity regarding applicability of any final rule to securities loans that are outstanding on the rule's implementation date); FIX Trading Letter, at 3 (stating “It is not clear how the rule handles loans created prior to the rule coming into effect but modified after the rule comes into effect We recommend some wording be added to the rule to clarify a) whether loans already in existence prior to the rule coming into effect need to be reported, b) how modifications should be handled for such loans.”).

⁴³⁰ AIMA Letter 1, at 5.

⁴²⁴ See *infra* Part IX.C.1 (discussing an RNSA's discretion with respect to benchmark pricing).

⁴²⁵ See FIF Letter, at 10 (stating “termination of a securities loan should be reported based on the return of securities by the borrower against the return of the collateral by the lender. The same approach as proposed for reporting new loans and loan terminations should apply for reporting loan modifications.”).

⁴²⁶ Under the final rule, a reduction (or increase) in the loan amount is required to be reported to an RNSA under paragraph (d) of the final rule as a modification to the loan amount in paragraph (c)(6). If the parties to the covered securities loan regard/treat the reduction as termination of the covered securities loan, that is also required to be reported to an RNSA under paragraph (d) of the final rule as a modification to the termination date of the covered securities loan in 17 CFR 240.10c–1a(c)(11) (“final Rule 10c–1a(c)(11)”). Moreover, if the parties to the covered securities loan terminate their loan and such termination involves a reduction in the loan size, this would qualify as a reportable modification under paragraph (d) of the final rule as a modification resulting in a change to the amount or size data element in paragraph (c)(6).

⁴²⁷ See also Proposing Release, 86 FR 69815 (stating “a termination of a loan would be a modification for which information would need to be provided to an RNSA . . . because the termination would result in a reduction of the quantity of securities initially provided to an RNSA for that loan under paragraph (b)(6)”).

should consider ways to report and identify such loans.⁴³¹

Certain commenters stated that many loans are open-ended and continuously modified,⁴³² and sought clarity regarding the treatment of loans in existence prior to the final rule's reporting date for covered persons that are subsequently modified, which commenters characterized as the day-one problem.⁴³³ For example, one commenter stated that the proposal does not consider a key implementation question regarding the day-one problem for reporting existing loans, specifically, that "most loans are open-ended without a set termination date. Accordingly, loans are continually resized and rerated until either the lender or the borrower recalls or returns all shares, respectively. Given the longevity of the average loan, there will be a substantial number of loans that exist prior to the implementation date of the reporting requirements, and such loans will likely continue to be modified as long as they remain outstanding."⁴³⁴ This commenter provided three possible paths for handling such day-one loans: "(1) report each loan the first time it is modified after the implementation date as if it were a new loan, (2) provide all existing loans with an identifier on the day of implementation, or (3) exclude all existing loans from all reporting obligations, including reporting of modifications made to those loans after implementation date."⁴³⁵

The commenter's first alternative for reporting each "day-one" loan the first time it is modified provides an appropriate means of on-boarding data for such loans, as discussed below.⁴³⁶

⁴³¹ See, e.g., Letter from JD Cumpson (Mar. 14, 2022), at 1 (stating "[t]his should be required to be back-dated for all current lending; no hidden 'legacy' deals that are underreported"); BlackRock Letter, at 3 (stating "the Commission should consider ways to report and identify open securities loans initiated before the first day any new requirements are effective; this is the 'day-one problem' . . . either the Commission or the designated RNSA will need to devise a solution for appropriately incorporating them into the data set").

⁴³² See, e.g., BlackRock Letter, at 9; AIMA Letter 1, at 5.

⁴³³ See, e.g., BlackRock Letter, at 9; AIMA Letter 1, at 5; ICI Letter 1, at 13.

⁴³⁴ BlackRock Letter, at 9.

⁴³⁵ BlackRock Letter, at 9.

⁴³⁶ See *infra* note 974 (stating that the Commission does not expect significant additional costs to result from this requirement as it is not expected to impact the need for reporting agents to develop and maintain systems for reporting securities lending information but will simply require the inclusion of some additional data transfers that occur largely around the reporting date. Since the cost of individual transmissions are expected to be small, this aspect of the final rule is expected to have a small impact on the

As discussed below, in Part IX.C.1, the lack of information about these loans would harm data quality because it would render the data less complete and would thus limit market participants' ability to determine conditions in the lending market. Accordingly, paragraph (d)(2) of the final rule provides that if a modification is made to a covered securities loan for which reporting under paragraph (a) of the final rule was not required on the date the loan was agreed to or last modified (a "pre-existing covered securities loan") and results in a change to any of the data elements in paragraph (c) of the final rule, there is an obligation to report each of the data elements in paragraph (c) of the final rule as of the date of the modification.⁴³⁷ Paragraph (d)(2) will provide a snap shot of a pre-existing covered securities loan the first time it is modified on or after the reporting date. If, for example, under the final rule, a pre-existing covered securities loan is first modified two months after the reporting date and the modification results in a change to a data element in paragraph (c) of the final rule, the covered person must provide each of the data elements under paragraph (c) to an RNSA, including the date and time the pre-existing covered securities loan was effected pursuant to 17 CFR 240.10c-1a(c)(3) ("final Rule 10c-1a(c)(3)") and 17 CFR 240.10c-1a(c)(4) ("final Rule 10c-1a(c)(4)"), which will indicate that this is a pre-existing covered securities loan. Reporting of the date and time that the pre-existing covered securities loan was originally effected will provide market participants and regulators with a more complete picture as to the duration of the outstanding loan that is being modified.

In addition to the date and time that the pre-existing covered securities loan was effected (*i.e.*, information in paragraphs (c)(3) and (c)(4)), the covered person must also provide information in paragraphs (c)(1), (c)(2), and (c)(5)

compliance costs of the final rule). See also *infra* note 1029 (The requirement to report information once a loan modification occurs after that loan qualifies for reporting will further support the benefits of the final rule, including reduced information asymmetries and enhanced price competition, by helping to ensure a level playing field during the earlier phases of implementation. This provision will prevent lenders, that have a higher number of long-term loans that did not initially qualify for final Rule 10c-1a reporting, from gaining a competitive advantage by being able to see the loans of other market participants without disclosing the terms of their own loans).

⁴³⁷ See final Rule 10c-1a(d)(2). This approach also responds to the various requests from commenters, including ICI and BlackRock, requesting that the SEC or FINRA provide clarity regarding the applicability of the final rule to day-one loans (*i.e.*, securities loans that are outstanding on implementation data).

through 17 CFR 240.10c-1a(c)(12) ("final Rule 10c-1a(c)(12)") as of the date of the modification. The date and time of the modification will provide market participants with specificity and context regarding the terms of the modifications, including the rates available for modification at that date and time (which may be different than rates available for new loans). Including the date and time will be important because it will indicate if a report of a modification is not filed in a timely fashion.

If, for example, a pre-existing covered securities loan is first modified, either on or after the reporting date, and it is a modification to the loan amount, the covered person will be required to report the number of shares as modified under paragraph (c)(6) of the final rule to an RNSA, as well as each of the other data elements in paragraph (c), including the date and time the pre-existing covered securities loan was effected, by the end of the day on which such loan was modified. In that same example, the date and time of the modification will be required to be reported. Recognizing that a unique identifier will not yet exist for the loan and no data about the loan was previously reported or made publicly available under the final rule, the data elements in (d)(1)(ii) and (d)(1)(iii) will not be required to be reported for such pre-existing covered securities loans.⁴³⁸ However, any subsequent modifications going forward will be subject to the modification reporting requirements under paragraph (d)(1) of the final rule such that only the information in paragraphs (d)(1)(i) through (iii) of paragraph (d) will be required to be reported to an RNSA. Pre-existing covered securities loans that do not have a modification to a data element in paragraph (c) will not be subject to the reporting obligation under paragraph (d)(2) of the final rule.⁴³⁹

The Commission is not adopting the commenter's alternative of requiring reporting of all pre-existing covered securities loans on the first reporting date. Such an alternative would result in costs and burdens for an RNSA to build out the capacity to handle a much larger number of reports on the first reporting date. The Commission is also not adopting the commenter's alternative of omitting all pre-existing covered securities loans, as the data regarding such loans will be useful to investors as well as regulators and the on-boarding of data for such loans when modified will help reduce information

⁴³⁸ See final Rule 10c-1a(d)(2).

⁴³⁹ See final Rule 10c-1a(d)(2).

asymmetries.⁴⁴⁰ These modifications to the final rule address the concerns of other commenters seeking certainty regarding such day one loans.

The commenter also recommended “provid[ing] all existing loans with an identifier on the day of implementation.”⁴⁴¹ However, simply providing an identifier to a pre-existing loan without data about the loan would not provide transparency about the terms of the loan. Instead, the final rule requires that an RNSA assign a unique identifier to the pre-existing covered securities loan when it is reported to an RNSA.

Specifically, 17 CFR 240.10c-1a(g)(3) (“final Rule 10c-1a(g)(3)”) requires that an RNSA assign a unique identifier to a pre-existing covered securities loan that is reported to it pursuant to paragraph (d)(2). Consistent with covered securities loans, an RNSA is also required to make publicly available the data elements in paragraphs (c) and (d)(1)(i) reported to it, other than loan amount data element in paragraph (c)(6), not later than the morning of the business day after the covered securities loan is modified.⁴⁴² In addition, an RNSA is required to make the loan amount publicly available on the twentieth business day after the pre-existing covered securities loan is modified.⁴⁴³ These requirements for pre-existing covered securities loans that are modified after the reporting date are necessary so that the data reported regarding these modified loans are also made publicly available in a manner similar to loans that are covered securities loans under paragraph (g) of the final rule.

3. Confidential Data Elements—Rule 10c-1a(e)

Proposed Rule

The Commission also proposed certain material transaction data elements to be provided to, and retained by, an RNSA, but not made public (“confidential data elements”). As proposed, the confidential data elements provision of the rule is designed to have certain data information used solely by regulators to better understand securities lending, including interest in short selling and price discovery for securities lending, yet without identifying market participants or revealing sensitive

information about their internal operations to the rest of the market. Paragraph (d) of the proposed rule also required the confidential data elements to be provided to an RNSA within 15 minutes after each securities loan was effected (and then an RNSA would be required to keep such information confidential, subject to the provisions of applicable law).

As proposed, the confidential data elements included:

(i) The legal name of each party to the securities loan; where applicable, CRD or IARD Number, MPID, and the LEI of each party to the transaction, and whether such person is the lender/borrower/intermediary between the lender and the borrower (if known);⁴⁴⁴

(ii) If the person lending securities is a broker or dealer and the borrower is its customer, to report whether the security is loaned from a broker’s or dealer’s securities inventory to a customer of such broker or dealer;⁴⁴⁵ and

(iii) If known, whether the securities loan is being used to close out a fail to deliver either pursuant to 17 CFR 242.204 (“Rule 204”) of Regulation SHO or outside of Regulation SHO.

Final Rule

The Commission sought and received comment regarding the proposed provision that would require lenders or their agents⁴⁴⁶ to provide the confidential data items to an RNSA within 15 minutes after each loan is effected.⁴⁴⁷ Commenters stated that the Commission should impose explicit confidentiality obligations on FINRA so

as to protect the confidential securities lending information that would be reported.⁴⁴⁸ Paragraph (h)(4) of the final rule requires that an RNSA establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of the collected information, which should enhance protection of the confidential data that it collects under the final rule.

One commenter suggested that the final rule include masking or further additional redactions to better protect an individual’s personal non-public information.⁴⁴⁹ Another commenter stated that a retail client has increased confidentiality concerns compared to an institutional client.⁴⁵⁰ These concerns appear to arise primarily from the potential identification of a broker or dealer’s individual fully paid customers. Paragraph (e)(1) of the final rule specifies that a broker or dealer is not required to provide the legal name of (or otherwise make identifiable) the customer when reporting loans of fully paid excess margin securities pursuant to Rule 15c3-3(b)(3). Thus, a broker or dealer may redact or mask such information prior to submitting the information to an RNSA.

Another commenter supported the Commission’s proposed requirement that lenders provide to an RNSA the identities of borrowers of securities loans (although they would not be publicly disclosed), explaining that this information is essential for effective market oversight, and failure to collect this information would materially

⁴⁴⁴ In proposed Rule 10c-1(d)(1), the Commission stated its preliminary belief that provision of this first data element to an RNSA would allow regulators to understand buildups in risk at market participants. It would also provide an RNSA with information that would be required to administer the collection of all data elements provided to it under paragraphs (b) and (d) of proposed Rule 10c-1, such as ensuring the completeness of submissions, contacting persons that have errors in their provided data, and troubleshooting person-specific technical issues. *See* Proposing Release, 86 FR 69815.

⁴⁴⁵ In proposed Rule 10c-1(d)(2), the Commission stated its preliminary belief that this second data element would provide regulators with information on the strategies that broker-dealers use to source securities that are lent to their customers. The Commission also explained that this data element would not apply to lenders that are not broker-dealers. The Commission also stated that it preliminarily believed that making this information available to the public would be detrimental because it may reveal confidential information about the internal operations of a broker-dealer. *See* Proposing Release, 86 FR 69815-16.

⁴⁴⁶ The term “lenders or their agents” in proposed Rule 10c-1 is replaced in the final rule by the term “covered person” (as defined in final Rule 10c-1a(j)). *See also* discussion of “covered person” above, in Part VII.A.

⁴⁴⁷ *See* proposed Rule 10c-1(d).

⁴⁴⁸ ICI Letter 1, at 11 (stating that, “to protect the confidential securities lending information that would be reported to FINRA under proposed rule 10c-1, the SEC should impose explicit confidentiality obligations on FINRA . . . [and] should also ensure that FINRA implements adequate data security measures, given that FINRA will serve as a repository of a large amount of sensitive and non-public securities lending data.”). *See also* Federated Hermes Letter, at 2 (stating that it fully endorses and supports the ICI’s comments, particularly ICI’s proposal to protect confidential data, which, as described includes imposing explicit confidentiality obligations on FINRA and ensuring that FINRA implements adequate data security measures, given that FINRA will serve as a repository of a large amount of sensitive and non-public securities lending data); ISLA Letter, at 2 (expressing concern that if there is too much disclosure of information it could lead to less securities lending activity, particularly if the required data are disproportional or considered unreasonable); MFA Letter 3, at 8 (recommending “that the Commission exercise its regulatory oversight of FINRA to ensure that FINRA implements adequate data security measures”). *See, e.g.,* IIB Letter, at 3 (recommending that the final rule require RNSAs to adopt certain data security measures, including masking or encryption); Charles Schwab Letter, at 2.

⁴⁴⁹ *See* Charles Schwab Letter, at 2; *see also* FIF Letter, at 7.

⁴⁵⁰ *See* Charles Schwab Letter, at 2.

⁴⁴⁰ *See supra* note 436 (discussing costs that result from the requirement to report information once a loan modification occurs after the loan qualifies for reporting).

⁴⁴¹ BlackRock Letter, at 9.

⁴⁴² *See* final Rule 10c-1a(g)(3)(i).

⁴⁴³ *See* final Rule 10c-1a(g)(3)(ii).

weaken the efficacy of the rule.⁴⁵¹ Under the final rule, the names and identities of lenders (other than customers in a fully paid lending arrangement) will be required to be reported to an RNSA. This data will be fully captured by the final rule requiring a broker or dealer (as the “borrower” under the “fully paid” exception) to report such loans. With regard to fully paid arrangements, the final rule requires the broker or dealer to report such loans as the borrower. Although brokers or dealers will not be required to report the customer names to an RNSA, the brokers or dealers will be required to retain such information and make it available to the Commission and its representatives⁴⁵² and will be required to retain per RNSA rules.⁴⁵³

Another commenter suggested that, to make the rule more useful to investors, in addition to loan characteristics, there should also be a requirement to publicly disclose the legal names of the parties to the loan (in contrast to keeping that information confidential).⁴⁵⁴ In fact, multiple retail investor commenters stated that real reform for securities lending must include notifying the public about who is borrowing and lending shares (not just which company’s shares are being borrowed or lent).⁴⁵⁵ One commenter stated that

there is no reason for any of the information that is proposed to be provided to an RNSA to be restricted from public view and, thus, it should be made public.⁴⁵⁶ However, making this information available to the public could be detrimental because it could identify specific market participants or reveal confidential information about the internal operations or investment decisions of specific market participants.⁴⁵⁷

Others commented more generally on the importance of the securities lending disclosure requirements not adversely impacting the market (*e.g.*, by revealing investors’ short selling strategies). To avoid such adverse impacts, these commenters stated that there should be more prescriptive measures (than requiring policies and procedures, for instance) to prevent an RNSA, or the reporting agent, from releasing any of the confidential transaction data that are provided, under the final rule.⁴⁵⁸ Paragraph (h)(4) of the final rule sets forth a multi-part requirement that mandates: (1) written policies and procedures; (2) that such policies and procedures must be reasonably designed; and (3) that an RNSA establishes, maintains, and enforces such policies and procedures. This approach is intended to provide flexibility to an RNSA to tailor policies and procedures that will appropriately maintain the security and confidentiality of the confidential information required by paragraph (e) of the final rule, based on its experience with the multiple types of sensitive and confidential trading data that it

routinely handles as an RNSA. Policies and procedures generally are regularly monitored, tested, reviewed, and, if needed, updated to ensure that they remain continuously effective and, thus, should be particularly useful in helping to ensure that an RNSA adjusts to ever-changing technologies intended to circumvent data safeguards. Further, an RNSA’s policies and procedures are subject to Commission oversight.⁴⁵⁹

Some commenters expressed concerns about reporting agents maintaining confidential data received from covered persons.⁴⁶⁰ Consistent with the proposed rule, a covered person has the option of whether or not to entrust its confidential information with a reporting agent or to report such information directly to an RNSA. Further, paragraph (a)(2)(i) of the final rule requires that a covered person who relies on a reporting agent to fulfill its reporting obligations under the final rule must enter into a written agreement with such reporting agent. Such agreement could be used by the covered person and reporting agent to memorialize any measures that they agree to regarding the protection of the covered person’s Rule 10c–1a information. Further, registered brokers and dealers and registered clearing agencies are subject to provisions such as section 15(g) of the Exchange Act and thus, have experience with implementing, maintaining, and enforcing policies and procedures and other means of protecting and preventing the misuse of information.⁴⁶¹

One commenter recommended that the proposed rule be modified to permit an RNSA to confidentially provide regulatory-related information to SROs that are not RNSAs, such as NYSE Regulation, without first obtaining a Commission order.⁴⁶² Under the final

⁴⁵¹ See, *e.g.*, HMA Letter; NYSE Letter 1, at 2 (supporting the proposed confidential treatment of the proposed confidential data elements, particularly the parties to each transaction and further stating that “[p]roposed Rule 10c–1(c)(3) guards against this concern by providing that all identifying information about lending agents, reporting agents, and other persons using reporting agents, will not be made publicly available and the RNSA will be required to keep such information confidential. Thus, the investment strategies of market participants will be appropriately protected through reporting and dissemination of securities lending transactions on an unattributed basis.”).

⁴⁵² See, *e.g.*, 15 U.S.C. 78q (section 17(b) of the Exchange Act; see also 17 CFR 240.17a–4(j) (“Rule 17a–4(j)”) (requiring a broker-dealer to furnish records promptly to the Commission); Rule 15c3–3(b)(3) (requiring a broker-dealer to enter into a written agreement with each fully paid lending customer); 17 CFR 240.17a–4(b)(7) (“Rule 17a–4(b)(7)”) (requiring the broker-dealer to retain written agreements relating to its business as broker-dealer).

⁴⁵³ See, *e.g.*, FINRA Rule 4511 (regarding preservation of records), available at <https://www.finra.org/rules-guidance/key-topics/books-records>.

⁴⁵⁴ See Morningstar Letter, at 3. However, if the Commission decides not to require public disclosure of legal names to the public, this commenter suggested, as an alternative, the Commission require detailed information about the fund type and borrower type be provided to the public by an RNSA. See Morningstar Letter, at 3.

⁴⁵⁵ See, *e.g.*, Letter from Susanne Trimboth, STP Advisory Services (Dec. 3, 2021) (whose remarks/comments have been extensively quoted/paraphrased by a multitude of commenters on the Proposing Release, *i.e.*, Form A Letters and Form B Letters) (“Trimboth Letter”).

⁴⁵⁶ See Letter from Jimit Raithatha (Oct. 11, 2022).

⁴⁵⁷ See Proposing Release, 86 FR 69815.

⁴⁵⁸ See, *e.g.*, Letter from Managed Funds Association (Jan. 7, 2022) (“MFA Letter 1”), at 4 (suggesting the Commission explicitly require an RNSA to maintain strict confidentiality and information security standards. While the commenter applauded the Commission’s efforts to ensure that FINRA has policies and procedures in place to protect the confidentiality of information that is submitted to it, the commenter believes that the Commission should require, among other things, more prescriptive measures similar to Rule 613 of Regulation NMS (consolidated audit trail) to ensure the security and confidentiality of information, as well as information barriers, information security systems, user confirmation, and access audits.); MFA Letter 3, at 3. Given the confidential and proprietary nature of some of the information that an RNSA will be collecting, this commenter stated it is imperative that the Commission ultimately ensure that FINRA adopt more prescriptive confidentiality and information security in connection with any final rule. As discussed above, the requirements of paragraph (h)(4) of the final rule provide an appropriate level of flexibility to an RNSA regarding specific prescriptive measures to use to maintain the security and confidentiality of the confidential information required by paragraph (e) of the final rule while, at the same time, placing strict requirements around such choices.

⁴⁵⁹ See also ICI Letter 1, at 11 (suggesting a proposal to protect confidential data to include imposing explicit confidentiality obligations on FINRA and ensuring that FINRA implements adequate data security measures, given that FINRA will serve as a repository of a large amount of sensitive and non-public securities lending data); ISLA Letter, at 2 (expressing concern that if there is too much disclosure of information it could lead to less securities lending activity, particularly if the required data are disproportional or considered unreasonable).

⁴⁶⁰ See S3 Partners Letter, at 12; IHS Markit Letter, at 4; Pirum Letter, at 5; BlackRock Letter, at 9.

⁴⁶¹ See 15 U.S.C. 78o.

⁴⁶² See, *e.g.*, NYSE Letter 2, at 1–3; Nasdaq Letter, at 3–4 (supporting regulators having access to information that is not publicly available and advocating for the SEC to make non-public information available to other regulators). See also paragraph (h)(2) of final Rule 10c–1a regarding an RNSA making certain information available to the Commission; or other persons as the Commission

rule, an RNSA is required to establish, maintain, and enforce policies and procedures specifically tailored to protect the confidential information enumerated in the final rule. To address commenters' concerns regarding the potential market impact of loan information required to be provided to an RNSA by the final rule, the Commission may designate by order upon a demonstrated regulatory need, dissemination to persons other than an RNSA. Thus, as discussed further below, in Part VII.K, it is appropriate to provide such information to persons (other than the Commission) by order, on a case-by-case basis, upon a demonstrated regulatory need. Such case-by-case determination strikes the proper balance between protecting confidential information and facilitating the regulatory function, such as those of an SRO. Another commenter requested that the Commission clarify whether the "if known" parenthetical, included at the end of paragraph (d)(1) of the proposed rule, was meant to apply to each of the confidential data elements (*i.e.*, CRD, IARD, MPID) in that paragraph.⁴⁶³ In reviewing this provision, the Commission recognizes that the proposed rule text, by locating the "if known" language at the end of paragraph (d)(1) in the proposed rule (rather than at the beginning as was done with other "if known" language that was used for the confidential data elements in paragraph (d)(3) of the proposed rule), the scope of this "if known" language with respect to the individual confidential data elements in paragraph (d)(1) was not entirely clear. Thus, the placement of the "if known" language similarly at the beginning of the paragraph (e)(1) of the final rule clarifies that each piece of information enumerated in that paragraph (*i.e.*, following the "if known" language) is required to be reported only to the extent that piece of information is known by the covered person. To clarify this intent, it is appropriate to modify proposed paragraph (d)(1) by moving the placement of the "if known" language that is currently proposed at the end of paragraph (d)(1) (in the proposed rule), and relocating it to the beginning of paragraph (e)(1) in the final rule, consistent with the same "if known" language at the beginning of 17 CFR 240.10c–1a(e)(3) ("final Rule 10c–1a(e)(3)").

To the extent the data elements of final Rule 10c–1a(e)(1) are known, providing these data elements to an

RNSA will allow regulators to understand buildups in risk at market participants and may otherwise assist an RNSA in monitoring and surveilling the security markets. The data elements will also provide an RNSA with the necessary information to administer the collection of all the other data elements provided to it under final Rules 10c–1a(c) and (d), such as ensuring the completeness of submissions, contacting persons that have errors in their provided data, and troubleshooting person-specific technical issues.⁴⁶⁴

The Commission also proposed requiring that information be reported (but not publicly disclosed) on whether the securities loan is being used to close out a fail to deliver pursuant to Rule 204 of Regulation SHO⁴⁶⁵ or to close out a fail to deliver outside of Regulation SHO. Rule 204 of Regulation SHO generally requires closing a firm's fail to deliver position in equity securities at a registered clearing agency by purchasing or borrowing securities of like kind and quantity. Accordingly, under the final rule, this data element will provide regulators with information both about the loans used by brokers or dealers to close out fails to deliver as required by Regulation SHO, as well as additional insight into the use of loans, particularly the extent that loans are used to cover account-level fail to deliver positions in reportable securities.

Several commenters were supportive of this confidential data element, as proposed, with one commenter noting the benefits of such data for regulatory oversight,⁴⁶⁶ and yet other commenters requested that this data element be required to be publicly reported.⁴⁶⁷

⁴⁶⁴ See, *e.g.*, Proposing Release, 86 FR 69815 (regarding information collected pursuant to paragraphs (c) through (e) of the final rule available to the Commission; or other persons as the Commission may designate by order upon a demonstrated regulatory need).

⁴⁶⁵ 17 CFR 242.204.

⁴⁶⁶ See FINRA Letter, at 2 n.4 (stating that fail to deliver data in particular "would significantly enhance FINRA's Regulation SHO surveillance programs"). This commenter stated that it agrees that the proposed rule will provide the Commission, FINRA, and other regulators with data that could be used for important regulatory functions, including facilitating and improving FINRA's in-depth monitoring of members' activity and surveillance of the securities markets in stating, "this additional data would facilitate better surveillance by FINRA for regulatory compliance by its members" and improve FINRA's ability to enforce relevant regulations. See *id.* at 1–2. More specifically, "the additional data, including in particular the identification of whether a loan will be used to close out a fail to deliver, would significantly enhance FINRA's Regulation SHO surveillance programs." *Id.* at 4.

⁴⁶⁷ See, *e.g.*, Hindley Letter ("In my opinion, this data not being made publicly available is wrong."); Erick R. Letter ("I believe the terms . . . should also be made public.").

Final Rule 10c–1a(e)(3), adopts this data element as proposed. The Commission has elected to adopt without modification (*i.e.*, not requiring public dissemination) this specific data element in paragraph (d)(3) of the proposed rule because, as a commenter stated,⁴⁶⁸ such information could be abused and is designed to be primarily useful for regulatory purposes.⁴⁶⁹ As the Commission has stated, fails to deliver may result from long sales as well as short sales, and may be closed out by either purchasing or borrowing shares. Fails to deliver can occur for various reasons, such as "human or mechanical errors or processing delays can result from transferring securities in custodial or other form rather than book-entry form, thereby causing a fail to deliver on a long sale."⁴⁷⁰ Such data will be useful to regulators in determining both the extent of the use of securities loans for fails to deliver, as well as how and when fails to deliver are being addressed by securities loans. However, the Commission agrees with the commenter that such information, if made public, could be abused. For example, market participants that become aware of fails to deliver may seek to short squeeze the security knowing that the person failing to deliver has a time-sensitive need to cover its short position.

Another commenter stated that, in addition to the data elements in paragraph (d)(1) of the proposed rule, it will not have knowledge of whether the loan was used to cover a fail to deliver at the time of providing the confidential report to an RNSA, as would be required by paragraph (d)(3) of the proposed rule.⁴⁷¹ The final rule adopts as proposed the requirement that such information must be reported if known.⁴⁷²

As non-substantive changes to the rule, the Commission is replacing the word "person" with the defined term "covered person" as discussed above, in Part VII.A. Thus, as adopted, paragraph (e) of final Rule 10c–1a requires, consistent with the Proposing Release, that "[i]f required by paragraph (a) of this section, a covered person directly,

⁴⁶⁸ See Citadel Letter, at 11.

⁴⁶⁹ See FINRA Letter, at 1–2.

⁴⁷⁰ *Amendments to Regulation SHO*, Release No. 34–60388 (July 17, 2009); 74 FR 38266, 38271 (July 31, 2009) (Adopting Release).

⁴⁷¹ See OCC Letter, at 9 (stating that OCC does not know the CFT, IARD, MPID, or LEI of the lending or borrowing clearing members or whether the lending or borrowing clearing members are acting as intermediaries—and does not know if the loan is being used to close out a fail to deliver pursuant to SEC Regulation SHO or otherwise). See also BlackRock Letter, at 5.

⁴⁷² See final Rules 10c–1a(e)(1) and (e)(3).

may designate by order upon a demonstrated regulatory need.

⁴⁶³ See OCC Letter, at 9.

or indirectly using a reporting agent shall provide the following information to an RNA, if applicable, by the end of the day on which a covered securities loan is effected.”⁴⁷³ As non-substantive changes to the rule, the Commission is replacing the word “person” with the defined term “covered person” as discussed above, in Part VII.A. Thus, as adopted, paragraph (e) of final Rule 10c–1a requires, consistent with the Proposing Release, that “[a] covered person shall provide the following information to an RNA, if applicable, by the end of the day on which a covered securities loan is effected.”⁴⁷⁴

4. Removal of Securities Available to Loan Data Element

Proposed Rule

Among the securities lending data elements required to be reported to an RNA, the Commission included in the proposed rule a requirement to report the total amount of each security that is not subject to legal or other restrictions that prevent it from being lent (“available to lend”).⁴⁷⁵ The Commission also required that certain identifying information, including the legal name of the security, and the ticker symbol or other identifier, be reported with the available to lend data.⁴⁷⁶ The Commission stated in the Proposing Release that it designed the securities available to loan data elements to allow for the calculation of a “utilization rate” for each security.⁴⁷⁷ The utilization rate, which could be calculated by dividing the total number of shares on loan by the total number of shares available for loan, could then be used by market participants to evaluate whether the security will be difficult or costly to borrow.⁴⁷⁸

Final Rule

The Commission received numerous comments regarding the “available to lend” data element⁴⁷⁹ of the proposed rule. Certain commenters expressed

concern that such data could be inaccurate,⁴⁸⁰ with some highlighting a variety of limitations on securities lending that could make the data unreliable.⁴⁸¹ Commenters expressed concern that the available to lend data could be underreported if it omitted data from persons that were not required to provide information to an RNA or that did not have an open securities loan.⁴⁸² One commenter stated that “data would be particularly misleading for large international banking organizations with substantial operations outside of the United States.”⁴⁸³ Other commenters expressed general concern that the proposed “available to lend” data element could discourage securities lending.⁴⁸⁴ Two

⁴⁸⁰ See RMA Letter, at 11; IIB Letter, at 8; SIFMA Letter 1, at 15; ICI Letter 1, at 8–9; SIFMA AMG Letter, at 8; State Street Letter, at 4–5; Fidelity Letter, at 4; ABA Letter, at 4; CASLA Letter, at 2; Federated Hermes Letter, at 2; S3 Partners Letter, at 11–12; Sharegain Letter, at 3; Linklaters Letter, at 5; MFA Letter 3, at 6–7; EBF Letter, at 2 (expressing general support for comments from SIFMA and IIB addressing the reporting of “available to lend” data).

⁴⁸¹ See, e.g., State Street Letter, at 4 (“Although clients who participate in securities lending programs generally agree to lend all portfolio assets, or categories of assets, securities lending authorization agreements typically place limits on both portfolio and counterparty exposure. Furthermore, the actual supply of available securities may be impacted by additional client instruction resulting from various idiosyncratic or market events, as well as discretionary transfers in and out of investment portfolios.”). See also IIB Letter, at 8 (“Portfolio limits, concentration limits and simple lending preferences and strategies may substantially limit both the individual securities that a party may be willing to lend and the amount of lending that they are willing to provide on aggregate.”); ICI Letter 1, at 2 n.8 (“A fund may not have on loan at any time securities representing more than one-third of the fund’s total value.”). Further stating that “[t]his restriction stems from section 18 of the Investment Company Act.”); SBAI Letter, at 2 (“However, funds managed under 1940 Act regulations have restrictions on their approach to securities lending (e.g., limit on lending: A fund may not have on loan at any time securities representing more than one-third of the fund’s total value), thereby not allowing an accurate calculation of ‘securities available to lend’ on an individual security basis.”); RMA Letter, at 12 (“... securities lending in a portfolio provided to a Lending Agent by a beneficial owner may be limited by (i) negotiated or legal portfolio limits that impact the amounts and types of securities that may be lent, (ii) ad hoc or periodic beneficial owner instructions to limit lending in particular ways based on idiosyncratic preferences . . . or external factors and (iii) discretionary transfers in and out of custody accounts unrelated to securities lending interest, and other factors.”); Linklaters Letter, at 5; James J. Angel Letter, at 4.

⁴⁸² See, e.g., IIB Letter, at 8. See also RMA Letter, at 11.

⁴⁸³ See IIB Letter, at 8.

⁴⁸⁴ See, e.g., State Street Letter, at 5 (stating that “[i]n our experience, the prospect of being obligated to disclose, even in aggregate form, all portfolio holdings may be enough to drive certain clients out of the securities lending market, with important implications for liquidity”). See also ICI Letter 1, at 8; IIB Letter, at 8–9; RMA Letter, at 13; IHS Markit

commenters recommended replacing the “available to lend” metric for the calculation of a utilization rate with publicly available information on the issuer’s total share float.⁴⁸⁵ However, other commenters supported the reporting of “available to lend” data.⁴⁸⁶

One of the Commission’s goals in proposing the “available to lend” data requirements was “to allow for the calculation of a ‘utilization rate’ for each particular security,” which in turn “could be used by market participants to evaluate whether the security will be difficult or costly to borrow.”⁴⁸⁷ The Commission stated in the Proposing Release that “the information provided under paragraph (e) [of the proposed rule] should allow market participants to calculate a utilization rate that is likely to be reliable.”⁴⁸⁸ However, many commenters expressed concerns that there may be significant challenges to the accurate reporting of “available to lend” data.⁴⁸⁹ One commenter stated, before highlighting barriers to obtaining accurate “available to lend” data, that the “[c]alculation of the utilization rate requires an accurate measure of the ‘securities available to lend’ for all market participants.”⁴⁹⁰

Upon consideration, the Commission agrees with commenters’ concerns with the potential for underreported or inaccurate “available to lend” data being reported. Therefore, final Rule 10c–1a has been amended from the proposed rule to remove the reporting of “available to lend” data, as described under proposed Rules 10c–1(e)(1)(iii) and (e)(2)(iii), and to remove the

Letter, at 11 (stating that “[b]eneficial owners, especially sovereign wealth funds and other sensitive investors, may have policies that could force them to withdraw from securities lending if they are required to submit available to lend data to a broker-dealer”).

⁴⁸⁵ See State Street Letter, at 4; IHS Markit Letter, at 7, 9 (responding to Questions 25 and 49).

⁴⁸⁶ See HMA Letter, at 7 (stating that such information “is essential to building a comprehensive view of the markets”); FINRA Letter, at 2 (stating that “the information subject to reporting under the Proposal regarding the aggregate quantity of shares . . . available to loan would provide useful information in monitoring the levels of short selling activity occurring in a security and determining when a security is hard to borrow”); ASA Letter, at 3.

⁴⁸⁷ See Proposing Release, 86 FR 69817 (stating that the utilization rate “would be calculated by dividing the total number of shares on loan by the total number of shares available for loan”).

⁴⁸⁸ See Proposing Release, 86 FR 69817 n.113.

⁴⁸⁹ See, e.g., ICI Letter 1, at 8–9; Federated Hermes Letter, at 2; ABA Letter, at 4; RMA Letter, at 11; State Street Letter, at 4–5; IIB Letter, at 8; SBAI Letter, at 2; Sharegain Letter, at 3.

⁴⁹⁰ See SBAI Letter, at 2 (stating that “funds managed under 1940 Act regulations have restrictions on their approach to securities lending . . . thereby not allowing an accurate calculation of ‘securities available to lend’ on an individual security basis”).

⁴⁷³ See final Rule 10c–1a(e) (referring to “Confidential data elements” in paragraphs (e)(1) through (3)).

⁴⁷⁴ See final Rule 10c–1a(e) (referring to “Confidential data elements” in paragraphs (e)(1) through (3)).

⁴⁷⁵ See proposed Rule 10c–1(e)(1)(iii).

⁴⁷⁶ See proposed Rules 10c–1(e)(1)(i) and (ii).

⁴⁷⁷ See Proposing Release, 86 FR 69817.

⁴⁷⁸ See Proposing Release, 86 FR 69817.

⁴⁷⁹ The term “available to lend data” refers to both the “total amount of each security that is not subject to legal or other restrictions that prevent it from being lent” information proposed to be reported by a lending agent under proposed Rule 10c–1(e)(1)(iii), and the “total amount of each specific security that is owned by the person and available to lend” information proposed to be reported by persons that do not use a lending agent under proposed Rule 10c–1(e)(2)(iii).

corresponding requirement that an RNSA make such information publicly available, as described under proposed Rule 10c-1(e)(3). Additionally, final Rule 10c-1a removes the reporting requirements for the identifying information (*e.g.*, legal name of the security, LEI of the issuer, ticker symbol, ISIN, CUSIP, FIGI, or other identifier) of such “available to lend” securities, as listed under proposed Rules 10c-1(e)(1)(i) and (ii) and 10c-1(e)(2)(i) and (ii). Therefore, final Rule 10c-1a does not include a requirement that “available to lend” data be reported to an RNSA, by a lending agent, a person that does not employ a lending agent, or otherwise. The elimination of this requirement from the proposed rule responds to commenter concerns, will limit the burden of the final rule’s reporting requirements on covered persons, and will preempt the potential for inaccurate or unreliable data to be made publicly available to market participants.

5. Removal of Securities On Loan Data Element

Proposed Rule

The Commission proposed a requirement that, by the end of each business day that a lending agent was required to provide Rule 10c-1 information to an RNSA or had an open securities loan about which it was required to provide information to an RNSA, the lending agent shall provide to an RNSA the total amount of each security on loan that has been contractually booked and settled (“security on loan”).⁴⁹¹ The proposed rule also required that by the end of each business day that a person that does not use a lending agent provides Rule 10c-1 information to an RNSA, or had an open securities loan about which it was required to provide information to an RNSA, the person shall also provide to an RNSA the total amount of each security on loan that has been contractually booked and settled (“security on loan”).⁴⁹² The Commission also proposed that “[f]or each security about which the RNSA receives [such] information The RNSA shall make available to the public only aggregated information for that security.”⁴⁹³

The Commission stated its preliminary belief that securities on loan data could help market participants plan their borrowing activity.⁴⁹⁴ The Commission also stated that it designed

the proposed securities on loan data element to allow for the calculation of a “utilization rate” for each particular security.⁴⁹⁵ The utilization rate could then be used by market participants to evaluate whether the security will be difficult or costly to borrow.⁴⁹⁶

Final Rule

Commenters provided differing views on the proposed reporting requirement for the securities on loan data element. Certain commenters supported or did not object to the requirement to report securities on loan data⁴⁹⁷ in the proposed rule.⁴⁹⁸ One commenter recommended that more granular securities on loan data be made available, including that the “total number of shares of each stock on loan [should be] disaggregated by lender.”⁴⁹⁹ Multiple commenters supported the proposed requirement for an RNSA to make securities on loan data publicly available on an aggregate basis,⁵⁰⁰ with one recommending that “[f]or each security, FINRA could disseminate the total volume of securities on loan by shares or principal value (as applicable) and as a percentage of the shares or principal value (as applicable) of all securities that are outstanding.”⁵⁰¹ Another commenter disapproved of the proposed securities on loan data reporting requirement, expressing concerns that the data “may be misleading,” and recommended removing it.⁵⁰² The commenter stated that some brokers use approaches to calculating securities on loan data that

“routinely misrepresent the true number of borrowed shares.”⁵⁰³

Similar to the concerns described above, in Part VII.F.4, about the proposed securities available to loan data element, the Commission agrees with the commenters that there may be challenges to the collection of accurate securities on loan data.⁵⁰⁴ Additionally, aggregated information similar to the proposed securities on loan data will be made available by RNSAs, without the additional, potentially duplicative, reporting requirements of proposed Rule 10c-1(e)(1)(iv) and (e)(2)(iv).⁵⁰⁵ Under the final rule, RNSAs will be required to design and provide not only information pertaining to the aggregate transaction activity⁵⁰⁶ for each reportable security, but also distribution of loan rates for each reportable security.⁵⁰⁷ These requirements should provide market participants with information to help plan their borrowing activity, while avoiding potentially duplicative reporting obligations. Such aggregated data would be consistent with some commenters’ support for requiring RNSAs to make “securities on loan” data available on an aggregated basis.⁵⁰⁸ Additionally, RNSAs will be required to make the disaggregated “amount of the security loan” data publicly available,⁵⁰⁹ comparable to the disaggregated “securities on loan” data recommended by one commenter.⁵¹⁰ However, as discussed below, in Part VII.J, such disaggregated data will only be publicly available on a delayed basis, on the twentieth business day after the covered securities loan is effected, in order to protect the sensitive nature of individual securities lending “amount” information (*e.g.*, such as size or volume).⁵¹¹ Furthermore, for the reasons described above, in Part VII.F.4, final Rule 10c-1a will not require the reporting of an available to loan data element, which therefore would not be available to pair with the proposed securities on loan data element in order

⁴⁹⁵ See Proposing Release, 86 FR 69817.

⁴⁹⁶ See Proposing Release, 86 FR 69817.

⁴⁹⁷ The term “securities on loan data” refers to both the “total amount of each security on loan that has been contractually booked and settled” information proposed to be reported by lending agents under proposed Rule 10c-1(e)(1)(iv), and the “total amount of each specific security that is owned by the person” information proposed to be reported by persons that do not use a lending agent under proposed Rule 10c-1(e)(2)(iv).

⁴⁹⁸ See SIFMA Letter 1, at 4 n.9; SIFMA AMG Letter, at 11; FINRA Letter, at 2 (stating that “the information subject to reporting under the Proposal regarding the aggregate quantity of shares on loan . . . would provide useful information in monitoring the levels of short selling activity occurring in a security and determining when a security is hard to borrow.”); Better Markets Letter, at 6.

⁴⁹⁹ See Letter from Americans for Financial Reform Education Fund, at 3 (Apr. 1, 2022) (“AFREF Letter 2”).

⁵⁰⁰ See FIF Letter, at 11; ICI Letter 1, at 11.

⁵⁰¹ See FIF Letter, at 11.

⁵⁰² See S3 Partners Letter, at 12 (stating that “prime brokers often use their own internal inventory of shares which means no actual ‘borrowing’ takes place. By failing to take this ‘internalization’ into account, approaches that use ‘securities on loan’ routinely misrepresent the true number of borrowed shares.”).

⁵⁰³ See S3 Partners Letter, at 12.

⁵⁰⁴ See FIF Letter, at 10; S3 Partners Letter, at 11–12; Linklaters Letter, at 5–6.

⁵⁰⁵ See final Rule 10c-1a(c).

⁵⁰⁶ See final Rule 10c-1a(g)(5). The term “aggregate transaction activity” used in the final rule refers to information pertaining to the absolute value of transactions such that net position changes could not be discerned in the data. The addition of the term “aggregate transaction activity” in the final rule limits the possibility of publishing proprietary information while still providing volume transparency to market participants.

⁵⁰⁷ See final Rule 10c-1a(g)(5).

⁵⁰⁸ See SIFMA Letter 1, at 18–19; SIFMA AMG Letter, at 10.

⁵⁰⁹ See final Rule 10c-1a(g).

⁵¹⁰ See AFREF Letter 2, at 3.

⁵¹¹ See final Rule 10c-1a(g)(2).

⁴⁹¹ See proposed Rule 10c-1(e)(1)(iv).

⁴⁹² See proposed Rule 10c-1(e)(2)(iv).

⁴⁹³ See proposed Rule 10c-1(e)(3).

⁴⁹⁴ See proposed Rule 10c-1(e)(3).

to calculate a “utilization rate” metric.⁵¹² Therefore, while certain benefits derived by market participants from the reporting and disclosing of securities available to lend data and securities on loan data elements together may not be realized, market participants may benefit from the public availability of aggregate transaction activity and distribution of loan rates.⁵¹³

For the foregoing reasons, final Rule 10c-1a has been changed from the proposed rule to remove the reporting of securities on loan data, as described under proposed Rule 10c-1(e)(1)(iv) and (e)(2)(iv), and to remove the corresponding requirement that an RNSA make such information publicly available, as described under proposed Rule 10c-1(e)(3). Therefore, final Rule 10c-1a does not include a requirement that a lending agent or other covered person report securities on loan data to an RNSA.

G. Timing of Required Reporting to an RNSA

1. Timing of Reporting of Loans

Proposed Rule

As discussed above, in Part VII.F.1, paragraph (b) of the proposed rule would have required certain loan transaction data elements to be reported to an RNSA, on a transaction-by-transaction basis, within 15 minutes of the loan being effected, followed by an RNSA assigning each loan a unique transaction identifier and then making such information publicly available as soon as practicable. As part of the proposed rule, the Commission sought specific comment as to the proposed 15-minute requirement for reporting specified data elements to an RNSA.

Final Rule

While the proposed 15-minute reporting requirement received some support,⁵¹⁴ most of the comments

received by the Commission from larger institutional market participants strongly opposed the proposed rule’s requirement that the specified data elements be reported to an RNSA within 15 minutes after a loan is effected (*i.e.*, in addition to the data being publicly disseminated on a transaction-by-transaction basis). For example, most of these larger market participants explained that the terms of securities loans change during the day and are generally not finalized until the end of the day.⁵¹⁵ These changes include reallocations of securities loans among lenders, re-pricings, and changes in collateral.⁵¹⁶ As a result, the commenters stated that requiring transaction-by-transaction reporting, particularly on a 15-minute/intraday basis, would result in significant unintended negative consequences, including the public dissemination of incomplete or misleading information, which could adversely impact the securities/lending markets.⁵¹⁷ Another commenter also stated that the proposed

hiding in loopholes). In fact, one commenter stated that at a minimum “the final rule should significantly shorten the 15-minute reporting timeframe.” Better Markets Letter, at 8. This commenter urged the Commission to finalize the proposed rule without undue delay and without diluting the proposal in any way absent credible, specific evidence that such dilution will not have an impact on the utility of the data reported. *See id.* This commenter also stated that “the SEC should also shorten the required timeframes for the reporting” and identified “potential shortcomings of these timeframes, including how they hamper real-time regulatory oversight or allow manipulative activity based on information leakage or other means of exploiting the 15-minute reporting delay . . . for public disclosure.” *Id.* Other commenters expressed support for the proposed rule and specifically noted that it is a leading provider of data and analytics in the securities lending market and is currently able to do intraday reporting. *See, e.g.*, Equilend Letter; *see also* Morningstar Letter, at 4 (stating its support for the proposed 15-minute reporting requirement). The Commission acknowledges the above benefits stated by these commenters regarding the proposed 15-minute reporting requirement and has considered the comments that argued in favor of end-of-day reporting. As discussed below, in this part, the Commission has determined to replace the proposed intraday 15-minute reporting requirement with an end of day requirement that will allow covered persons additional time in which to collect and report their Rule 10c-1a information in compliance with final Rule 10c-1a’s requirements.

⁵¹⁵ *See* Fidelity Letter, at 2–3 (stating that “[t]he reporting timeframe for transactions should be no earlier than end of day”). *See also* MFA Letter 1, at 8; MFA Letter 2.

⁵¹⁶ *See* FIF Letter, at 3.

⁵¹⁷ *See, e.g.*, SIFMA AMG Letter, at 3 (stating that the proposed 15-minute requirement would lead to the reporting of superfluous information benefitting neither market transparency nor regulatory oversight). *See also* SIFMA Letter 1, at 13–14; SIFMA Letter 2, at 5. *See also* State Street Letter, at 2–3 (stating the 15-minute reporting requirement will result in incomplete or error prone information because it ignores that loans are usually finalized by the end of day). *See also* AIMA Letter 1, at 4; ICI Letter 1, at 6.

15-minute reporting requirement is impractical and logistically challenging and would “create noise and misleading information in the market.”⁵¹⁸ In addition commenters stated that there would be costs to participants to create and maintain an entirely new infrastructure for loan data reporting and dissemination.⁵¹⁹

Other commenters stated that the proposed 15-minute reporting time period would exponentially increase the number of execution (and modification) reports that would be required to be filed.⁵²⁰ Another commenter stated that requiring reporting every 15 minutes gives away too much proprietary information to the market regarding closely guarded trading strategies, risking exposures to short squeezes, front running, reverse-engineering—particularly with hard-to-borrow securities.⁵²¹ Another commenter raised the concern that a 15-minute reporting requirement may be unnecessarily frequent and that there did not appear to be any stated rationale in the Proposing Release for how a 15-minute reporting interval would be helpful to market participants or why this frequency is appropriate.⁵²²

⁵¹⁸ *See, e.g.*, CCMR Letter, at 5 (stating that disclosing securities loan activity on a transaction-by-transaction basis as soon as 15 minutes after they are effected would likely signal to the market that a short selling position is being actively established in that security, which could have potential negative effects on short sellers, increase costs associated with establishing a short position through information leakage and slippage; or lead to “short squeezes”). *See also* SBAI Letter, at 2; AIMA Letter 1, at 3–4 n.11; RMA Letter, at 18.

⁵¹⁹ *See* MFA Letter 1, at 3.

⁵²⁰ *See also* RMA Letter, at 9.

⁵²¹ *See* AIMA Letter 1, at 4–5 (stating that in response to the proposed rule market participants may adjust their trading strategies or exit the borrowing market when they otherwise would be active participants thereby reducing liquidity and increasing volatility).

⁵²² *See* Letter from Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (Jan. 7, 2022) (“Chamber of Commerce Letter”). *But see* Nasdaq Letter, at 3 (stating “the data reported should be made available to investors within a reasonable timeframe to utilize the information effectively to make informed investment decisions. To that end, it is unclear whether the fifteen-minute timeframe for reporting certain data is optimal and is supported by sufficient research or other justification. When compared to the speed at which markets operate, the fifteen-minute delay may be excessive and, on the other hand, there may be little benefit to investors in receiving such information after a fifteen-minute delay as opposed to a longer period, such as the end of the day. . . .”). *See also* RMA Letter, at 9 (stating that “[r]equiring reporting on an intraday basis as proposed would be operationally impractical in many respects and would provide little to no incremental value compared to end-of-day reporting”). *See also* Federated Hermes Letter, at 1 (stating that “the requirement to report securities loans within 15 minutes of ‘being effected’ or modified does not

Continued

⁵¹² *See* Proposing Release, 86 FR 69817 (“The utilization rate, which would be calculated by dividing the total number of shares on loan by the total number of shares available for loan, could be used by market participants to evaluate whether the security will be difficult or costly to borrow.”).

⁵¹³ *See* Proposing Release, 86 FR 69817.

⁵¹⁴ Some commenters did express support for the proposed 15-minute reporting requirement. These commenters were primarily smaller retail investors who stressed the benefits of real-time intraday reporting. *See, e.g.*, Letter from Nick Morgan (May 4, 2023) (advocating for transaction-by-transaction reporting and the 15-minute reporting requirement, as well as promoting transparency in securities lending, which will benefit retail investors and strengthen the SEC’s ability to fulfill its mandate while also guarding against economic fragility and potential national security threats). *See also* Letter from Edwin Liew (May 4, 2023) (supporting the 15-minute reporting requirement saying the cost and effort are justified to prevent fraud and prevent

To address these concerns, commenters offered possible modifications for the final rule. Many of the commenters who suggested an alternative approach favored an “end-of-day” reporting requirement.⁵²³ They explained that end-of-day reporting would make more sense and result in more worthwhile information being reported as it takes into account that most securities loan trades are not finalized until end of day.⁵²⁴ One of the commenters explained how most securities loan market participants already use/rely on “end-of-day” data because they view it as the most relevant and reliable measurement of market activity.⁵²⁵ This commenter also stated that, even though intraday data may already be available from service providers, it is still widely seen as indicative in nature and subject to frequent correction.⁵²⁶

Other commenters suggested reporting by end of the next day (*i.e.*, on a T+1 basis similar to what the EU/UK’s Securities Financing Transactions

appear to reflect the reality that the terms of securities loans are fluid and frequently modified throughout a business day”). Thus, the commenter states it is difficult to identify a particular intraday point that a given loan has been “effected.” *See id.* According to the commenter, even if it were possible to determine such an intraday point, 15 minutes is too short of a timeframe to collect and accurately report the required transaction data. Thus, the commenter stated that given the imprecision of defining the exact intraday moment at which a lending transaction is effected, and the frequency with which the transaction’s details are modified, new reporting requirements will be expensive and operationally difficult to implement. *See id.* *See also* IHS Markit Letter, at 2 (opposing the proposed 15-minute reporting requirement and stating “the frequency with which loans would be reported and disseminated would be both an immense hurdle and costly burden for the industry and could also lead to reduced market liquidity and participants withdrawing from lending altogether”).

⁵²³ *See, e.g.*, FIF Letter, at 4 (stating that reporting should be end of day; however, the letter still discusses implementation challenges for broker-dealers and complexity in requiring even end of day reporting).

⁵²⁴ *See* SIFMA Letter 1, at 3; *see also* ASA Letter, at 2–3 (stating an “end-of-day requirement to report securities lending transactions would be appropriate and provide investors with sufficient transparency regarding the terms of these transactions”); ICI Letter 1, at 6 (claiming any information reported within 15 minutes risks being misleading to investors and “noise” as it would not reflect the parties’ final terms); Sharegain Letter, at 4 (stating its support for a longer reporting time period than 15 minutes, “[i]n our view, decreasing the frequency of reporting to twice a day, or end-of-day reporting, would render compliance with the timing requirement much more reasonable”).

⁵²⁵ *See* IHS Markit Letter, at 5.

⁵²⁶ *See* IHS Markit Letter, at 2 (stating that “[i]ntraday data is also difficult to ingest and analyze and therefore accessible to only the largest and most sophisticated participants in the securities lending market”); *see also* ICI Letter 1, at 6 n.22 (stating “it is well understood by market participants . . . that intraday data may be incomplete and is subject to change”).

Regulation (“SFTR”) reporting regime requires).⁵²⁷ For example, one commenter stated it did not believe there is any additional value to investors in providing intraday data, given the nature of pricing for securities lending transactions, the potential for intraday data to confuse investors, and the unnecessary costs and burdens it would pose to market participants.⁵²⁸ Another commenter who favored next day reporting maintained that it was a way to avoid the operational challenges, disproportionate costs, and compliance complexities associated with the proposed 15-minute reporting requirement.⁵²⁹ Another commenter asked the Commission to amend the 15-minute reporting requirement in favor of end-of-day reporting on a next day (T+1) basis and stated that the 15-minute reporting requirement would be impractical, and that a T+1 standard would address transparency, reduce implementation costs, and align with the existing SFTR securities loan reporting regime.⁵³⁰ Another commenter suggested that the proposed rule be modified to allow the lending agent to have until the following business day to make the required report to avoid reporting errors.⁵³¹

⁵²⁷ *See, e.g.*, SIFMA AMG Letter, at 3 (suggesting “end of next day, T+1, or at least no more frequently than by the end of each business day”); *See also* BlackRock Letter, at 2–3 (requesting a T+1 reporting requirement); *see also* IIB Letter, at 2 (suggesting “end-of-day” reporting on a T+1 basis instead of intraday reporting); ABA Letter, at 4 (suggesting “until the following business day”); RMA Letter, at 3 (suggesting “end-of-day reporting on a next day, T+1 basis” instead of a 15-minute reporting requirement because it aligns with the existing SFTR securities loans reporting regime); S3 Partners Letter, at 3 (stating the Commission should revise the proposed rule to require aggregate, not transaction level, reporting on T+1). *See also* EBF Letter, at 2 (stating that it supports IIB’s and SIFMA’s EOD and T+1 reporting comments); Citadel Letter, at 2 (referencing the significant costs associated with transaction-by-transaction reporting and the Commission’s conclusion [albeit in another SEC release] that aggregated and delayed disclosure of short sale positions was preferable to transaction-by-transaction and intraday disclosure). *See also* MFA Letter 3, at 5 (stating “the SEC’s proposal to require the reporting of the material terms of a securities loan within 15 minutes of a loan “being effected” is unworkable in a securities loan context”). According to this commenter, securities loans do not involve an outright purchase or sale but may be on-loan for extended periods, can be returned at any time, and may subsequently be re-lent. The terms of a securities loan are typically negotiated throughout the day and often not finalized until the end of the day or the next day.” *Id.* at 5. *See also* Morningstar Letter, at 2–4 (stating support for loan-level data to be made publicly available by next business day in order to provide investors with a more transparent and complete depiction of a fund’s lending activities).

⁵²⁸ *See* BlackRock Letter, at 2–4.

⁵²⁹ *See* Pirum Letter, at 2.

⁵³⁰ *See* RMA Letter, at 3.

⁵³¹ *See* ABA Letter, at 4.

Commenters also stated that next day or T+1 reporting would provide more appropriate flexibility for developing systems and processes for reporting at substantially lower cost.⁵³² Some commenters expressed support for modifying the reporting requirement to require next business day (*i.e.*, on T+1 basis) but also for an earlier reporting requirement (*i.e.*, end of the same day) provided that the Commission provides clarity regarding the precise time period for such reporting (*e.g.*, the exact point in time that will constitute “end of day” for purposes of the final rule) so that market participants will have the clarity and certainty they will need to comply and report accurately.⁵³³

After reviewing and considering the public comments and recommendations regarding the proposed 15-minute reporting requirement, the Commission is adopting final Rule 10c–1a(c), substantially as proposed, but with targeted modifications to the proposed rule’s reporting period to address commenters’ concerns about the proposed timing requirement being unworkable and overly burdensome by replacing the proposed 15-minute reporting period with end-of-day reporting, as well as bringing the different regulatory regimes in closer alignment with the final rule’s public dissemination requirements. Adopting the final rule with an end-of day reporting requirement will help reduce the concerns raised by the commenters, while still furthering the underlying objectives of the final rule.⁵³⁴

As modified, the final rule’s end-of-day reporting requirement will help prevent an excessive number of incomplete or slightly modified reports that otherwise would occur throughout the day yet without providing any incremental value. Thus, in modifying the final rule to include an end-of-day reporting requirement, rather than requiring frequent intraday reporting, the Commission understands the frequency with which parties to a securities loan may agree to some of the

⁵³² *See, e.g.*, RMA Letter 1, at 11 (stating next-day reporting would provide more appropriate flexibility for developing systems and processes for reporting at substantially lower cost).

⁵³³ *See* ICI Letter 1, at 6 (stating that for anything earlier than T+1, the SEC should provide clarity regarding the timeframe for such reporting to ensure it is feasible).

⁵³⁴ Consistent with the proposed rule, the Commission is not specifying the time that will be the “end of each business day” or what holidays are a “business day” to give an RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly, provided they are consistent with the rule as adopted. *See also* Proposing Release, 86 FR 69816 n.104. *See supra* note 72 (regarding an example for times set by an RNSA for other reporting regimes).

basic terms initially, but that some or many of the securities loan terms may not be agreed to (or may be updated throughout the day and, thus, not finalized) until the end of the day.⁵³⁵ Nonetheless, whether or not a loan has been effected is a legal/factual question and a delay in settlement (or if one of the agreed to loan terms is modified the next day) does not impact the initial requirement to report all loans (and modifications) within the required timeframes under the final rule.⁵³⁶

As adopted, paragraph (c) of the final rule requires a covered person (directly, or indirectly using a reporting agent) to provide the Rule 10c-1a information, if applicable, to an RNSA “by the end of the day on which a covered securities loan is effected.”⁵³⁷ By replacing the proposed 15-minute reporting requirement with a more flexible end-of-day (or “EOD”) reporting requirement in final Rule 10c-1a(c), the Commission recognizes that many covered securities loans are not likely to be finalized within that 15-minute time period or until the end of the day. Unlike SFTR in Europe, final Rule 10c-1a’s reporting requirement (*i.e.*, to an RNSA) will not extend until the next day, on a T+1 basis. While final Rule 10c-1a and the SFTR both deal with securities lending, they are two unique and different regulatory regimes, with differences in their underlying objectives and scope of regulations. Final Rule 10c-1a, however, does allow an RNSA until the morning of the next business day (thus on T+1, the same as SFTR) to disseminate the Rule 10c-1a information it receives the night before. This allows an RNSA sufficient time it needs between receipt of the Rule 10c-1a information and its dissemination to the public, which necessitates the Rule

10c-1a information being collected no later than the night before.

2. Timing of Reporting of Loan Modification

Proposed Rule

As discussed above, in Part VII.F.2, paragraph (c) of the proposed rule would have required that certain loan modification data elements be provided to an RNSA within 15 minutes after each loan is modified if the modification results in a change to the Rule 10c-1 information that is already required to be provided to an RNSA under paragraph (b) of the proposed rule (and for an RNSA to make such information available to the public as soon as practicable).⁵³⁸ In issuing the proposed rule, the Commission sought comment specifically regarding the proposed timing requirement in paragraph (c), which would have required specified loan modification data elements to be reported to an RNSA within 15 minutes after a loan is modified.

Final Rule

Most of the comments received by the Commission on the proposed loan modification data elements in paragraph (c) of the proposed rule were focused on the proposed 15-minute loan modification reporting requirement, with many of the commenters suggesting that it be replaced with end-of-day reporting (*i.e.*, similar to the end-of-day timing modification discussed above with respect to the securities loan data elements information originally reported to an RNSA).

In addition to the comments discussed above, in Part VII.F.2, commenters opposing the proposed 15-minute reporting requirement also raised concerns that new trades can be executed for market delivery at any time during the day before the close of settlement at DTC and, as a result, that some market participants will book trades in “batches” or at their discretion, as opposed to individually when agreed.⁵³⁹ Some commenters stated that other reporting regimes do not require intraday reporting, as certain activity reported intraday might

ultimately not result in an executed trade.⁵⁴⁰

Reporting the loan modification data elements for each covered securities loan that is modified is important to ensure that data elements previously reported to an RNSA accurately reflect currently outstanding covered securities loans and to prevent evasion of the rule. However, in response to commenters’ concerns, particularly with respect to operational difficulties associated with the proposed 15-minute loan modification reporting requirement and uncertainties as to the scope of its intended application, the Commission is adopting the loan modification data elements provision in paragraph (d) of the final rule, substantially as proposed, but with a modification as to the timing of the reporting period and some clarifying changes to the proposed rule text.

More specifically, to promote the integrity and consistency of the reporting under the final rule, the Commission has determined to remove the proposed requirement to report loan modification data elements to an RNSA within 15 minutes after each loan is modified and to replace it with the same end-of-day reporting the Commission is requiring for the original loan data elements under paragraph (c) of the final rule.⁵⁴¹ For the same reasons discussed above, in Part VII.F.1, allowing covered persons until the end of the day to report any required loan modification data information to an RNSA is appropriate because it will help to address commenters’ concerns and operational difficulties with frequent intraday reporting while still furthering the transparency objectives of the final rule.

As modified, the final rule requires the specified loan modification data elements to be provided by the covered person (directly or indirectly using a reporting agent) to an RNSA, by the end of the day on which a covered securities loan is modified.⁵⁴² By replacing the proposed 15-minute reporting requirement with a more flexible end-of-day reporting requirement in final Rule 10c-1a(d), the timing modification should help reduce the concerns raised by commenters, that is, by allowing covered persons and reporting agents

⁵³⁵ See RMA Letter, at 10 (expressing the concern that, “data reported during the course of the day would fluctuate substantially, would be incomplete in many respects and would likely include meaningful levels of exception reporting, outcomes that could be mitigated by giving borrowers and lenders the ability to conduct reconciliations at the end of the day prior to reporting”). According to this commenter, most market participants would prefer (trust) verified data with a time delay, which the commenter believed would likely be more accurate than real-time data. See *id.*

⁵³⁶ Under final Rule 10c-1a, in those instances where a covered securities loan is not settled or finalized until the next day, *i.e.*, T+1, a covered person will still be required to report the covered securities loan by the end of the day on which such covered securities loan is effected by the parties. It will not need to be reported again when it does settle the next day, on T+1—unless the reported covered securities loan is modified the next day, on T+1, when it does settle. See final Rules 10c-1a(c) and (d).

⁵³⁷ Final Rule 10c-1a(c). See also *infra* note 541 and accompanying text.

⁵³⁸ See proposed Rule 10c-1(c).

⁵³⁹ See, e.g., Pirum Letter, at 2 (explaining the batch process and how the majority of the data are processed and received in batches and, thus, end-of-day reporting, rather than the proposed 15-minute reporting requirement, will thereby allow sufficient time for necessary control processes to take place to ensure the accuracy of data submissions).

⁵⁴⁰ See, e.g., SIFMA Letter 1, at 14; SIFMA Letter 2, at 5 (supporting concerns raised in the SIFMA Letter 1, at 14); ICI Letter 1, at 6; RMA Letter, at 9; MFA Letter 1, at 9; Fidelity Letter, at 3; IIB Letter, at 6–7; IHS Markit Letter, at 10.

⁵⁴¹ See final Rules 10c-1a(c) through (e) (as modified, and for consistency, all three data elements paragraphs require end-of-day reporting, rather than the proposed 15-minute reporting requirement).

⁵⁴² See final Rule 10c-1a(d).

additional time (until the end of each day, rather than just within 15 minutes), to report any required loan modification information to an RNSA and also to help reduce the overall implementation cost for market participants, and allow such participants to better manage the flow of data in line with the existing internal processes for reporting.⁵⁴³

3. Timing of Reporting of Confidential Data Elements

Proposed Rule

As discussed above, in Part VII.F.3, the Commission also proposed that certain confidential data elements would be provided to, and retained by an RNSA,⁵⁴⁴ but not made publicly available by an RNSA.⁵⁴⁵ Such confidential data was intended to provide regulators with specific information about the loan (such as the identity of the parties to the loan) that would be kept confidential due to concerns about potential misuse of such information. The Commission proposed that such information be reported to an RNSA within 15 minutes after the loan is effected.

Final Rule

The Commission is modifying the proposed timing requirement for reporting the confidential data elements, as adopted in paragraph (e) of the final rule, similar to the timing revisions the Commission made with respect to the proposed loan and loan modification data elements adopted in paragraphs (c) and (d) of the final rule (*i.e.*, by replacing the proposed 15-minute reporting requirement with the similar end-of-day reporting period). As modified, and otherwise consistent with the rule as proposed, paragraph (e) of the final rule will continue to require that any confidential data elements be reported to an RNSA;⁵⁴⁶ however, an RNSA will be required to keep such information confidential, “in accordance with the provisions of

paragraph (h) of this section and applicable law.”⁵⁴⁷

H. Definition of Registered National Securities Association—10c–1a(j)(5)

Proposed Rule

The Commission proposed that any person that loans a security on behalf of itself or another person shall provide to an RNSA certain specified information.⁵⁴⁸ However, the Commission did not include a definition of the term “RNSA.” The Proposing Release stated that the only existing RNSA has experience establishing and maintaining systems that are designed to capture transaction reporting, similar to the requirements of final Rule 10c–1a.⁵⁴⁹

Final Rule

The Commission received comments stating that FINRA, as the only existing RNSA, is best positioned for such a role.⁵⁵⁰ To provide additional clarity regarding the regulatory body that Rule 10c–1a information must be reported to, the final rule defines the term “RNSA” to mean “an association of brokers and dealers that is registered as a national securities association pursuant to 15 U.S.C. 78o–3 (‘section 15A’) of the Exchange Act.”⁵⁵¹ This definition applies to any association of brokers and dealers that is registered as a national securities association pursuant to section 15A of the Exchange Act now or in the future.⁵⁵²

I. RNSA Rules To Administer the Collection of Information—Rule 10c–1a(f)

Proposed Rule

The Commission proposed that “[t]he RNSA shall implement rules regarding the format and manner to administer the collection of information in paragraphs

(b) through (d) of [the proposed rule] and distribute such information in accordance with the rules approved by the Commission pursuant of section 19(b) of the Exchange Act and Rule 19b–4 thereunder.”⁵⁵³ In the Proposing Release the Commission stated its preliminary belief that permitting an RNSA to implement rules regarding the administration of the collection of securities lending transactions would enable an RNSA to maintain and adapt potential technological specifications and any changes that might occur in the future.⁵⁵⁴ The Commission also affirmed that it would retain oversight of an RNSA’s adoption of rules to administer the collection of information under proposed Rule 10c–1.⁵⁵⁵

Final Rule

The Commission asked in the Proposing Release whether Rule 10c–1 should require that lenders provide material information to an entity other than an RNSA.⁵⁵⁶ One commenter stated that FINRA, the only existing RNSA, is best positioned to serve in such a role due to its expertise and experience in administering trade reporting rules.⁵⁵⁷ Other commenters also supported the role of RNSAs in collecting and distributing information under the proposed rule,⁵⁵⁸ with one specifically stating that the format and manner through which information will be provided to an RNSA should be defined by an RNSA and should not be specified in proposed Rule 10c–1.⁵⁵⁹ The Commission agrees with the commenters that an RNSA is well positioned to define, consistent with section 19(b) and Rule 19b–4 of the Exchange Act as well as an RNSA’s own internal business requirements and systems designs, the format and manner in which it collects Rule 10c–1a information.

Alternatively, another commenter recommended that the Commission should eventually transition the collection and dissemination of the data collected under proposed Rule 10c–1 to an internal process at the Commission to enhance enforcement of the proposed rule and allow the Commission to share

⁵⁴³ See, e.g., Proposing Release, 86 FR 69815 n.96 (providing an example of a modification that would not trigger as the requirement in paragraph (c) of the proposed rule (*i.e.*, when a borrower posts additional collateral in response to an increase in value of the loaned securities). Information about this change would not have needed to be provided under proposed paragraph (c) because, while proposed paragraph (b)(10) requires the Lender to provide the percentage of collateral to value of loaned securities required to secure such loan, it did not require information about the value of collateral posted in dollar terms. See also *supra* note 413 (discussing an example of a non-qualifying modification).

⁵⁴⁴ See proposed Rule 10c–1(c).

⁵⁴⁵ See proposed Rule 10c–1(g).

⁵⁴⁶ See final Rules 10c–1a(e)(1) through (e)(3).

⁵⁴⁷ See final Rule 10c–1a(g)(4). Similar to the other data element provisions under the final rule, modifying paragraph (e)’s reporting time period in this manner will not only help to ensure market participants’ compliance with final Rule 10c–1a’s confidential transaction data requirements but will respond to many of the concerns raised by commenters regarding a more frequent and burdensome intraday timeframe, as was originally proposed.

⁵⁴⁸ See proposed Rule 10c–1a(1).

⁵⁴⁹ See Proposing Release, 86 FR 69808.

⁵⁵⁰ See, e.g., OCC Letter, at 12 (stating that “FINRA is currently best positioned to serve in this role given FINRA’s experience and expertise to date in administering other trade reporting systems”). See also HMA Letter, at 7; Nasdaq Letter, at 3–4; IHS Markit Letter, at 1; FINRA Letter, at 2; AFREF Letter 1, at 4 (stating that FINRA “is the only RNSA that exists now, and the Commission should rely on FINRA to aggregate and disseminate the additional data on the securities lending market”).

⁵⁵¹ See final Rule 10c–1a(j)(5).

⁵⁵² See 15 U.S.C. 78o–3.

⁵⁵³ See proposed Rule 10c–1(f).

⁵⁵⁴ See Proposing Release, 86 FR 69819.

⁵⁵⁵ 15 U.S.C. 78s(b).

⁵⁵⁶ See Proposing Release, 86 FR 69809 (Question 13).

⁵⁵⁷ See OCC Letter, at 12 (stating that it “believes that FINRA is currently best positioned to serve in this role given FINRA’s experience and expertise to date in administering other trade reporting systems”).

⁵⁵⁸ See HMA Letter, at 7. See also Nasdaq Letter, at 3–4.

⁵⁵⁹ See IHS Markit Letter, at 11.

relevant data.⁵⁶⁰ However, in addition to providing securities lending information to the public, the final rule is intended to provide additional tools to RNSAs to enhance RNSAs' surveillance over the securities markets. An RNSA is appropriately suited for collecting and analyzing such data for such surveillance purposes.

Some commenters expressed concerns or provided recommendations for an RNSA's administration of information collected under the final rule. One commenter stated the importance of RNSAs' compliance with section 19(b) and Rule 19b-4 of the Exchange Act when implementing RNSA rules required by final Rule 10c-1a.⁵⁶¹ Consistent with the proposed rule,⁵⁶² any proposed changes to an RNSA's rules required by final Rule 10c-1a, including its Rule 10c-1a information collection and dissemination practices, will also be subject to notice, public comment, and Commission review pursuant to section 19(b) and Rule 19b-4 prior to implementation. This requirement, including the notice and opportunity for public comment, will help the Commission ensure that the direct reporting to an RNSA by covered persons is logistically feasible, prior to the effectiveness and implementation of such RNSA rule, and that its methodology helps ensure the accuracy and quality of the reported data.

Another commenter expressed concern that the proposed rule "would provide no mechanism for quality assurance."⁵⁶³ An RNSA could choose to include mechanisms for quality assurance in its rules to implement the system under the final rule. Further, all RNSA rules implementing the system under the final rule will be subject to notice, public comment, and Commission review under section 19(b) and Rule 19b-4.

Another commenter stated that the Commission "should ensure that direct reporting to the RNSA is logistically feasible for entities that are not broker-dealers."⁵⁶⁴ The final rule permits such entities to enter into agreements with reporting agents that are brokers, dealers, or registered clearing agencies to fulfill their reporting obligations on their behalf, should they determine that

direct reporting is not the most appropriate choice for them.⁵⁶⁵

One commenter recommended that the collection, maintenance, and publication of securities lending data, which an RNSA was required to perform under the proposed rule, be subject to a competitive bidding process to select a technology vendor or vendors to provide such services.⁵⁶⁶ However, the oversight that the Commission maintains over RNSAs, including oversight of their rules to administer the collection of Rule 10c-1a information pursuant to section 19(b) and Rule 19b-4, would not apply to the more general population of "technology vendors" that the commenter proposes should participate in a competitive bidding process to collect, maintain, and distribute Rule 10c-1a information.⁵⁶⁷ The commenter's proposed approach would not be appropriate in the absence of such oversight. The Commission agrees with one commenter's statement that the existing RNSA is well positioned to serve in this role under final Rule 10c-1a given its expertise in administering other trade reporting systems.⁵⁶⁸

Having considered commenters' submissions, for the foregoing reasons, the Commission is adopting the requirement that an RNSA shall implement rules regarding the format and manner to administer the collection and dissemination of certain information, substantially as proposed. The final rule includes minor changes to reflect that the relevant Rule 10c-1a information paragraphs have been renumbered to align with the format of the final rule,⁵⁶⁹ to provide citations to the statutory provision and regulation that such rules must be promulgated pursuant to, the term "distribute such information" has been modified to "make publicly available such information" to more accurately reflect an RNSA's responsibilities for the publication of data under final Rule 10c-1a(g), and the term "approved by the Commission" has been modified to "promulgated" to more accurately reflect the process by which RNSA rules are implemented pursuant to section 19(b) and Rule 19b-4 of the Exchange Act.

J. RNSA Publication of Data—10c-1a(g) Proposed Rule

The proposed rule would have required an RNSA to make available to the public the information required by proposed paragraph (b), including the legal name of the security issuer, and the LEI of the issuer, if the issuer has an active LEI,⁵⁷⁰ and the ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier.⁵⁷¹ In addition, modifications that resulted in a change to the data elements required to be provided to an RNSA under paragraph (b) of the proposed rule would also have been made public by an RNSA.⁵⁷² An RNSA would have also provided identifying information for each security for which aggregate information would be made public.⁵⁷³ Paragraph (e)(3) of the proposed rule further required that an RNSA keep identifying information about lending agents, reporting agents, and other persons using reporting agents confidential, subject to applicable law.⁵⁷⁴ In addition, the confidential data elements in proposed Rules 10c-1(d)(1) through (3) would be kept confidential so as to not identify market participants or reveal information about the internal operations of market participants.⁵⁷⁵ The proposed rule also required an RNSA to assign a unique transaction identifier to each loan.⁵⁷⁶

Final Rule

The Commission received many comments that expressed support for increasing transparency and price discovery in the securities lending market by increasing the amount and availability of data to the public.⁵⁷⁷ Commenters were generally supportive of the requirement that an RNSA be responsible for making reportable data publicly available.⁵⁷⁸

The proposed rule combined reporting requirements with RNSA

⁵⁷⁰ See proposed Rule 10c-1(b)(1).

⁵⁷¹ See proposed Rule 10c-1(b)(2).

⁵⁷² See proposed Rule 10c-1(c).

⁵⁷³ See proposed Rule 10c-1(g).

⁵⁷⁴ See proposed Rule 10c-1(e)(3).

⁵⁷⁵ See Proposing Release, 86 FR 69812 n.85.

⁵⁷⁶ See proposed Rule 10c-1(b).

⁵⁷⁷ See, e.g., FINRA Letter, at 1 (stating that it "agrees with the Commission that the public dissemination of securities lending information under the Proposal will, among other benefits, improve price discovery in the securities lending market."); Nasdaq Letter, at 3; AFREF Letter 1, at 3; Better Markets Letter, at 4-7; Bloomberg L.P. Letter, at 1 ("[w]e appreciate the Commission's endeavor to improve the transparency and efficiency of the securities lending market by increasing the availability of information regarding securities lending transactions"); ASA Letter, at 1; Letter from N. Abanes (Aug. 15, 2023); Letter from Brandon Smith (Aug. 15, 2023).

⁵⁷⁸ See, e.g., HMA Letter, at 7.

⁵⁶⁰ See AFREF Letter 1, at 4.

⁵⁶¹ See Bloomberg L.P. Letter, at 4 (stating "the importance of RNSAs' compliance with section 19(b) of the Exchange Act and Rule 19b-4 thereunder when implementing rules pertaining to the securities lending data").

⁵⁶² See Proposing Release, 86 FR 69819 n.116.

⁵⁶³ See S3 Partners Letter, at 5.

⁵⁶⁴ See BlackRock Letter, at 3.

⁵⁶⁵ See final Rule 10c-1a(a)(2).

⁵⁶⁶ See S3 Partners Letter, at 12-13.

⁵⁶⁷ See S3 Partners Letter, at 12-13.

⁵⁶⁸ See OCC Letter, at 12.

⁵⁶⁹ See final Rule 10c-1a(g). References to the relevant collected information in paragraphs (b) through (e) of the proposed rule have been amended to reference paragraphs (c) through (e) of the final rule.

publication requirements, which resulted in commenters addressing these respective requirements in conjunction with one another.⁵⁷⁹ The Commission did not intend to conflate the requirements. The final rule separates an RNSA's publication responsibilities from a covered person's reporting requirements to improve the structure of the final rule. Therefore, final Rule 10c-1a is modified to separate the requirements of an RNSA from the reporting requirements applicable to covered persons and reporting agents. Final Rule 10c-1a now places an RNSA's publication of data elements into new paragraph (g).

In response to the comments received that the disclosure of reported information by an RNSA on a transaction-by-transaction basis could increase the risk of revealing short sale strategies,⁵⁸⁰ final Rule 10c-1a bifurcates paragraph (g) requirements such that certain data elements will be made publicly available on a transaction-by-transaction basis and aggregate transaction activity and distribution of loan rates) will also be made publicly available in an aggregated format for each reportable security. With respect to aggregated data, the final rule includes a new requirement for an RNSA to make "information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security and the security identifier(s) under paragraphs (c)(1) or (2) of the final rule for which an RNSA determines is appropriate to identify" publicly available "as soon as practicable, and not later than the morning of the business day after the covered securities loan is effected or modified."⁵⁸¹ The term "aggregate transaction activity," as used in the final rule, refers to information pertaining to the absolute value of transactions such that net position changes should not be discernable in the data, and is intended to help ensure that only aggregate information about net positions changes, rather than individualized information, is provided to the public. The addition of the term "aggregate transaction activity" responds to commenters' concerns about the potential exposure of proprietary information, while still providing volume transparency to market participants. Providing information

about the distribution of loan rates⁵⁸² for each security recognizes that the cost-to-borrow for loans of securities is influenced by a number of factors (e.g., counterparty-creditworthiness) and, thus, information about loan rates on a transaction-by-transaction basis may not facilitate a perfect comparison of such rates between loans of the same security. Consequently, knowing the distribution of loan rates for a given security can give market participants information to help market participants compare the pricing of their covered securities loan against the pricing of other covered securities loans. This can facilitate conversations between beneficial owners and their lending agents or end borrowers with their brokers or dealers regarding the terms of their loan.

Additionally, the final rule delays an RNSA's publication of loan amount, on a transaction-by-transaction basis in paragraph (c)(6), to the twentieth business day after the covered securities loan is effected along with the loan and security identifying information specified in paragraphs (g)(1)(i)(A) and (C) of this section.⁵⁸³ The final rule also delays an RNSA's publication of a modification to loan amount, on a transaction-by-transaction basis, in paragraph (c)(6), to the twentieth business day after the covered securities loan is modified with the loan and security identifying information specified in paragraphs (g)(1)(i)(A) and (C).⁵⁸⁴

For purposes of compliance with the final rule, the countdown to the "twentieth business day" starts the day after the covered securities loan is effected. For example, if a covered securities loan were effected at 4:00 p.m. on a Wednesday, and the applicable Rule 10c-1a information is received by an RNSA by the end of that day, that Thursday after the Wednesday on which the covered securities loan is effected will start the 20-business day period, assuming that Thursday is not a holiday.

The final rule contains requirements for an RNSA to make data elements other than loan amount publicly available as soon as practicable, and not later than the morning of the business

day after the covered securities loan is effected.⁵⁸⁵ Similarly, the final rule requires an RNSA to make loan modifications, excluding modifications to loan amount, publicly available, as soon as practicable, and not later than the morning of the business day after the covered securities loan is modified.⁵⁸⁶ The final rule also requires that an RNSA make the data elements in paragraph (c) of the final rule, other than loan amount, publicly available as soon as practicable, and not later than the morning of the business day after the covered securities loan is effected, if a securities loan is modified when such covered securities loan is a pre-existing covered securities loan (*i.e.*, a covered securities loan for which reporting under paragraph (a) was not required on the date the loan was agreed to or last modified).⁵⁸⁷ This requirement is designed to provide transparency for covered securities loans that have not been previously reported to an RNSA prior to having a data element of paragraph (c) modified. As discussed above, in Part VII.F.2, the final rule also requires that an RNSA make publicly available the data elements in paragraph (c) of the final rule for pre-existing covered securities loans. The final rule also contains a requirement for an RNSA to keep confidential data elements confidential, in accordance with subparagraph (h) and consistent with applicable law.⁵⁸⁸ Final Rule 10c-1a also contains updated terminology from the proposed Rule 10c-1, including that the "unique transaction identifier" is updated to "unique identifier;" and references to "loan" are updated to "covered securities loan."⁵⁸⁹ Revisions to final Rule 10c-1a(g) are updated with the relevant paragraphs renumbered to align with the format of the final rule.⁵⁹⁰

Final Rule 10c-1a requires an RNSA to assign each covered securities loan a unique identifier in paragraphs (g)(1)(i)(A) and (g)(3). The final rule makes a revision to terminology by replacing the term "unique transaction identifier" assigned by an RNSA to the original loan, as used in the proposed rule, with "unique identifier" assigned by an RNSA to the original covered securities loan. The removal of "transaction" is to avoid confusion with the defined term "covered securities loan," which is the accurate description

⁵⁷⁹ See, e.g., proposed Rule 10c-1(b).

⁵⁸⁰ See, e.g., *supra* note 399 and accompanying text.

⁵⁸¹ See final Rule 10c-1a(g)(5).

⁵⁸² "Loan rate" refers to aggregate fee and rebate information provided to an RNSA in final Rule 10c-1a(c)(8) and final Rule 10c-1a(c)(9). The loan rate for a security is reported differently depending on whether the securities loan is cash or non-cash collateralized. For cash-collateralized loans, the "loan rate" is indicated by the rebate rate (as reflected in final Rule 10c-1a(c)(8)); for non-cash-collateralized loans, the "loan rate" is the lending fee (as reported in final Rule 10c-1a(c)(9)).

⁵⁸³ See final Rule 10c-1a(g)(2).

⁵⁸⁴ See final Rule 10c-1a(g)(3).

⁵⁸⁵ See final Rule 10c-1a(g)(1).

⁵⁸⁶ See final Rule 10c-1a(g)(3).

⁵⁸⁷ See final Rule 10c-1a(g)(3)(i).

⁵⁸⁸ See final Rule 10c-1a(g)(4).

⁵⁸⁹ See final Rule 10c-1a(g).

⁵⁹⁰ See final Rules 10c-1a(g)(3)(i) and (ii).

of what the “unique identifier” represents.

While the final rule continues to require an RNSA to “assign each covered securities loan a unique identifier,” a general theme received from commenters was about the operational efficiency of allowing market participants to create and submit their own unique identifiers.⁵⁹¹ In response to the Proposing Release, one commenter stated that “beneficial owners or those reporting on their behalf should have flexibility to generate their own Transaction Identifiers provided they meet minimum standards for integrity and identification” and that “this Transaction Identifier [be used] in connection with any loan modification reporting in connection with the relevant loan.”⁵⁹² Another commenter recommended that “allowance is made for the UTI to be provided to the RNSA by the reporting party, with an on-receipt issuance model only available should firms have no existing UTI for a reportable transaction.”⁵⁹³ Another commenter agreed that firms should be allowed to internally assign UTIs and report them to an RNSA, but alternatively suggested that if the UTI is required to be assigned by an RNSA then an RNSA should return this internal identifier to the reporting firm along with an RNSA-assigned UTI in order to link a modification to the original reported loan.⁵⁹⁴ This commenter also recommended that, under either approach, UTIs should be different in the U.S. and other jurisdictions, as applicable.⁵⁹⁵ Another commenter stated that under the final rule, if there was a loan that was reported to both an RNSA and the SFTR, the loan would have an identifier for each system and prevent global aggregation.⁵⁹⁶

The Commission understands that for many reporting entities, obtaining a unique identifier from an RNSA on a post-trade basis and then tagging it to the trade for accurate reporting may add complication and expense and introduces operational risk for post-trade errors in aligning trades with transaction identifiers (particularly if a trade has been modified during the course of intraday trade reporting). According to one commenter, “the objective of a Transaction Identifier is to

uniquely identify a particular transaction; so long as that objective is satisfied, the SEC should be neutral as to the manner in which the Transaction Identifier is produced.”⁵⁹⁷ Doing so, the commenter suggests, “would [provide] the flexibility to an RNSA to allow reporting parties to provide their own Transaction Identifiers [which] would likely materially reduce costs for any such parties.”⁵⁹⁸ According to the commenter, this approach has been successfully deployed in Europe, under the SFTR, and the U.S. in connection with security-based swap reporting rules.⁵⁹⁹ Accordingly, this commenter urged the Commission to permit the reporting agent to generate the transaction identifiers prior to reporting to an RNSA, with an RNSA available to provide Transaction Identifiers as a back-up for those reporting parties who are unable, for whatever reason, to generate their own transaction identifiers.⁶⁰⁰ Another commenter stated that while the data elements required to be reported are sufficient to allow for an RNSA to identify loans and to create a unique transaction identifier, the Commission should specify how such identifier will be shared with the reporter.⁶⁰¹

Having a unique identifier assigned to each covered securities loan is necessary for an RNSA to easily track the loan and facilitate the identification and reporting of any subsequent modifications to a particular covered securities loan. The Commission agrees with the comment that the objective is to have a unique identifier for tracking and that the Commission should be neutral as to the manner in which the unique identifier is produced,⁶⁰² and that it is appropriate to allow administrative details of the process to be left to the discretion of an RNSA, rather than dictated by the Commission.⁶⁰³ It is appropriate to require an RNSA to assign a unique identifier to the loan, even if such loan already has an identifier that is reported to the SFTR, for consistency with an RNSA’s rules and systems. Further, the final rule requires an RNSA to create a system capable of generating unique identifiers, but does not preclude market participants from creating their

own unique identifiers when submitting information to an RNSA.

The Commission agrees that FINRA, as the sole existing RNSA, has the experience and controls to implement an appropriate system for market participants, including, if appropriate, how an identifier will be shared with a reporter. Structuring the final rule to provide an RNSA with flexibility to accept unique identifiers and/or use an RNSA assigned unique identifier to publish data is operationally practical. Accordingly, final Rule 10c–1a(g) maintains that an RNSA shall assign a unique identifier to the covered securities loan and make publicly available as soon as practicable, and not later than the morning of the business day after the covered securities loan is effected.⁶⁰⁴

K. RNSA Data Retention, Availability, Fees, and Security

1. Data Retention—Rule 10c–1a(h)(1) Proposed Rule

Under the proposed rule the Commission required that RNSAs retain the information collected pursuant to paragraphs (b) through (e) of the proposed rule in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years.⁶⁰⁵ In the Proposing Release, the Commission stated that requiring an RNSA to retain records for five years was consistent with other retention obligations of records that Exchange Act rules impose on an RNSA.⁶⁰⁶ As examples, the Commission identified Rule 17a–1⁶⁰⁷ and 17 CFR 242.613(e)(8) (“Rule 613(e)(8)”) of Regulation NMS, both of which require RNSAs to keep documents for a period of not less than five years.

Final Rule

The Commission received limited comments concerning this element of the proposed rule. One commenter stated that a retention period of six years plus the current year would simplify GDPR and UK tax compliance.⁶⁰⁸ The Commission recognizes the importance of compliance with other regulatory regimes; however, requiring RNSAs to retain records for not less than five years is consistent with other record retention obligations that Exchange Act rules

⁵⁹¹ See, e.g., State Street Letter, at 6; ABA Letter, at 4.

⁵⁹² See RMA Letter, at 1, 19.

⁵⁹³ Pirum Letter, at 4.

⁵⁹⁴ See FIF Letter, at 8–9.

⁵⁹⁵ See FIF Letter, at 9.

⁵⁹⁶ See Pirum Letter, at 4.

⁵⁹⁷ RMA Letter, at 19.

⁵⁹⁸ RMA Letter, at 19.

⁵⁹⁹ See RMA Letter, at 19.

⁶⁰⁰ See RMA Letter, at 19.

⁶⁰¹ See IHS Markit Letter, at 8.

⁶⁰² See RMA Letter, at 19.

⁶⁰³ See OCC Letter, at 12 (stating that “FINRA is currently best positioned to serve in this role given [its] experience and expertise to date in administering other trade reporting systems.”).

⁶⁰⁴ See final Rule 10c–1a(g).

⁶⁰⁵ See proposed Rule 10c–1(g)(1).

⁶⁰⁶ See Proposing Release, 86 FR 69819.

⁶⁰⁷ See 17 CFR 240.17a–1.

⁶⁰⁸ See Letter from Andrew Robinson (Jan. 7, 2022) (“Robinson Letter”), at 12.

impose on RNSAs.⁶⁰⁹ Including a retention period that is consistent with other rules applicable to RNSAs could reduce the burden for an RSA to comply with the retention requirements in proposed Rule 10c–1 because RNSAs will have developed experience and controls around administering similar record retention programs.⁶¹⁰ Therefore, the Commission is adopting RSA data retention requirements as proposed (*i.e.*, in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years), with the relevant paragraphs renumbered to align with the format of the final rule.⁶¹¹

2. Data Availability to the Public—Rule 10c–1a(h)(3)

Proposed Rule

The Commission proposed that RNSAs make certain data⁶¹² available to the public in a convenient and usable standard electronic data format on its website or similar means of electronic distribution, without charge and without use restrictions, for at least a five-year period.⁶¹³ The Commission stated its preliminary belief that requiring an RSA to provide certain information to the public would further the direction by Congress in section 984(b) of the Dodd-Frank Act for the Commission to promulgate rules that are designed to increase the transparency of information to brokers-dealers and investors, with respect to the loan or borrowing of securities.⁶¹⁴ The Commission acknowledged that establishing and maintaining a system to provide public access to Rule 10c–1 information is not without cost, and expressed the preliminary belief that such costs should be borne by an RSA in the first instance and be permitted to be recouped by an RSA from market

participants who report securities lending transactions to an RSA.⁶¹⁵ The Commission also stated its belief that any restrictions on how the publicly available Rule 10c–1 information is used could impede the utility of such information and limit the ability of investors, commercial vendors, and other third parties, such as academics, from developing uses and analyses of the information.⁶¹⁶

Final Rule

It is appropriate to remove the phrase “without charge” from an RSA’s availability of information requirements in final Rule 10c–1a(h)(3). Some commenters supported the Commission making certain securities lending information available without charge, as proposed.⁶¹⁷ One commenter stated generally that it would be extremely helpful to have freely available data.⁶¹⁸ The Commission agrees that having access to securities lending data without charge will benefit market participants. As discussed below, in Part VII.K.3, the Commission received comment recommending that RNSAs be permitted to charge fees to entities other than lending agents and beneficial owners.⁶¹⁹ After considering commenter input, the Commission is removing the “without charge” requirement from the final rule to provide RNSAs with greater flexibility to structure reasonable fees. As discussed below, in Part VII.K.3, and as proposed,⁶²⁰ any such fees will have to be filed with the Commission pursuant to section 19(b) of the Exchange Act and Rule 19b–4, and would be published for notice and public comment. Additionally, consistent with the Proposing Release,⁶²¹ and the provisions that govern RNSAs under the Exchange Act,⁶²² the final rule requires that RNSAs may only establish and collect fees that are reasonable.⁶²³ Furthermore, as proposed, the final rule prohibits use restrictions on the publicly available information.⁶²⁴ Any restrictions on how the publicly available Rule 10c–1a information is used could impede its utility and limit the ability of investors, commercial vendors, and other third

parties, such as academics, from developing uses and analyses of the information.⁶²⁵

The Proposing Release included a request for comment asking if a period of five years is the appropriate length of time for an RSA to make information available to the public.⁶²⁶ One commenter responded, stating that, “transparency is a good thing, and lessons can be learned from history, ‘in perpetuity’ would be the ideal period of time.”⁶²⁷ The Commission acknowledges the value of historical studies of securities markets, and the final rule does not preclude an RSA from making certain reported data public in perpetuity. However, requiring that RNSAs make certain information publicly available indefinitely could prove unduly burdensome on RNSAs when compared with the utility of old and potentially less informative data. Furthermore, making information available in a convenient and usable standard electronic data format indefinitely would necessitate that RNSAs retain the data indefinitely, which would be inconsistent with the final rule’s data retention requirements⁶²⁸ and other retention obligations of records that Exchange Act rules impose on RNSAs.⁶²⁹ Five years is the appropriate length of time for an RSA to be required to make information available to the public, because such a time period will provide broker-dealers and investors with an opportunity to identify trends occurring in the market and in individual securities based on changes to the material terms of securities lending transactions.

For the foregoing reasons the Commission is adopting the collected information availability requirements for RNSAs, with respect to making certain collected information available to the public, substantially as proposed, with the phrase “without charge” removed and the relevant paragraphs renumbered to align with the format of the final rule.⁶³⁰

⁶⁰⁹ See Proposing Release, 86 FR 69819. Rule 17a–1 requires RNSAs to keep documents for a period of not less than five years. Similarly, Rule 613(e)(8) of Regulation NMS, on which the retention period for proposed Rule 10c–1 is modeled, requires the central repository to retain information in a convenient and usable standard electronic data format that is directly available and searchable electronically without any manual intervention for a period of not less than five years.

⁶¹⁰ See Proposing Release, 86 FR 69819.

⁶¹¹ See 17 CFR 240.10c–1a(h)(1) (“final Rule 10c–1a(h)(1)”). References to the relevant collected information in paragraphs (b) through (e) of the proposed rule have been updated to accurately reflect their place in paragraphs (c) through (f) of the final rule.

⁶¹² See proposed Rule 10c–1(g)(3) (specifically including the information collected under paragraphs (b) and (c) of the proposed rule and the aggregate of the information provided pursuant to paragraph (e) of the proposed rule).

⁶¹³ See proposed Rule 10c–1(g)(3).

⁶¹⁴ See Proposing Release, 86 FR 69819.

⁶¹⁵ See Proposing Release, 86 FR 69819–20.

⁶¹⁶ See Proposing Release, 86 FR 69820.

⁶¹⁷ See James J. Angel Letter, at 3; Morningstar Letter, at 4 (stating that an “RSA’s free and unrestricted disclosures to the public increase transparency”).

⁶¹⁸ See James J. Angel Letter, at 2.

⁶¹⁹ See ABA Letter, at 2–3.

⁶²⁰ See Proposing Release, 86 FR 69820.

⁶²¹ See proposed Rule 10c–1(h).

⁶²² See 15 U.S.C. 78o(b) (section 15A(b) of the Exchange Act).

⁶²³ See final Rule 10c–1a(i).

⁶²⁴ See final Rule 10c–1a(h)(3).

⁶²⁵ The requirement to provide the Rule 10c–1a information in the same manner such information is maintained pursuant to final Rule 10c–1a(h)(1) and without use restrictions is not intended to preclude an RSA from creating alternative means to provide information to the public or subscribers. For example, an RSA might choose to file with the Commission proposed rules to establish data feeds of the Rule 10c–1a information that vendors might subscribe to (including fee-based subscriptions) and repackage for onward distribution.

⁶²⁶ See Proposing Release, 86 FR 69820 (Question 58).

⁶²⁷ See Robinson Letter, at 12.

⁶²⁸ See final Rule 10c–1a(h)(1).

⁶²⁹ See *supra* note 609.

⁶³⁰ See final Rule 10c–1a(h)(3). References to the relevant collected information in paragraphs (b) and

3. RNSA Fees—Rule 10c–1a(i)

Proposed Rule

The Commission proposed that RNSAs may establish and collect reasonable fees, pursuant to rules that are effective pursuant to section 19(b) of the Exchange Act and Rule 19b–4 thereunder, from each person who provides any data set forth in paragraphs (b) through (e) of this section directly to an RNSA.⁶³¹ Under the Exchange Act, RNSAs are allowed to adopt rules that impose the equitable allocation of reasonable fees among members and issuers, and other persons that use an RNSA facility or system.⁶³² In the Proposing Release the Commission stated its preliminary belief that it would be appropriate to establish and collect reasonable fees from each person who directly provides the information set forth in the rule to an RNSA.

Final Rule

One commenter supported an RNSA acting in accordance with section 19(b) of the Exchange Act and Rule 19b–4 thereunder when implementing rules regarding fees.⁶³³ Another commenter recommended that reporting costs should not only be borne by persons who provide data directly to an RNSA and recommended that “costs incurred by FINRA . . . be shared among all those that benefit from securities lending activity, not solely on lending agents and beneficial owner clients.”⁶³⁴ Similarly, another commenter recommended “that the costs incurred by the RNSA to establish and operate the reporting system for securities

lending data should be equitably shared by both borrowers and lenders, along with a tiered fee structure that eliminates costs for General Collateral (“GC”) transactions.”⁶³⁵

The Commission recognizes that additional flexibility may be warranted in how costs incurred by an RNSA are recouped. To provide more flexibility in the establishment and collection of reasonable fees by RNSAs, the final rule has been amended from the proposed rule to remove the requirement that fees only be collected “from each person who provides any data set forth in paragraphs (b) through (e) of this section directly to the RNSA.”⁶³⁶ The final rule provides that an RNSA may “establish and collect reasonable fees, pursuant to rules that are promulgated pursuant to section 19(b) and Rule 19b–4 of the Exchange Act.”⁶³⁷ These changes from the proposed rule will provide RNSAs with greater flexibility to structure reasonable fees, including permitting the charging of fees to entities that use certain value-added services, as discussed above in Part VII.K.2, when accessing the information made publicly available by an RNSA.⁶³⁸

4. Data Security—Rule 10c–1a(h)(4)

Proposed Rule

The Commission proposed a requirement that RNSAs establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of certain confidential information required by the proposed rule.⁶³⁹ In the Proposing Release the Commission stated its preliminary belief that an RNSA needs to protect Rule 10c–1 information from intentional or inadvertent disclosure to protect investors that provide such information by establishing reasonably designed written policies and procedures because the distribution of such information would identify market participants or could reveal information about the internal operations of market participants, which could be adverse to those providing information to an RNSA.⁶⁴⁰

⁶³⁵ See State Street Letter, at 2.

⁶³⁶ See proposed Rule 10c–1(h).

⁶³⁷ Final Rule 10c–1a(i).

⁶³⁸ See *supra* Part VII.K.2 (discussing the removal of the phrase “without charge” from proposed Rule 10c–1(g)(3) concerning the requirements for RNSAs to make certain information available to the public).

⁶³⁹ See proposed Rule 10c–1(h)(4) (specifically including the information collected pursuant to paragraphs (d) and (e)(3) of the proposed rule).

⁶⁴⁰ See Proposing Release, 86 FR 69820.

Final Rule

For the reasons discussed above, in Part VII.F.3, the Commission is adopting the final rule as proposed and requiring an RNSA to establish, maintain, and enforce written policies and procedures to maintain the confidentiality of the confidential data elements collected under the final rule.⁶⁴¹

L. Data Availability to the Commission and Other Persons—Rule 10c–1a(h)(2)

Proposed Rule

The Commission proposed that RNSAs be required to make certain information, including confidential information, collected pursuant to the proposed rule available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need.⁶⁴²

Final Rule

Two commenters recommended that the final rule require RNSAs to make collected confidential information available to SROs without obtaining an SEC order.⁶⁴³ However, another commenter recommended that access to such information by securities exchanges should require a clear regulatory purpose.⁶⁴⁴ The Commission recognizes that other regulators and SROs may require access to the confidential information reported to RNSAs pursuant to final Rule 10c–1a for regulatory purposes. However, it is appropriate to only provide such information by order of the Commission upon a demonstrated regulatory need.⁶⁴⁵ Imposing this condition on access to reported information should help ensure the security of the reported data elements, while taking into account that other regulators may require access. For the foregoing reasons the Commission is adopting the requirement that RNSAs make collected information available to the

⁶⁴¹ See final Rule 10c–1a(h)(4).

⁶⁴² See proposed Rule 10c–1(g)(2) (specifically including the information collected pursuant to paragraph (a)(2)(iii) and paragraphs (b) through (e) of the proposed rule).

⁶⁴³ See NYSE Letter 2, at 2 (stating that “[t]here may be NYSE inquiries or investigations where securities lending information would be important, and where time could be of the essence”); Nasdaq Letter, at 4.

⁶⁴⁴ See HMA Letter, at 11 (stating that any access by exchanges “must be narrowly tailored to achieve a clear, specific regulatory purpose, and subject to significant oversight by the Commission”).

⁶⁴⁵ See Proposing Release, 86 FR 69852. See also final Rule 10c–1a(h)(2). Restrictions on the availability of reported Rule 10c–1a information to other persons is subject to applicable law, as an RNSA could be compelled to provide information pursuant to a court order or other legal authority (such as a subpoena).

(c) of the proposed rule have been updated to reference paragraphs (c) and (d) of the final rule. The proposed rule’s reference to “the aggregate of the information provided pursuant to paragraph (e) of this section” has been removed from the final rule as discussed above, in Parts VII.F.4 and VII.F.5. Additionally, the word “provide” at the beginning of proposed Rule 10c–1(g)(3) has been replaced by “make” in final Rule 10c–1a(h)(3) for consistency.

⁶³¹ See proposed Rule 10c–1(h).

⁶³² See 15 U.S.C. 78o–3(b)(5) (“The rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls.”).

⁶³³ See Bloomberg L.P. Letter, at 3 (stating that “[t]he rules of an RNSA, including those pertaining to any fees, should thus comport with the requirements of the Exchange Act”). See also HMA Letter, at 7 and 10 (stating that “it will be essential for the Commission to ensure that the RNSA’s . . . fees related to the development and operations of the reporting and dissemination systems contemplated by the Proposal are subject to meaningful scrutiny” and recommending “that any fees are imposed pursuant to filings that are subject to Commission review, and approved only if determined to be consistent with the Exchange Act and Commission Rules”).

⁶³⁴ See ABA Letter, at 3.

Commission, and make it available to other persons as the Commission may designate by order upon a demonstrated regulatory need, with a technical edit.⁶⁴⁶ with the relevant paragraphs renumbered to align with the format of the final rule.⁶⁴⁷

M. Cross-Border Application of Rule 10c-1a

The Commission received a number of comments about the rule's intended cross-border application.⁶⁴⁸ Many of these comments requested that the Commission provide cross-border guidance to help promote legal certainty and competitive equity, and that in doing so the Commission rely on existing definitions for U.S. and non-US

⁶⁴⁶ The Commission is also making a technical edit to specify that its own access to the information collected pursuant to paragraph (b)(1)(iv) and paragraphs (c) through (e) is not limited. Final Rule 10c-1a(h)(2) has been formatted to distinguish the Commission's access from "other persons as the Commission may designate."

⁶⁴⁷ See final Rule 10c-1a(h)(2). References to the relevant collected information in paragraphs (a)(2)(iii) and (b) through (e) of the proposed rule have been updated to reference paragraphs (b)(4) and (c) through (e) of the final rule.

⁶⁴⁸ See, e.g., Letter from Mark A. Steffensen, Senior Executive Vice President and General Counsel for HSBC North American Holdings Inc. and HSBC Bank USA, N.A. (Jan. 24, 2023) ("HSBC Letter 1"), at 1-2 (expressing concern that the cross-border application of the proposed rule is unclear and overbroad, which makes it difficult for firms to assess the scope of the new reporting obligations and challenging to implement internal programs, policies, procedures to ensure compliance with the new reporting regime. Further, an expansive cross-border application could lead to questions regarding the Commission's authority to promulgate the rule, and its commitment to respecting the decisions of peer EU/UK regulators.). See also Linklaters Letter, at 2 (stating that, "because the proposed rule would apply to 'any person,' 'the scope of the proposed rule, particularly outside the U.S., is unclear and potentially overbroad'"). The commenter, however, offered suggestions for clarifying the proposed rule's extraterritorial scope, including recommending that the Commission clarify that the proposed rule "does not apply to non-U.S. persons that do not use any U.S. jurisdictional means in connection with a securities lending transaction or, alternatively, exclude Canadian institutions from the scope of the proposed rule." See *id.* To provide legal certainty as to its cross-border application, the commenter also suggested that the Commission should clarify that, given that it would be promulgated under section 10(c)(1) of the Exchange Act, final Rule 10c-1a would not apply to non-U.S. persons that do not use any U.S. jurisdictional means to effect, accept, or facilitate a securities lending transaction. See *id.* at 2-3. See also ICI Letter 1, at 7-8 (encouraging the Commission to analyze and clarify the cross-border implications of the final rule to ensure that the final rule does not have inappropriate cross-border reach). See also IIB Letter, at 4-5; RMA Letter, at 17-18; Federated Hermes Letter, at 2 (agreeing with ICI's comment regarding the Commission needing to clarify the cross-border ramifications of the final rule); EBF Letter, at 1-2 (stating that the SEC needs to clarify the cross-border reach of the proposed rule by following the same approach as used for foreign broker-dealer registration, with the goal of being able to define the precise territorial scope of the proposed rule).

market participants to avoid new documentation requirements.⁶⁴⁹ Among other things, these commenters requested clarification or specific guidance as to when non-U.S. persons would be subject to the final rule⁶⁵⁰ and clarity as to the circumstances under which a securities loan will be deemed to be within the U.S. market for purposes of applying reporting requirements.⁶⁵¹ Some commenters stated that because the rule would apply broadly to "any person" that loans a security on behalf of itself or another person, that could mean the rule would

⁶⁴⁹ See RMA Letter, at 18.

⁶⁵⁰ One commenter stated that it believed the rule should not apply to non-U.S. persons who do not facilitate, effect, or accept loans in the U.S. That commenter also suggested the Commission consider taking a risk-based approach that advances the goals of section 984 of the Dodd-Frank Act by more precisely targeting the segment of the securities lending market that presents the greatest risks to the U.S. financial system, by excluding certain categories of market participants, such as Canadian Institutions. The commenter did not further explain the parameters of their suggested approach. See Linklaters Letter, at 3. The cross-border scope of the rule should be focused on facilitating, effecting, or accepting loans in the U.S. rather than the alternative approach the commenter suggests that would exclude Canadian Institutions and thereby limit transparency regarding loans of securities that are facilitated, effected, or accepted in the U.S. Another commenter stated that, despite the legislative history of section 10(c) and the Commission's statements in the proposal, "the intent of proposed Rule 10c-1 was to increase transparency of securities lending information with respect to the U.S. markets for the benefit of U.S. brokers, dealers, and investors" but that the reach of the rule to all lenders is broader. See ICI Letter 1, at 7-8. See also SIFMA Letter 1, at 19-20. See MFA Letter 3, at 6 (stating that the Commission should "clarify the cross-border implications of any final securities lending reporting rule it adopts," and also stated that "it would be inappropriate to apply the Proposed Securities Lending Rules to non-U.S. entities such as UCITS, AIFs, or other funds that are subject to reporting under SFTR and not otherwise subject to U.S. regulatory requirements"). See also HSBC Letter 1, at 2 (stating that, "[g]iven that complying with any new reporting regime is likely to be costly and operationally complex regardless of its ultimate scope—especially for large firms with global operations . . . it is essential that the Commission clarify the cross-border application and certain other aspects of each of the proposed rules in line with the Commission's authority to promulgate rules only where necessary and appropriate in the U.S. public interest or for the protection of U.S. investors"). Another commenter urged the Commission to define the jurisdictional scope of the transactions to be reported under the final rule, including which securities must be reported and which parties are required to report. See FIF Letter, at 8.

⁶⁵¹ See, e.g., RMA Letter, at 17 (stating that, "[w]ithout such definition, non-U.S. beneficial owners and agent lenders would be left with substantial legal uncertainty"). According to this commenter, the "reach of the reporting requirements should be limited territorially, setting explicit rules on when transactions involving non-U.S. entities are deemed to be within scope." *Id.* See also IHS Markit Letter, at 3 (requesting clarity regarding whether international broker-dealers lending U.S. securities are within the scope of the proposed rule).

apply to "all lenders"⁶⁵² regardless of whether the lender loans a U.S. security or a non-U.S. security and whether or not the lender was a U.S. person or not.⁶⁵³ Other commenters, in contrast, warned that, because a significant amount (up to 18 percent) of lender transactions in the U.S. market are provided by funds outside of the U.S., the Commission risks not capturing this considerable volume of activity if it does not clarify cross-border scope of the final rule.⁶⁵⁴ Many of these commenters raised questions about the scope of the Commission's cross-border regulatory authority under section 10(c).⁶⁵⁵

Although the Proposing Release did not propose rule text addressing the cross-border aspects of proposed Rule 10c-1 or otherwise discuss the rule's cross-border reach, the Commission is addressing commenters' contentions about the Commission's cross-border authority under section 10(c) and offering general guidance as to the rule's cross-border scope. As an initial matter, the Commission advises that final Rule 10c-1a is intended to reach the full scope of the cross-border authority provided for by section 10(c).⁶⁵⁶

Turning to the cross-border scope of section 10(c), the Commission's understanding of that provision's cross-

⁶⁵² See, e.g., SIFMA AMG Letter, at 3 (urging the Commission to "address extraterritorial issues such as the scope of securities (US or non-US) and lenders (US or non-US) as the present drafting potentially addresses all securities (US and non-US) lent by US lenders and/or all US securities lent by all lenders (US and non-US)"). See also Pirum Letter, at 3 (stating that, as proposed, any person that loans a security on behalf of itself or another person has a reporting requirement yet without the rule specifying whether it is the domicile of the person lending the security, the security itself or a combination of both, which brings a transaction into scope for reporting).

⁶⁵³ See, e.g., ICI Letter 1, at 7-8 (stating that the rule's cross-border reach needs to be clarified because the proposed rule currently applies to "any person" (very broad) and it is unclear whether it could apply to non-U.S. entities). In requesting this clarification, this commenter points out the legislative history of section 10(c) and its focus on U.S. markets and increasing transparency for the benefit of U.S. broker-dealers. See *id.*

⁶⁵⁴ See ISLA Letter, at 2.

⁶⁵⁵ See, e.g., MFA Letter 1, at 12 (suggesting the Commission limit the scope of the proposed rule to U.S. securities and stating that applying the rule to all securities irrespective of the jurisdiction that principally regulates such offerings goes beyond what is intended by section 10(c). According to this commenter, Congress did not intend to capture cross-border lending activities when it added section 10(c) to the Exchange Act, and capturing such activities would not further the transparency goals of the proposed rule but, instead, could inadvertently result in market participants segregating their foreign lending activities so as to limit U.S. assertion of jurisdiction activities).

⁶⁵⁶ Because final Rule 10c-1a is co-extensive with the full cross-border authority of section 10(c), by definition, it cannot exceed the cross-border authority that Congress afforded.

border reach is based on the territorial approach that the Commission has applied when crafting rules to implement other provisions of the Exchange Act.⁶⁵⁷ Consistent with that territorial approach (which is based on Supreme Court precedent, including *Morrison v. National Australia Bank, Ltd.* and its progeny) the Commission examined the relevant statutory provision to determine the domestic conduct that is covered by the provision.⁶⁵⁸ By its terms, section 10(c) requires reporting when, directly or indirectly, a person has “effect[ed], accept[ed], or facilitat[e]” a transaction involving the loan or borrowing of securities. Based on that language, the Commission concludes that the relevant domestic conduct that triggers the Commission’s regulatory authority under section 10(c) is conduct within the U.S. that comprises (in whole or in part) effecting, accepting, or facilitating of a borrowing or lending transaction. Because the Commission intends final Rule 10c–1a to be co-extensive with the regulatory scope of section 10(c), the Commission is of the view that the rule’s reporting requirements will generally be triggered whenever a covered person effects, accepts, or facilitates (in whole or in part) in the U.S. a lending or borrowing transaction.

One significant exclusion proposed by commenters concerned non-U.S. residents. Having considered those comments, such an exclusion would not be appropriate. Section 10(c) is focused on increasing transparency regarding lending and borrowing transactions that are effected, accepted, or facilitated (in whole or in part) within the U.S. Excluding borrowing and lending transactions by non-U.S. persons when those transactions are effected, accepted, or facilitated (in whole or in part) within the U.S. could impact the completeness of the data, providing less transparency and potentially resulting in U.S. market participants receiving misleading information as a result of those omissions. Moreover, the exclusion of non-U.S. persons suggested by the commenters could cause competitive harm to U.S. market

participants as it would allow non-U.S. persons engaging in the same activities as U.S. persons to benefit from the transparency about the U.S. securities lending market provided by final Rule 10c–1a without contributing to that transparency. For these reasons, the Commission declines to adopt such an exclusion.

Commenters suggested several other exclusions from final Rule 10c–1a that the Commission has also decided not to adopt, including that the final rule should apply only to loans of U.S.-exchange traded securities offered by a U.S. lender.⁶⁵⁹ One commenter stated “that market participants—particularly those outside of the United States—might determine to limit or cease trading or interacting with U.S. intermediaries, or leave the U.S. markets altogether” in order to prevent public disclosure of their transactions.⁶⁶⁰ Another commenter stated that capturing such activities would not further the transparency goals of the rule but, instead, could inadvertently result in market participants segregating their foreign lending activities so as to avoid reporting under final Rule 10c–1a.⁶⁶¹ Other commenters suggested that final Rule 10c–1a should apply only to loans of securities in which: (1) the country of issue and primary trading market of the securities is the U.S., and (2) the beneficial owner/lender or Lending Agent is a U.S. person.⁶⁶² Having considered these comments, as a policy matter, it is not appropriate to exclude any of these categories of lending transactions. Each of these types of transactions could have a potential direct impact upon U.S. markets and U.S. market participants and, thus,

consistent with the breadth of the cross-border scope of section 10(c) it is appropriate to retain these categories of transactions within the rule’s reporting requirements so as to enhance overall transparency in the U.S. securities market.⁶⁶³

Finally, some commenters asked the Commission to consider the issue of potential overlap with the SFTR that is already implemented in the EU and UK.⁶⁶⁴ These commenters stated that the SFTR uses the domicile of the transacting entities (*i.e.*, both the lender and the borrower) to determine which entity has the reporting obligation and expressed concern about potential adverse impacts from regulatory overlap with Rule 10c–1a to the extent it covers non-U.S. persons.⁶⁶⁵ One commenter suggested that the Commission, at a minimum, include a carve-out from proposed Rule 10c–1 (or allow for substituted compliance with respect to the rule) for loans by EU or UK lenders that are subject to reporting under the EU or UK SFTR.⁶⁶⁶ The Commission acknowledges that there will be some overlap with the SFTR, however, the overlap that may occur with respect to entities established in the EU or UK (or to the EU or UK branch of a non-EU/UK entity) is not sufficient to warrant an exclusion. To the extent transactions are subject to both the EU or UK SFTR reporting rules and Rule 10c–1a, this overlap will be due to the occurrence

⁶⁶³ The Commission acknowledges some market participants may seek to restructure their activities to avoid reporting, but on balance it is appropriate that the rule operate within the full scope of the cross-border authority that Congress established when it adopted section 10(c).

⁶⁶⁴ See, *e.g.*, BlackRock Letter, at 3 (stating that, when determining scope, the SEC should look to avoid overlap or duplication with SFTR reporting in Europe and encouraging the SEC to minimize the number of individual loans required to be reported under both regimes); IIB Letter, at 5 (expressing the concern that the SEC should provide clear guidelines, as well as follow the registered broker-dealer registration model).

⁶⁶⁵ See Pirum Letter, at 3; Fidelity Letter, at 4 (expressing the concern that the Commission does not address whether the proposed rule is intended to require the reporting of loans of non-U.S. securities and recommending that the final rule not require the reporting of loans of non-U.S. securities as such loans are already subject to reporting under the EU’s SFTR); See Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 Nov. 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012; see also ICI Letter 1, at 12–13 (expressing concern regarding the apparent broad reach of the rule and how it potentially could apply to non-U.S. entities, including those entities already subject to SFTR’s reporting regime and citing Article 4 of (EU) 2015/2365, available at <https://www.esma.europa.eu/policy-activities/post-trading/sftr-reporting>). See also CASLA Letter, at 3 (stating that the SEC should clarify if the domicile of the underlying client/agent lender would apply from territorial approach scope perspective).

⁶⁶⁶ See HSBC Letter 2, at 1.

⁶⁵⁷ See, *e.g.*, *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, Release No. 34–74244 (Feb. 11, 2015), 80 FR 14563, 14649 (Mar. 19, 2015) (discussing the territorial approach to the cross-border application of Title VII requirements for regulatory reporting and public dissemination of security-based swap transactions).

⁶⁵⁸ 561 U.S. 247. See, *e.g.*, *Abitron Austria GmbH v. Hetronix Int’l, Inc.*, 600 U.S. 412, 418 (June 29, 2023) (stating that “[t]he Supreme Court has] repeatedly and explicitly held that courts must ‘identif[y] ‘the statute’s ‘focus’ and as[k] whether the conduct relevant to that focus occurred in United States territory”).

⁶⁵⁹ See, *e.g.*, HSBC Letter 1, at 3; Mark A. Steffensen, Senior Executive Vice President and General Counsel, HSBC Bank USA, N.A. (Feb. 5, 2023) (“HSBC Letter 2”), at 1–2; SIFMA Letter 1, at 4; SIFMA Letter 2, at 3; see also MFA Letter 1, at 12; MFA Letter 3, at 12.

⁶⁶⁰ HSBC Letter 1, at 5. *But see* HSBC Letter 2, at 1 (stating, in response to a question regarding whether the rule should be limited to U.S. lenders that the commenter “would expect the depth and liquidity of the U.S. market to act as a disincentive for U.S. asset managers to avoid U.S. lenders altogether, and [the commenter] cannot envision any incentive for U.S. asset managers to prefer non-U.S. lenders that are themselves subject to similar reporting requirements in their home jurisdictions”).

⁶⁶¹ See MFA Letter 1, at 12. The commenter stated that applying the rule to all securities irrespective of the jurisdiction that principally regulates such offerings goes beyond what is intended by section 10(c), but for the reasons already discussed the Commission does not agree.

⁶⁶² See SIFMA Letter 1, at 19–20 (stating that proposed Rule 10c–1 should “apply only to loans of securities where (i) the country of issue and primary trading market of the securities are the U.S. and (ii) the beneficial owner lender or lending agent is a U.S. person”). See also FIF Letter, at 8.

within the U.S. of the relevant domestic activities as specified by section 10(c). For the reasons discussed above, related to transparency and competition within the U.S. market, Rule 10c–1a will apply to those transactions notwithstanding any potential overlap and resulting adverse impacts.

N. Additional Comments

One commenter stated that the Commission has already exhausted its rulemaking authority under section 984(b) of the Dodd-Frank Act, that the authority to promulgate rulemaking has expired, and that the Commission is seeking to regulate transactions outside the scope of the intended Congressional authority.⁶⁶⁷ Section 984(a) of the Dodd-Frank Act, codified in section 10(c)(1) of the Exchange Act, has no deadline for Commission action. Although, section 984(b) includes such a date, the “[p]assage of the statutory action deadline does not deprive the agency of the power to act.”⁶⁶⁸ Section 984(b) of the Dodd-Frank Act provides that the Commission shall promulgate “rules” and does not limit the number of any such rules. The Commission did not “exhaust” its authority under sections 984(a) and (b) by adopting the Investment Company Reporting Modernization rules.⁶⁶⁹

The commenter also stated that, by “linking” securities loan transactions entered into in order to fulfill delivery obligations arising from customer short sales,⁶⁷⁰ the Commission would be exceeding the scope of its rulemaking authority.⁶⁷¹ With regard to authority, section 10(c)(1) of the Exchange Act confers the Commission with plenary authority over both short sales and the loan or borrowing of securities, with a limited exception to authority over securities loans related to the safety and soundness or systemic risk of certain financial institutions such as banks and credit unions.⁶⁷² A loan of a security may be used for short sales or other purposes, and the use of a securities loan to facilitate a short sale is separate and distinct from the short sale itself. While it is possible that some persons

may seek out short sale information through securities lending information that will be provided under this rule, the modifications made from the proposed rule, in particular delaying the publication of the amount of the loan, should make it more difficult for such persons to succeed at such efforts, thereby addressing the potential negative consequences of such “linking” of securities loan information to short sale information (e.g., short sellers seeking to use securities lending information to alter their short selling strategies, thereby potentially reducing liquidity and harming investors) raised by the commenter.

Some commenters urged the Commission to take additional or different regulatory and non-regulatory actions than the approaches that were proposed, including actions that the Commission did not propose. These suggestions covered a variety of areas, including: notifications to retail investors;⁶⁷³ securities lending transaction terms;⁶⁷⁴ other SEC regulations;⁶⁷⁵ SEC enforcement actions and penalty provisions;⁶⁷⁶ studies, audits, and roundtables;⁶⁷⁷ reporting technologies;⁶⁷⁸ broker-dealer

revenue;⁶⁷⁹ and “onward lending.”⁶⁸⁰ These issues are outside the scope of the proposal, and the final amendments appropriately further the Commission’s objectives of promoting investor protection, enhancing market efficiency, and facilitating capital formation by implementing the requirements of section 984(b) of the Dodd-Frank Act and enhancing the transparency of securities lending and borrowing.

VIII. Compliance Date

The Proposing Release did not include a specific proposed compliance date for the final rule, but commenters expressed a range of views on the length and structure of an implementation period.⁶⁸¹

The Commission received several comments recommending an implementation period that runs from the time that technical specifications are published by an RNSA.⁶⁸² One commenter proposed an “initial compliance period of at least 18 months to develop necessary systems and otherwise prepare for compliance.”⁶⁸³ Another commenter proposed a period of “at least 18 months after publication of technical specifications by the registered national securities association to come into compliance with the new

⁶⁷³ See, e.g., Form Letters A and B; Trimbath Letter; Letter from Adam Rensel (Aug. 16, 2022); Letter from Kevin Hagemann (Aug. 16, 2022); Letter from Sam Wood (Sept. 1, 2022).

⁶⁷⁴ See, e.g., Trimbath Letter; Form Letters A and B.

⁶⁷⁵ See, e.g., Letter from Marc Pecnik (Dec. 6, 2022); Letter from A K Tran, MD, Ph.D. (Nov. 26, 2021); Letter from Christian Bashnick (Aug. 16, 2022); Letter from Doyoung Park (Aug. 16, 2022); Letter from Dakota Glassburn (Aug. 16, 2022); Form Letter from Brandon Gallagher, et al. (Aug. 16, 2022); Letter from Adrian Convery (Aug. 16, 2022); Letter from Antonio Franco (Aug. 16, 2022); Letter from Cam Johnson (Aug. 16, 2022); Letter from Patrick Barragan (Aug. 16, 2022); Letter from M. A. Uit den Boogaard (Aug. 16, 2022); Letter from Fulton (Aug. 16, 2022).

⁶⁷⁶ See, e.g., Letter from DWK (Oct. 8, 2022); Letter from Curtis Higgins (Mar. 2, 2022); Letter from Enrique Deaguila (Oct. 29, 2022); Letter from Matt Hyland (Feb. 19, 2022); Letter from Ryan Deolall (Oct. 30, 2022); Letter from Dave Cazza (Aug. 15, 2023).

⁶⁷⁷ See, e.g., Letter from Edmon Blount, Founder and Director Emeritus, Center for the Study of Financial Market Evolution (Dec. 15, 2021) (“CSFME Letter 1”), at 6; Letter from Edmon Blount, Founder and Director Emeritus, Center for the Study of Financial Market Evolution (Apr. 26, 2022) (“CSFME Letter 4”), at 1; Letter from Edmon Blount, Founder and Director Emeritus, Center for the Study of Financial Market Evolution (Nov. 1, 2022) (“CSFMA Letter 5”); see also Letters from Dr. Radek Stech, CEO, Global Principles for Sustainable Securities Lending (Global PSSSL) and Senior Lecturer, University of Exeter Law School (Jan. 7, 2022, Apr. 7, 2022, and Nov. 1, 2022); ISLA Letter, at 2–3.

⁶⁷⁸ See, e.g., Letter from David S. Schwartz, Managing Director, Center for the Study of Financial Market Evolution (Mar. 17, 2022) (“CSFME Letter 3”), at 1–2; Advanced Securities Consulting Letter, at 1–3; Letter from Matthew Cohen, Provable Markets (Jan. 7, 2002); Data Boiler

Technologies Letter LLC; Letter from Alan Konevsky, interim Chief Executive Officer and Chief Legal Officer, tZERO (Jan. 7, 2022); Letter from Dan Liefwalker (Dec. 17, 2021); Letter from Jordan Cox (Jan. 4, 2022); Letter from Samuel Hudock (Mar. 10, 2022); Letter from Enzo Villani (Jan. 19, 2022).

⁶⁷⁹ See, e.g., Trimbath Letter, at 1–2.

⁶⁸⁰ See, e.g., Form Letters A and B; Trimbath Letter; Letter from Julian Young (Aug. 16, 2022); Letter from Helmut Herglotz (Oct. 31, 2022); Letter from Juan Camarena (Oct. 30, 2022).

⁶⁸¹ With respect to the compliance period, several commenters requested the Commission to consider interactions between the proposed rule and other recent Commission rules. In determining compliance periods, the Commission considers the benefits of the rules as well as the costs of delayed compliance periods and potential overlapping compliance periods. For the reasons discussed throughout this release, to the extent that there are costs from overlapping compliance periods, the benefits of the rule justify such costs. See *infra* Part IX.B for a discussion of the interactions of the final rule with certain other Commission rules.

⁶⁸² See FIF Letter, at 2; BlackRock Letter, at 9 (recommending a timeline that allows persons that make covered securities loans to establish internal reporting regimes “after the designated RNSA has completed their technology database and requisite testing”); EBF Letter, at 2 (recommending a period of “at least 18 months after publication of technical specifications by the [RNSA] to come into compliance with the new requirements”); SIFMA Letter 1, at 20 (recommending “that market participants . . . be given a minimum of 18 months following the RNSA’s finalization of the technical specifications for reporting”). See also ASA Letter, at 2 (stating that “[v]endors would need time to modify and upgrade their technology systems to comply with any new standards”).

⁶⁸³ See IIB Letter, at 3.

⁶⁶⁷ See Citadel Letter, at 12–14.

⁶⁶⁸ Hickman and Pierce, *Administrative Law Treatise* Section 4.9 (6th Edition, 2023–1 Cum. Supp. 2018). When are Agencies Required to Act by Rule? (citing *Brock v. Pierce County*, 476 U.S. 253 (1986); *Southwestern Bell Telephone Co. v. Federal Communications Commission*, 138 F.3d 746 (8th Cir. 1998)).

⁶⁶⁹ *Investment Company Reporting Modernization*, Release No. 34–79095 (Oct. 13, 2016) 81 FR 81870, 81887–88 n.192 (Nov. 18, 2016).

⁶⁷⁰ See Citadel Letter, at 13.

⁶⁷¹ See Citadel Letter, at 14.

⁶⁷² See 15 U.S.C. 240.78j(c) (section 10(c)(1) of the Exchange Act).

requirements.”⁶⁸⁴ Another commenter recommended that the Commission “provide a minimum two-year implementation period” for the final rule.⁶⁸⁵ One commenter stated that ample time should be provided for covered persons to develop “procedures and protocols and properly train their compliance and trading personnel before subjecting them to additional regulation.”⁶⁸⁶ However, other commenters encouraged the Commission to expedite the adoption of the final rule.⁶⁸⁷

Certain commenters requested a phased approach to implementation, including a recommendation that the implementation of the final rule begin only with loans of U.S. equity securities.⁶⁸⁸ Other commenters recommended initially reporting only securities listed or traded on a U.S. exchange and reporting other U.S. equity securities or debt securities after further study.⁶⁸⁹ Other commenters recommended deferring public dissemination of data to allow the Commission to gain experience with the data.⁶⁹⁰ Similarly, one commenter supported “an approach to implementation that requires confidential reporting for regulatory

purposes to give the SEC experience with the data to refine it as necessary to ensure it serves its purpose. Any further stages that would require public dissemination of the data should only be considered following additional economic analysis and public consultation.”⁶⁹¹

Another commenter recommended that “[a]ny proposed timeline should carefully consider the universe of entities required to report transactions for the first time.”⁶⁹² The Commission recognizes that covered persons may have differing degrees of expertise and familiarity with existing RNSA reporting systems, and that lacking such familiarity could increase the time needed to prepare for compliance with final Rule 10c-1a’s requirements. However, the Commission also recognizes that the final rule permits the use of reporting agents, as well as other third party vendor service providers, either of which could help facilitate preparation for fulfillment of the final rule’s reporting requirements by less experienced covered persons. For example, some commenters stated that existing third party vendors have experience and technological capacity to be able to provide reporting-related services (e.g., data vendors and entities that report information for other regulatory purposes).⁶⁹³

Another commenter proposed means of expediting the implementation of the final rule, including initially: (1) applying it to only larger market participants; (2) requiring only certain data elements; and (3) not enforcing it for several years.⁶⁹⁴ However, limiting the reporting of Rule 10c-1a information (*i.e.* to larger market participants or only requiring certain data elements) would provide the public with a narrow and incomplete view of the securities lending market activity.⁶⁹⁵

⁶⁹¹ See Letter from Members of the U.S. House of Representatives Alma S. Adams, Ph.D., Frank D. Lucas, Madeleine Dean, Bill Huizenga, Bill Foster, Blaine Luetkemeyer, Vicente Gonzalez, Ann Wagner, Josh Gottheimer, Andy Barr, Al Lawson, French Hill, David Scott, Tom Emmer, and Bryan Steil (Nov. 22, 2022), at 2. See also Letter from Representative Lucas, et al., at 1; MFA Letter 3, at 8.

⁶⁹² See BlackRock Letter, at 7–8.

⁶⁹³ See S3 Partners Letter, at 12; Sharegain Letter, at 2; IIB Letter, at 10.

⁶⁹⁴ See James J. Angel Letter, at 10.

⁶⁹⁵ See Proposing Release, 86 FR 69807 (stating that “available data are incomplete, as private vendors do not have access to pricing information that reflects all transactions. This, in part, reflects the voluntary submission of transaction information by subscribers to vendors”); *id.* at 69807 (stating that “participation in the give-to-get data product is purely voluntary, meaning that the data could be missing observations in a systematic fashion, thus biasing the impression it creates of the lending market”).

Similarly, not enforcing the rule for several years could incentivize non-reporting and skew the reported data to disproportionately represent market participants that voluntarily report.

Taking into consideration commenters’ wide-ranging recommendations, the following compliance dates strike an appropriate balance between making securities loan information publicly available and providing adequate time for industry participants to come into compliance. Specifically, the final rule’s compliance dates require that: (1) an RNSA propose rules pursuant to final Rule 10c-1a(f) within four months of the effective date of final Rule 10c-1a; (2) the proposed RNSA rules are effective no later than 12 months after the effective date of final Rule 10c-1a; (3) covered persons report Rule 10c-1a information to an RNSA starting on the first business day 24 months after the effective date of final Rule 10c-1a (the “reporting date”); and (4) RNSAs publicly report Rule 10c-1a information pursuant to final Rules 10c-1a(g) and (h)(3) within 90 calendar days of the reporting date for covered persons to report Rule 10c-1a information to an RNSA. Additionally, upon the reporting date requiring covered persons to report Rule 10c-1a information to an RNSA, RNSAs are required to fulfill the data retention and availability requirements—including relevant information security policies and procedures—pursuant to paragraphs (h)(1), (h)(2), and (h)(4), and may establish and collect reasonable fees pursuant to paragraph (i) of final Rule 10c-1a.

This approach to the final rule’s compliance dates balances the Commission’s goal of increasing transparency in the securities lending market with providing RNSAs and market participants with adequate time to implement systems and processes to comply with the final rule’s reporting requirements. The Commission has also taken into consideration that the technology to collect and disseminate Rule 10c-1a information already exists. Specifically, FINRA, which is currently the only RNSA, already operates facilities that collect and disseminate transaction information, including TRACE.⁶⁹⁶ FINRA’s extensive experience in developing and operating such facilities will enable it to design and propose rules regarding the format and manner of its collection of

⁶⁹⁶ See FINRA Letter, at 2 (stating that “FINRA has extensive experience establishing and maintaining systems that are designed to capture and disseminate transaction information—similar to the system contemplated by the Commission under the Proposal”).

⁶⁸⁴ See EBF Letter, at 2.

⁶⁸⁵ See Fidelity Letter, at 2. The commenter also recommended that “[t]he Commission should also provide necessary guidance to market participants on the final rule a full year in advance of the implementation date.” An RNSA may elect to provide updates as it develops its rules for compliance with final Rule 10c-1a. As discussed below in this part, the compliance date for covered persons, referred to throughout this release as the “reporting date”, will be the first business day 24 months after the effective date of final Rule 10c-1a. See also Nasdaq Letter, at 2 (stating that “a two-year implementation period would provide adequate time for market participants to comply with the Proposal”).

⁶⁸⁶ See S3 Partners Letter, at 5.

⁶⁸⁷ See HMA Letter, at 1 (stating that the Commission should “revise and adopt the Proposal without delay”); Better Markets Letter, at 1 (recommending that the Commission “finalize this long-overdue, mandatory rulemaking without delay or dilution”).

⁶⁸⁸ See, e.g., BlackRock Letter, at 3; ICI Letter 1, at 7; Federated Hermes Letter, at 2; AIMA Letter, at 5; MFA Letter 3, at 6; SIFMA AMG Letter, at 11 (recommending that “[o]nce the SEC and the RNSA become familiar with the data they are receiving and can assess the data’s potential utility to the market, the SEC could then propose rules on making data available to the public”); ABA Letter, at 4 (“The SEC should limit covered securities lending transactions, at least during the initial stages of reporting, to National Market System equity securities and not include fixed-income securities, such as government securities.”); S3 Partners Letter, at 15 (recommending “that the Commission phase-in implementation in a manner consistent with best practices in technology and policy implementation”).

⁶⁸⁹ See CASLA Letter, at 2; RMA Letter, at 15–17. See also SBAI Letter, at 2; MFA Letter 3, at 6.

⁶⁹⁰ See CASLA Letter, at 2; RMA Letter, at 17; MFA Letter 3, at 7.

information within four months following the effective date of the final rule. Additionally, requiring that RNSA rules are effective no later than 12 months after the effective date of final Rule 10c-1a will help to ensure that information improving the transparency of the securities lending market is made available to the public without unnecessary delay.

A reporting date for covered persons of 24 months after the effective date of final Rule 10c-1a is sufficient for covered persons (and eligible reporting agents) to prepare for compliance with the final rule's reporting requirements. Two commenters recommended an implementation period of two years,⁶⁹⁷ and another commenter recommended a compliance period of at least 18 months.⁶⁹⁸ One commenter's proposed implementation period of eighteen months after publication of technical specifications by an RNSA could provide more or less implementation time to covered persons than the final rule does. Depending on when an RNSA adopts rules pursuant to final Rule 10c-1a(f), covered persons could potentially have more than 12 months to begin reporting Rule 10c-1a information, including more than the 18 months the commenter recommends. Further, the final rule has been modified to reduce certain burdens, such as requiring end-of-day reporting rather than reporting in 15-minute increments, and removal of the available to lend and securities on loan requirements, which should reduce the amount of time required to prepare for compliance. As stated above, in this part, the reporting date for covered persons strikes a balance between making securities loan information publicly available and providing industry participants with sufficient time to come into compliance. Covered persons' permitted reliance on reporting agents and ability to use third party vendors⁶⁹⁹ to help facilitate the fulfillment of reporting obligations will allow for the outsourcing of certain

functions to prepare for and comply with the final rule's requirements.

A compliance date that requires RNSAs to publicly report Rule 10c-1a information within 90 calendar days of the reporting date for covered persons reporting Rule 10c-1a information to an RNSA will help ensure the utility of such data once it is made publicly available. Providing RNSAs with up to 90 calendar days between covered persons being required to publicly report Rule 10c-1a information and RNSAs being required to make such information available to the public pursuant to final Rules 10c-1a(g) and (h)(3) will help RNSAs resolve any initial issues with collecting, aggregating, and publishing Rule 10c-1a information following the reporting date for covered persons. Additionally, upon the reporting date for covered persons an RNSA is required to fulfill the data retention and availability requirements—including relevant information security policies and procedures—pursuant to paragraphs (h)(1), (h)(2), and (h)(4), and may establish and collect reasonable fees pursuant to paragraph (i) of final Rule 10c-1a.

IX. Economic Analysis

A. Introduction and Market Failure

1. Introduction

The Commission has considered the economic effects of final Rule 10c-1a and, wherever possible, the Commission has quantified the likely economic effects of the final rule.⁷⁰⁰ The Commission is providing both a qualitative assessment and quantified estimates of the potential economic effects of the final rule where feasible. The Commission has incorporated data and other information to assist it in the analysis of the economic effects of the final rule. However, as explained in more detail below, because the Commission does not have, and in certain cases does not believe it can reasonably obtain, data that may inform the Commission on certain economic effects, the Commission is unable to

quantify certain economic effects.⁷⁰¹ 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. Our inability to quantify certain costs, benefits, and effects does not imply that such costs, benefits, or effects are less significant.

Commenters raised a number of concerns with the analyses and conclusions in the Proposing Release. The Commission reviewed all of the comments received and, in a few instances, have modified the subsequent economic analysis in response to additional information provided by commenters. We have also conducted analyses of changes to the proposed rule text.

The Commission believes that the final rule will increase transparency in the securities lending market by making available the public portion of Rule 10c-1a information, which is more comprehensive than existing data, and by making such data available to a wider range of market participants and other interested persons than currently are able to access existing data.

The subsequent benefits include a reduction of the information disadvantage faced by end borrowers and beneficial owners in the securities lending market, improved price discovery in the securities lending market, increased competition among providers of securities lending analytics services, reduced costs associated with tracking market conditions for broker-dealers and lending programs, and improved decision-making by investors, beneficial owners and other market participants.⁷⁰² The Commission believes that final Rule 10c-1a will also likely reduce the borrowing costs of some securities,⁷⁰³ which will improve price discovery, liquidity, and capital formation in the underlying security markets. The Commission also believes the final rule will benefit investors by increasing the ability of regulators to surveil, study, and provide oversight of

⁶⁹⁷ See Fidelity Letter, at 2 (recommending that the "Commission should provide a two-year implementation period for any final rulemaking on the Proposal"); Nasdaq Letter, at 2 ("a two-year implementation period would provide adequate time for market participants to comply with the Proposal").

⁶⁹⁸ See IIB Letter, at 3 (recommending that the "SEC should provide reporting entities an initial compliance period of at least 18 months to develop necessary systems and otherwise prepare for compliance with the requirements of the rule").

⁶⁹⁹ Numerous commenters have mentioned their experience in the market for reporting services. See, e.g., IHS Markit Letter, at 1; Pirum Letter, at 1; DTCC Letter, at 4; Sharegain Letter, at 2. See also Equilend Letter, at 1 (stating that it "welcomes the opportunity to act as a reporting agent for the Proposed Rule").

⁷⁰⁰ Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. Additionally, section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) of 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.

⁷⁰¹ For example, while the Commission believes that certain currently available securities lending data products may be biased due to missing observations, the extent of the biases cannot be quantified as the data that would be needed to assess the extent of the bias are missing. See *infra* note 759 and corresponding text for further discussion.

⁷⁰² See *infra* Part IX.C.1 for further discussion of the expected benefits of final Rule 10c-1a.

⁷⁰³ See *infra* Part IX.C.1 for further discussion of the expected effects of final Rule 10c-1a on short selling. See *infra* note 853 and corresponding text for further discussion of why the effects discussed above are likely to be concentrated among stocks that have higher borrowing costs.

both the securities lending market and individual market participants.

The Commission believes that the final Rule 10c-1a will result in costs. The final rule will lead to direct compliance costs as entities providing Rule 10c-1a information to an RNSA will have to build or adjust systems to meet the requirements of the final rule. The entities that provide Rule 10c-1a information to an RNSA may absorb these costs in the form of lower profits or may pass them on to their customers in the form of increased fees for broker-dealer services or lending program services. The final rule will also impose direct costs on an RNSA responsible for collecting, maintaining, and distributing the data, who may pass on these costs by imposing fees on entities that provide Rule 10c-1a information to an RNSA and/or consumers of Rule 10c-1a data ("Rule 10c-1a data"). Additionally, the Commission believes that the final rule could render existing securities lending data services less valuable, potentially leading to less revenue for the firms currently compiling and distributing these data for a fee.⁷⁰⁴ Also, broker-dealers and lending programs will have costs in the form of lost information advantage when dealing with beneficial owners and end borrowers in the securities lending market. For securities lending data that are currently not reported, or to which access is limited, making the data public may affect the profitability of certain trading strategies as investors use the data to learn about market sentiment and adjust their trading strategies accordingly.

2. Market Failures

In the securities lending market, the cost to borrow a given security depends on a number of factors, including the current demand for the security, the length of the loan, and the type and amount of collateral used, among others.⁷⁰⁵ Information about loan prices along with information about loan characteristics helps inform market participants about whether the price of a given securities loan is consistent with the current market rate. At the same time, the securities lending market is characterized by information frictions that stem from the fact that access to timely securities lending data is limited for some market participants.⁷⁰⁶ This

means that, at any point in time, there is incomplete information on market conditions and some market participants have better information than others on borrowing costs and transactions. Such incomplete information and asymmetric information may lead to inefficient prices for securities loans (including loans of equity securities and fixed income securities).⁷⁰⁷

There is a general lack of comprehensive information on current market conditions in the securities lending market. Most providers of commercial securities lending data currently focus on loans from lending programs to broker-dealers ("Wholesale" loans)⁷⁰⁸ and largely use a "give-to-get" model, where entities who wish to obtain securities lending data are typically required to: (1) be participants in the Wholesale lending market themselves, with data that they could provide, and (2) provide their data to the commercial vendor in order to access the full dataset provided by the vendor. This means that only those market participants with data to report for themselves are able to access the

lending market. In response to commenters, the Baseline has been expanded to include a more robust discussion of data products that are currently available from commercial data vendors. *See infra* Part IX.B.5 for additional discussion.

⁷⁰⁷ The Commission believes that the issues discussed in this part regarding a need for additional market transparency apply to all reportable securities, though, as pointed out by commenters (*see, e.g.,* RMA Letter, at 16 and IIB Letter, at 6) and discussed below in Part IX.B.2, the market for securities lending may currently be more transparent for some reportable securities as compared to others. The Commission recognizes that, to the extent that crypto asset securities qualify as reportable securities under final Rule 10c-1a(j)(3), the benefits and costs of the final Rule 10c-1a in the market for crypto asset security lending may vary based on the characteristics of that market. The Commission is unable to describe the lending market in reportable crypto asset securities, however, in part because there is insufficient reporting of crypto asset security transactions to the CAT, TRACE, or RTRS to allow for meaningful analysis.

⁷⁰⁸ The Proposing Release defined "Retail" loans as those from a broker-dealer to an end borrower, while loans from lending programs to broker dealers constitute "Wholesale" loans (*See* Proposing Release, 86 FR 69805, 69831). To avoid confusion with the common use of the term "retail" to refer to a non-institutional (*i.e.,* individual) investor, this release will refer to loans from a broker-dealer to an end borrower as "Customer" loans or loans in the Customer market, and loans from a lending program to a broker-dealer or others as "Wholesale" loans, or loans in the Wholesale market. One commenter expressed concern that the Proposing Release did not adequately address the implications of the Rule for Short Sale Linked Activity (*see* Citadel Letter, at 5), by which the commenter stated that they are referring to what the Proposing Release calls the "retail market" (*see* Citadel Letter, at 1). The Economic Analysis uses the terms Wholesale market and Customer market to make clear the implications of the final rule for the different segments of the market.

data, and other market participants have a very limited view into the Wholesale market. Furthermore, participation in give-to-get data products is voluntary, meaning that relevant observations could be missing from the data in a systematic fashion, thus biasing the impression it creates of the lending market.⁷⁰⁹

Some commenters disagreed with the Commission's assessment of the current opacity of the securities lending market. One commenter pointed out that there are some commercial securities lending datasets that are available to all subscribers,⁷¹⁰ and another commenter stated that "the 'give-to-get' model is not the only model for commercial data for securities lending."⁷¹¹ Based on the Commission's experience, the collection of data for these currently available commercial datasets that are not give-to-get largely relies on surveying asset managers, and potentially others, in the Customer segment of the market about their borrowing experiences.⁷¹² To differentiate this data from the give-to-get data, this type of dataset will be referred to going forward as "Customer market survey" data.

One commenter stated that "the Commission does not explain why [Customer market] survey data is inadequate or unavailable."⁷¹³ The Commission acknowledges that Customer market survey data may be more widely available, as access to these datasets is generally not restricted in terms of which entities can purchase the data. However, the Commission believes that Customer market survey datasets are inadequate for two reasons. First, since they rely on surveys of borrowers in the Customer segment of the market, they lack comprehensiveness and have limited insight into the Wholesale market.⁷¹⁴ Second, similar to the give-to-get datasets, Customer market survey datasets may also contain biases as they rely on voluntary submissions of data from a potentially limited subset of

⁷⁰⁹ *See infra* Part IX.B.2 for further discussion of the potential for biases related to selection issues in commercial securities lending databases.

⁷¹⁰ *See* S3 Partners Letter, at 5.

⁷¹¹ *See* Citadel Letter, at 8.

⁷¹² *See* Proposing Release, 86 FR 69832, referring to this data by stating "Other firms provide a different approach to securities lending data by surveying fund managers about their borrowing experience, such as the fees they paid to borrow, from which they provide estimates of lending fees." *See* Antonio Garango, *Short Selling Activity and Future Returns: Evidence from FinTech Data* (Nov. 2020), at 1, 3, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775338 (retrieved from SSRN Elsevier database) ("Garango 2020").

⁷¹³ *See* Citadel Letter, at 8.

⁷¹⁴ *See supra* note 708 for a definition of "Customer" loans.

⁷⁰⁴ *See supra* Part IX.D.2 discussing why existing data providers may retain certain advantages in the market for securities lending data and analytics.

⁷⁰⁵ *See infra* note 723 and corresponding text for a discussion of factors that could be important drivers of borrowing costs.

⁷⁰⁶ *See infra* Part IX.B.2 for further discussion of the current state of transparency in the securities

market participants.⁷¹⁵ As discussed above, these two types of datasets differ in terms of the market segments that they cover, and in terms of their accessibility.⁷¹⁶

One commenter stated that the Commission “has overstated the level of opacity in the securities lending market,” that both the number of data vendors and the detail of their data products have increased over time, and that market participants generally have access to one or more securities lending datasets.⁷¹⁷ However, based on the Commission’s experience, the commercial securities lending data products that are currently available lack comprehensiveness and likely suffer from biases.⁷¹⁸ Furthermore, while some market participants could potentially have access to multiple datasets, this would generally be possible only for a limited set of market participants who have access to give-to-get data, and who may find it cumbersome or costly to combine different types of data.⁷¹⁹ The Commission is not aware of any commercially available securities lending dataset that currently provides securities lending data as comprehensive, accessible, and informative about all segments of the securities lending market (*i.e.*, both the Wholesale market and Customer market), as the data provided by the final rule.⁷²⁰

One commenter stated that lending agents frequently provide their clients with benchmark reports based on market data, and that beneficial owners currently benefit from substantial information obtained from lending agents.⁷²¹ However, the Commission believes that, even if some lending agents or broker-dealers are incentivized to provide their clients with information about the quality of their securities

lending services, it is unlikely that they have incentives to provide information in a standardized fashion. Therefore, it is unlikely that market participants would be able to use this information to compare the quality of securities lending services across lending agents or broker-dealers.

The Commission believes that the problems of incomplete information and information asymmetries in the securities lending market are unlikely to be solved by market forces. Specifically, these information problems are unlikely to be solved by the availability of commercial securities lending data products. Firstly, there is a general lack of incentives to improve the accessibility of give-to-get datasets. This is because market participants may be discouraged from contributing their data to give-to-get datasets if these datasets are widely available, *e.g.*, to sophisticated investors such as hedge funds who could use this information to learn about the other participants’ trading or hedging strategies.⁷²² Therefore, for give-to-get data vendors, restricting access is likely seen as necessary in order to persuade market participants to contribute to the vendors’ data products, and information asymmetry would be expected to persist as a result. Secondly, and more generally, as commercial data vendors lack the authority to mandate the reporting of securities loans, both the commercial data products that currently exist (both give-to-get and Customer market survey models), as well as any new commercial data product that could presumably emerge, can only be based on the voluntary contribution of data. Market participants who choose not to contribute data may so choose because they believe it is in their interest to keep their data out of public view. This makes it unlikely that any securities lending data vendor will be able to produce a securities lending data product that is comprehensive and free from biases.⁷²³ Thirdly, as discussed above, the information that lending agents or broker-dealers are incentivized to provide to their clients is unlikely to be standardized and thus useful for comparing the quality of securities lending services across lending agents or broker-dealers. Thus, the availability of this information would also be unlikely to solve the problems of

incomplete and asymmetric information in the securities lending market.

A. Economic Baseline

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the final rule are measured consists of the current state of the securities lending market, current practice as it relates to securities lending and availability of data about securities lending, and the current regulatory framework. The economic analysis appropriately considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the final rule are measured.⁷²⁴

Several commenters requested the Commission to consider interactions between the economic effects of the proposed rule and other recent Commission rules.⁷²⁵ The Commission

⁷²⁴ See, *e.g.*, *Nasdaq v. SEC*, 34 F.4th 1105, 1111–15 (D.C. Cir. 2022). This approach also follows SEC staff guidance on economic analysis for rulemaking. See Staff’s “Current Guidance on Economic Analysis in SEC Rulemaking,” (Mar. 16, 2012), available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf (“The economic consequences of proposed rules (potential costs and benefits including effects on efficiency, competition, and capital formation) should be measured against a baseline, which is the best assessment of how the world would look in the absence of the proposed action.”); *Id.* at 7 (“The baseline includes both the economic attributes of the relevant market and the existing regulatory structure.”). The best assessment of how the world would look in the absence of the proposed or final action typically does not include recently proposed actions, because that would improperly assume the adoption of those proposed actions.

⁷²⁵ See, *e.g.*, AIMA Letter 3, at 4 (“Because the . . . Proposals have aggregate and overlapping effects, they should be considered holistically and their potential adoption should be appropriately sequenced”); Letter from Eric J. Pan, President and CEO, Investment Company Institute, Aug. 17, 2023 (“ICI Letter 2”), at 1 (“The Commission has issued a wide range of interconnected rule proposals . . . [that] in the aggregate warrant further analysis by the Commission.”). Commenters indicated there could be interactions between this rulemaking and the following rules: *Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers*, Release Nos. 34–93169, IC–34389 (Sept. 29, 2021) 86 FR 57478 (Oct. 15, 2021) (“Amendments to Form N-PX Proposal”) (see, *e.g.*, HMA Letter, at 4); *Short Position and Short Activity Reporting by Institutional Investment Managers*, Release No. 34–94313 (Feb. 25, 2022) 87 FR 14950 (Mar. 16, 2022) (see, *e.g.*, Overdahl Letter, at 14; AIMA Letter 3, at 2); *Prohibition Against Fraud, Manipulation, or Deception in Connection With Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, Release No. 34–93784 (Dec. 15, 2021) 87 FR 6652 (Feb. 4, 2022) (see, *e.g.*, Overdahl Letter, at 14; AIMA Letter 3, at 2; ICI Letter 2, at n. 13); *Modernization of Beneficial Ownership Reporting*, Release Nos. 33–11030, 34–94211 (Feb. 10, 2022) 87 FR 13846 (Mar. 10, 2022) (see, *e.g.*, Overdahl Letter,

⁷¹⁵ See *infra* Part IX.B.2 for further discussion of the potential for biases related to selection issues in commercial securities lending databases.

⁷¹⁶ See *infra* Part IX.B.2 for additional discussion of the characteristics of, and differences between, customer market survey data and give-to-get data.

⁷¹⁷ Specifically, the commenter stated that “the level of detail in the data provided by data vendors has improved drastically” and “the number of data vendors present in the market has been growing,” such that “the vast majority of parties involved in the lending of securities have access to at least one securities lending data vendor, and in many cases multiple vendors.” See IHS Markit Letter, at 13.

⁷¹⁸ See *infra* Part IX.B.2 for further discussion of the biases and lack of comprehensiveness in commercial securities lending datasets.

⁷¹⁹ See *infra* notes 768 through 770 and corresponding text for further discussion of limitations related to combining multiple securities lending datasets.

⁷²⁰ See *infra* Part IX.B.2 for an additional discussion of this data.

⁷²¹ See RMA Letter, at 5–6.

⁷²² See *infra* Part IX.B.2 for further discussion of market participants’ incentives to provide data to give-to-get data vendors.

⁷²³ See *infra* Part IX.B.2 for further discussion of the potential for biases related to selection issues in commercial securities lending databases.

recently adopted four of the rules mentioned by commenters as potentially impacting the economic effects of the final Rule 10c–1a, namely the recent Amendments to Form N–PX Adoption,⁷²⁶ the Settlement Cycle Adoption,⁷²⁷ the May 2023 SEC Form PF Amending Release,⁷²⁸ and the Beneficial Ownership Amending Release.⁷²⁹ These recently adopted rules

at 14; ICI Letter 2, at n.13); *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, Release No. IA–5955 (Feb. 9, 2022) 87 FR 16886 (Mar. 24, 2022) (“SEC Private Fund Advisers Proposal”) (see, e.g., Overdahl Letter, at 14); and *Amendments to Form PF to Require Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers and to Amend Reporting Requirements for Large Private Equity Fund Advisers*, Release No. IA–5950 (Jan. 26, 2022) 87 FR 9106 (Feb. 17, 2022) (“February 2022 SEC Form PF Proposing Release”) (see Overdahl Letter, at 14); *Shortening the Securities Transaction Settlement Cycle*, Release Nos. 34–94196, IA–5957 (Feb. 9, 2022) 87 FR 10436 (Feb. 24, 2022) (see SIFMA Letter 1, at 20–21). See also Citadel Letter, at 10 (stating that Rule 10c–1a “must be assessed along with the additional public disclosure contemplated in recent Commission proposals regarding large security-based swap positions, beneficial ownership reporting and short position and activity reporting”).

⁷²⁶ *Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers*, Release Nos. 33–11131, 34–96206, IC–34745 (Nov. 2, 2022) 87 FR 78770 (Dec. 22, 2022) (“Amendments to Form N–PX Adoption”). The Form N–PX amendments require funds to report publicly their proxy voting records on an annual basis, and apply to most registered management investment companies. The effective date is July 1, 2024.

⁷²⁷ Settlement Cycle Adoption, *supra* note 738. The Settlement Cycle amendments shorten the standard settlement cycle for most broker-dealer transactions from two business days after the trade date to one business day after the trade date (“T+1”). The implementation date, May 28, 2024, will occur before the implementation of these rules, and we therefore expect that all reports made pursuant to this rule will occur after the implementation of the T+1 settlement cycle. Further, because of the need for an RNA to develop and implement rules before reporting can begin, we believe that the May 2024 implementation date for T+1 will precede any significant compliance costs incurred by market participants pursuant to this final rule.

⁷²⁸ *Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting*, Release No. IA–6297 (May 3, 2023) 88 FR 38146 (June 12, 2023) (“May 2023 SEC Form PF Amending Release”). The Form PF amendments require large hedge fund advisers and all private equity fund advisers to file reports upon the occurrence of certain reporting events. The compliance dates are December 11, 2023, for the event reports in Form PF sections 5 and 6, and June 11, 2024, for the remainder of the Form PF amendments.

⁷²⁹ *Modernization of Beneficial Ownership Reporting*, Release Nos. 33–11253, 34–98704 (Oct. 10, 2023) (“Beneficial Ownership Amending Release”). Among other things, the amendments shorten the filing deadlines for beneficial ownership reports filed on Schedules 13D and 13G. The compliance dates are 90 days after the effective date, for Schedule 13D amended filing deadlines; September 30, 2024, for the Schedule 13G amended

were not included as part of the baseline in the Proposing Release because they were not adopted at that time. In response to commenters, this economic analysis considers potential economic effects arising from the extent to which there is any overlap between the compliance period for final Rule 10c–1a and the compliance periods for each of these four adopted rules.⁷³⁰

Other rules mentioned by commenters remain at the proposal stage. To the extent those proposals are adopted, the baseline in those subsequent rulemakings will reflect the regulatory landscape that is current at that time.

1. Securities Lending

A securities loan is typically a fully collateralized transaction whereby the lender, also known as the beneficial owner, temporarily transfers legal right to a security to the borrower, the counterparty, in exchange for compensation. The form of compensation depends on the type of collateral used to secure the transaction. There are two general types of collateral: cash and non-cash.

In the U.S., the most common form of collateral for equity security loans is cash. The borrower of the security deposits collateral, typically 102 percent or 105 percent of the current value of the asset being loaned. The lender then reinvests this collateral, usually in low-risk interest-bearing securities, then rebates a portion of the interest earned back to the borrower. The difference between the interest earned and what is

filing deadlines; and December 18, 2024, for the structured data requirement. We anticipate that the implementation of amendments to Schedules 13D and 13G will precede any significant compliance costs incurred by market participants pursuant to final Rule 10c–1a.

⁷³⁰ Since proposing this rule, the Commission adopted another proposed rule identified by a commenter, the SEC Private Fund Advisers Proposal. See Overdahl Letter at 14; *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, Release No. IA–6383 (Aug. 23, 2023) 88 FR 63206 (Sep. 14, 2023) (“SEC Private Fund Advisers Adopting Release”). However, the Commission believes there are no potential significant effects from overlapping requirements to comply with final Rule 10c–1a. Specifically, one of the rules from the SEC Private Fund Advisers Adopting Release requires registered investment advisers to private funds to, among other things, provide transparency to their investors regarding the fees and expenses and other terms of their relationship with private fund advisers and the performance of such private funds. The Commission anticipates that most registered investment advisers would either not face any reporting obligations under final Rule 10c–1a(a) or, to the extent they are involved in the lending of securities, would not report loans directly, but would do so through a reporting agent. As a result, the Commission does not anticipate the compliance costs associated with final Rule 10c–1a to be incurred directly by those who are impacted by the SEC Private Fund Advisers Adopting Release.

rebated to the borrower is the lending fee earned by the lender. The portion of the interest earned on the reinvested collateral that is returned to the borrower is called the rebate rate, and is a guaranteed amount set forth in the terms of the loan. It is possible for the lender to lose money on the loan if the interest earned on the reinvestment of the collateral does not exceed the rebate rate. If the security is in high demand in the borrowing market, the rebate rate may be negative, indicating that the borrower does not receive any rebate and must also provide additional compensation to the lender. In contrast, borrowers of loans that are collateralized other than with cash typically must pay a lending fee. The following will refer to “cost to borrow” or “borrowing costs” being higher when rebate rates are lower (or negative) in the case of cash-collateralized loans, and lending fees are higher in the case of non-cash-collateralized loans.⁷³¹

Borrowing costs are influenced by the current demand for the given security, the potential difficulty a particular broker-dealer may face finding an alternative source of loans, the length of the loan, the collateral used, the creditworthiness of the counterparty, and the relative bargaining power of the parties involved, among other factors.⁷³² Consequently, there is usually a significant range of borrowing costs for loans of the same security on the same day to different entities.⁷³³

In the Wholesale market, securities loans are most commonly obtained through bilateral negotiations between lending programs and broker-dealers, often with a phone call.⁷³⁴ Generally, when an end investor wishes to borrow a share, and their broker-dealer does not have the share available in their own inventory or through customer margin

⁷³¹ In many datasets, rebate rates for loans collateralized by cash are converted to fees using the conventional method of subtracting the rebate rate from the Federal funds rate; see, e.g., the footnote in Table 1.

⁷³² Among other factors that can influence borrowing costs, commenters also pointed out that the size and stability of the lender’s position (see HMA Letter, at 2), the lender’s propensity to recall the loan (see Overdahl Letter, at 6), interest rate stability and supply concentration (see SIFMA AMG Letter, at 6), and factors idiosyncratic to the parties, such as capital and opportunity costs (see RMA Letter, at 6). One commenter pointed out that fees in the Customer market can depend on additional factors, such as whether a borrower/client has exclusive access to a lenders’ portfolio, the volume of a client’s borrow business, and other prime brokerage services being offered, among others (see MFA Letter 1, at 5).

⁷³³ See *infra* Part IX.B.3 for statistics on the range of borrowing costs.

⁷³⁴ Most broker dealers are regulated by FINRA and are subject to securities lending rules such as FINRA Rules 4314, 4320, and 4330.

accounts to loan,⁷³⁵ their broker-dealer will borrow a share from a lending agent with whom they have a relationship. Obtaining a securities loan often involves extensive search for counterparties by broker-dealers.⁷³⁶

Investors borrow securities in the Customer market for a variety of reasons. In the equity market, a primary reason for borrowing shares is to facilitate a short sale. Investors use short sales to take a directional position in a security, or to hedge an existing position.⁷³⁷ When investors execute a short sale, they do not borrow the shares on the day of the short sale. Rather, because the stock market settles up to two business days after a transaction occurs (“T+2”) and the lending market has same-day settlement, the loan actually occurs on the settlement day.⁷³⁸

Options market activity can also be a source of demand for security loans as short selling is a critical component of delta hedging. Delta hedging occurs when options market participants, particularly options market makers, holding directional positions hedge their inventory exposure by taking offsetting positions in the underlying stock.⁷³⁹ Equity options markets are often significantly less liquid than the markets for their underlying securities. Delta hedging a long call or short put position requires short selling, which in turn requires borrowing the underlying asset.

Equity security loans can also occur to close out a fail to deliver. Fail to delivers occur when one party of a transaction is unable to deliver at settlement the security that they previously sold. Fail to delivers can occur for multiple reasons.⁷⁴⁰ Rule 204

of Regulation SHO generally requires a participant of a registered clearing agency to close out any fail to deliver at the registered clearing agency by purchasing or borrowing securities of like kind and quantity. Thus, a broker or dealer that is required to close out a fail to deliver can borrow shares in the lending market to comply with Rule 204 of Regulation SHO.⁷⁴¹ Doing so allows more time for the individual to source the shares or purchase them in the open market.

The financial management activity of banks also drives securities loans, particularly in the Wholesale fixed-income securities lending market. It is the Commission’s understanding that a significant fraction of debt security loans occurs as banks manage liquidity on their balance sheets. Securities loans help banks manage liquidity on their balance sheets because when a security is on loan, legal claim to the security transfers to the borrower.⁷⁴² Thus, banks lacking sufficient high-quality liquid assets on their balance sheet may borrow such high-quality assets to bolster their liquidity ratios.⁷⁴³ U.S. Treasury/Agency bonds are often lent for this purpose, and consequently are the most commonly lent securities.⁷⁴⁴

Also, the Commission understands that some financial entities may use securities loans to obtain the type of collateral required for other agreements they are trying to enter into. For example, if a contract requires a certain kind of fixed income security as collateral, a firm may borrow that security to collateralize the contract.

While a security is on loan, the borrower is the legal owner of the security and receives any dividends, interest payments, and, in the case of equity security loans, holds the voting rights associated with the shares.⁷⁴⁵ Voting rights remain with the borrower until the loaned securities are returned. Usually, the terms of the loan stipulate that dividends and interest payments must be passed back to the beneficial owner in the form of so-called “substitute dividends.” Because dividends and substitute dividends are

sometimes taxed differently, an investor for whom a substitute dividend is taxed at a lower rate than a dividend may loan its shares to an investor for whom dividends are taxed at a lower rate than substitute dividends.⁷⁴⁶

Several commenters pointed out additional reasons for borrowing securities. One commenter stated that there are many reasons for securities lending that are unrelated to short selling.⁷⁴⁷ Another commenter purported that securities lending can be used to gain influence in the voting of equity securities.⁷⁴⁸

However, the Commission expects that the majority of equity securities lending, particularly in the Customer market, occurs to facilitate short selling. Investors’ ability to use securities loans for purposes other than short selling is limited by the “permitted purpose requirement” of the Board of Governors of the Federal Reserve System’s Regulation T. Regulation T broadly governs the lending activities of broker-dealers, and specifies that a broker-dealer may generally borrow or lend U.S. securities from or to a (non-broker-dealer) customer solely “for the purpose of making delivery of the securities in the case of short sales, failure to receive securities required to be delivered, or other similar situations,” unless an exemption applies.⁷⁴⁹ This limitation results in a close correlation between information about aggregate Customer loan sizes and short interest.⁷⁵⁰

2. Current State of Transparency in Securities Lending

As described above, currently available securities lending data are produced by commercial data vendors, and are based on voluntary data contributions, either using a give-to-get model or from Customer market surveys.⁷⁵¹ Some commenters expressed their belief that the Proposing Release did not adequately analyze the impact of Customer market survey data.⁷⁵² This

⁷³⁵ See *infra* Part IX.B.4 for further discussion of the sourcing of shares by broker-dealers for securities loans.

⁷³⁶ See, e.g., Adam C. Kolasinski, et al., *A Multiple Lender Approach to Understanding Supply and Search in the Equity Lending Market*, 68 J. Fin. 559, 559–95 (2013) (“Kolasinski (2013)”) (providing an examination of the effect of high search cost in the securities lending market).

⁷³⁷ Market makers in the equity market also use short selling to facilitate liquidity provision in the absence of sufficient inventory. However, these short sales are not considered here because they are almost always reversed intraday and thus do not result in a securities loan.

⁷³⁸ Equity settlement moves to T+1 on May 28, 2024; See *Shortening the Securities Transaction Settlement Cycle*, Release Nos. 34–96930, IA–6239 (Feb. 15, 2023), 88 FR 13872 (Mar. 6, 2023) (“Settlement Cycle Adoption”).

⁷³⁹ For a given option contract, a quantity known as the “delta” captures the sensitivity of the option’s price to a \$1 increase in the price of the underlying security. When hedging inventory, the market maker determines the appropriate position size in the underlying stock according to the delta.

⁷⁴⁰ See, e.g., *Amendments to Regulation SHO*, Release No. 34–58775 (Oct. 14, 2008), 73 FR 61690 n.8 (Oct. 17, 2008).

⁷⁴¹ See 17 CFR 242.204.

⁷⁴² See, e.g., *Concept Release on the U.S. Proxy System*, Release No. 34–62495 (July 13, 2010), 75 FR 42982, 42994 (July 22, 2010) (“When an institution lends out its portfolio securities, all incidents of ownership relating to the loaned securities, including voting rights, generally transfer to the borrower for the duration of the loan”).

⁷⁴³ These loans are generally collateralized with securities instead of cash. A market participant can increase the liquidity of their portfolio by borrowing highly liquid securities and collateralizing the loan with less liquid securities.

⁷⁴⁴ See OFR Pilot Survey, at 7; *supra* note 136.

⁷⁴⁵ See, e.g., OFR Reference Guide, *supra* note 4.

⁷⁴⁶ This is known as dividend arbitrage. While the IRS has issued regulations to try to combat this type of dividend arbitrage, there is evidence that it still occurs. See Peter N. Dixon, et al., *To Own or Not to Own: Stock Loans around Dividend Payments*, 140 J. Fin. Econ 539, 539–59 (2021) (“Dixon, et al., (2021)”).

⁷⁴⁷ See IHS Markit Letter, at 3.

⁷⁴⁸ See HMA Letter, at 3.

⁷⁴⁹ See 12 CFR 220.10(a).

⁷⁵⁰ See *infra* Part IX.B.6 for further discussion of the correlation between securities loan information and short interest.

⁷⁵¹ See *supra* Part IX.A.2 for a description of these types of datasets.

⁷⁵² For example, one commenter stated that, while they agree “with the Commission’s concerns regarding the inadequacy and information asymmetry issues inherent in the give-to-get model,” the give-to-get model is “is not the industry

baseline, and the discussion following have been expanded to provide a more detailed discussion of the Customer market survey data and its impact on securities lending transparency. The available data have limitations. Specifically, they lack comprehensiveness in that they are based on voluntary data contributions. The reliance on voluntary data contributions increases the likelihood that data are missing in a non-random manner which can introduce biases into the data. Lastly, not all market participants have access to all existing commercial datasets resulting in information asymmetries between market participants.

Some commercial data vendors obtain information on Wholesale loans using a give-to-get model.⁷⁵³ Access to data collected using a give-to-get model is largely restricted, as only certain entities can purchase the data. The Commission understands entities with access to the give-to-get Wholesale market data access that data using various means such as an application programming interface (API), spreadsheet add-in applications, file downloads, or directly from the distributor's website. It is the Commission's understanding that some large institutional investors who would like the give-to-get data, such as hedge funds, cannot access it, even for a fee, because they do not provide lending data to the commercial vendors and so are not qualified to purchase the data. Additionally, distributing the data to these investors may discourage other market participants from contributing their data to the data vendors. Because securities loans are often entered into to facilitate various trading and hedging strategies, if the give-to-get data providers expanded access to their data, some securities lending market participants may be discouraged from contributing data. Consequently, if sophisticated traders such as hedge funds can access the data, then some market participants may be leery of contributing data to the give-to-get data vendors for fear of hedge funds learning about their trading or hedging strategies. Additionally, while some data vendors do allow non-lending market participants, such as academics and regulators, to access the data for a fee, they sometimes place usage restrictions on the data that make it unusable for regulatory and some academic

functions.⁷⁵⁴ The Commission believes, based on conversations with industry participants and our staff's use of some of the data, that the coverage and timeliness of the three biggest give-to-get Wholesale data vendors are roughly comparable.⁷⁵⁵

Other commercial data vendors provide a different approach to securities lending data by surveying asset managers and others in the Customer segment of the market about their borrowing experience, such as their costs to borrow, from which they provide estimates of lending fees.⁷⁵⁶ One commenter stated that the Commission "offers no reason to believe that the [Customer market] survey and 'give-to-get' data are materially different."⁷⁵⁷ Customer market survey data have some characteristics that make them distinct from the give-to-get data provided by the vendors of Wholesale market data discussed above. First, Customer market survey data vendors generally aggregate information from respondents in the Customer market—that is, the end borrowers that engage in securities borrowing to facilitate short selling—and thus cover a different segment of the securities lending market.⁷⁵⁸ Second, while Wholesale market data are mostly available only on a restricted basis, Customer market survey data are generally available to any purchaser. However, despite these differences, Customer market survey data face a similar issue to the give-to-get data, in that they only contain information about the subset of those end borrowers that choose to provide data. Since it is unlikely that the full universe of lending programs and borrowers contribute all data to any given data vendor, the Commission believes that both give-to-

get and Customer market survey data lack comprehensiveness.

Furthermore, as stated in the Proposing Release and restated here, the Commission believes that the give-to-get data are likely biased due to non-random omissions that result from the voluntary nature of data submissions.⁷⁵⁹ The Commission also believes that, since Customer market survey data are also based on voluntary submissions, these data also suffer from bias due to non-random omissions. As will be further detailed below, data based on voluntary submissions can contain biases because market participants that choose not to disclose their data likely make that choice because it is in their strategic interest not to disclose, resulting in non-random omissions.

One commenter stated that the Commission's statements in the Proposing Release that give-to-get data could be systematically biased has "no basis beyond mere speculation."⁷⁶⁰ The Commission disagrees. It is true that it is not possible to empirically analyze or quantify the extent of this bias using existing data because there currently does not exist a complete dataset with which to compare the existing data, and comparing a biased sample to an unbiased sample is generally the only data-based means of determining the extent of the bias in a non-random sample. Instead, the determination that data are likely to not contain a representative sample is routinely made in economic studies (as well as data analysis generally) based on an understanding of how the sample is created, which alone can be sufficient to determine the likely validity of the sample. The fact that non-random data omissions result in biased data is well established in statistics and data science, and simply stems from the logic that, if the reporting subsample is systematically different from the population, then statistics based on the reporting sample will only reflect the reporting sample, and will not be reflective of the whole population.⁷⁶¹

In the context of commercial securities lending datasets, the

⁷⁵⁴ For example, some data providers retain the right to review and reject any use of the data at their own discretion.

⁷⁵⁵ See *infra* note 812 for evidence of this from the academic literature. The Commission expressed this belief in the Proposing Release (See Proposing Release, 86 FR 69832) and specifically requested comment regarding the baseline of the economic analysis as well as specific comment about "sources of insight" into securities lending activity (See Proposing Release, 86 FR 69849, questions 77 and 78). The Commission did not receive comment on this point and thus continues to believe that the data from the three biggest give-to-get Wholesale data vendors are roughly comparable.

⁷⁵⁶ See Garango 2020, *supra* note 712.

⁷⁵⁷ See Citadel Letter, at 8.

⁷⁵⁸ For reasons below *infra* note 769, there is uncertainty regarding the strength of the correlation between Wholesale and Customer borrowing costs, particularly for stocks that are not hard-to-borrow. Therefore, it is unclear whether customer survey data could be used to glean information about the Wholesale market.

⁷⁵⁹ See Proposing Release, 86 FR 69832.

⁷⁶⁰ See Citadel Letter, at 8. Similarly, another commenter asked for an assessment of the current accuracy of existing data; See S3 Partners Letter, at 4. However, neither commenter provided any supplemental analysis challenging the assumption of non-random omissions, nor did they provide additional insight into the nature of any bias. Neither did either commenter provide a pathway to overcoming obstacles related to such an empirical analysis.

⁷⁶¹ See, e.g., James J. Heckman, *Selection Bias and Self-Selection*, in *ECONOMETRICS*, 201–224 (John Eatwell, et al., eds., Palgrave Macmillan, London 1990) ("Heckman (1990)").

standard." See S3 Partners Letter, at 5. Similarly, another commenter stated that "the 'give-to-get' model is not the only model for commercial data for securities lending." See Citadel Letter, at 8.

⁷⁵³ See *supra* Part IX.A.2 for a description of the give-to-get model of data collection.

Commission believes that, because market participants can choose whether or not they want to contribute data to commercial datasets,⁷⁶² it is likely that the sample of securities lending data that is reported to commercial data vendors is, on average, different from the sample that is not reported. As such, there are well-established theoretical reasons as to why these data are likely biased. These reasons are largely based on the fact that market participants that voluntarily contribute data to commercial datasets “self-select” the data that they would like to be included in the dataset. The practice of having entities under study “self-select” into the dataset used to study them is widely acknowledged in the empirical economics literature to be very likely to lead to biased data.⁷⁶³ This is because the incentives to provide data are likely connected to the incentives that drive the behavior under study, such that the behavior of those market participants that do contribute data are likely to be systematically different from the behavior of those that do not contribute. Trying to draw inferences from such a dataset about the entire population of market participants would thus result in a biased view of the market.

The Commission has identified examples of such incentives that would likely introduce such “self-selection biases” into commercially available securities lending datasets. First, there may be competitive reasons for market participants to selectively choose which loans to contribute to a securities lending dataset. For example, to attract more beneficial owner customers, lending programs would like their average terms to appear better than the benchmark average terms. Thus, they are incentivized to voluntarily contribute information about their lending activity for loans with higher-than-average borrowing costs—skewing the average cost to borrow in the resulting dataset up and making the lender’s performance appear better than it actually was.⁷⁶⁴ This could lead the

reported borrowing costs in commercial datasets to be systematically higher than the actual borrowing costs in the securities lending market.⁷⁶⁵

Similarly, some market participants may choose not to voluntarily contribute data to securities lending datasets for their own strategic reasons, such as a desire to keep their activity private. The decision to not to participate is, in itself, indicative that such market participants are likely not reflective of those who do choose to participate. For example, market participants that choose not to contribute data may be more likely to be sophisticated investors with greater incentives to protect their trading and hedging strategies. This matters because the terms of securities loans are influenced by the characteristics of the parties involved,⁷⁶⁶ and so it follows that the borrowing costs for market participants that do not voluntarily contribute data are systematically different than the borrowing costs for market participants that do contribute data.

In addition to the issue of self-selection bias, currently there is no securities lending dataset that contains information about both the Customer and Wholesale segments of the market. The give-to-get datasets lack significant coverage of the Customer segment of the market, while the Customer market survey data lack significant coverage of the Wholesale segment of the market.⁷⁶⁷

⁷⁶⁵ Note that the reverse could also be true, as lenders, in order to attract more customers in the market for borrowers, may be incentivized to voluntarily contribute information about loans with lower-than-average borrowing costs, which would skew the average cost to borrow downwards. Ultimately, the Commission is not able to determine the potential direction of the self-selection bias, which could also vary over time. This would complicate any attempt to adjust for the bias when performing analyses on the data.

⁷⁶⁶ See *infra* Part IX.B.3 for further discussion of the factors that influence the prices of securities loans.

⁷⁶⁷ One industry publication noted in an interview with a market participant engaged in Wholesale market lending that they feel unable to benchmark the performance of their lending programs using commercial data because they have very little insight into the Customer market. See, e.g., Bob Currie, *The Power of Reinvention*, Sec. Fin. Times (Aug. 31, 2021), at 20, available at https://www.securitiesfinancetimes.com/slimes/SFT_issue_285.pdf, interviewing Matthew Chessum, who stated that “as a lender, we monitor fees paid to us by the agent, but we only see one side of the trade. We have no sight of the pricing paid by a hedge fund or prime broker, for example, when they borrow those securities.” One commenter questioned the applicability of this citation and stated their opinion that, “[t]hat a single person would like to see certain data is not evidence that requiring the disclosure of that data is worth the massive cost,” the commenter also states that “the Commission neglects to estimate the number of market participants that are seeking the same disclosure” (see Citadel Letter, at 10). The

While some, but not all, market participants could potentially gain access to data on both the Wholesale markets and Customer markets by subscribing to both give-to-get and Customer market survey datasets, this would generally be possible only for market participants that contribute data (and thus have access) to give-to-get datasets and would also not surmount the problems of incomplete or potentially biased data. Different types of data may also be cumbersome to combine.⁷⁶⁸ There are also limitations to using the Customer market survey data to assess conditions in the Wholesale market.⁷⁶⁹ Furthermore, the need to subscribe to multiple datasets increases market participants’ overall costs of data access.⁷⁷⁰

As an additional source of securities lending data, some market participants that have many connections within the securities lending market, such as large broker-dealers and lending programs, can query other market participants directly about current conditions. These centrally connected market participants are also likely to have access to both give-to-get Wholesale data and customer

Commission received numerous comment letters from industry members and organizations expressing support for the public disclosure of securities lending data. See, e.g., Nasdaq Letter, at 1–2; AFREF Letter 1, at 1; Better Markets Letter, at 1; NYSE Letter 1, at 1–2; ASA Letter, at 1; and Morningstar Letter, at 2; The Commission also received letters from academics and individuals supporting additional transparency. See, e.g., James J. Angel Letter, at 1; Letter from Carl Nyborg (Dec. 15, 2021), at 1; Letter from Eric Olsen (Jan. 24, 2022); Letter from Scott Clark (Jan. 22, 2022).

⁷⁶⁸ For example, commercial data vendors often convert rebate rates (for cash collateralized loans) into fees, in order to combine with information about lending fees for non-cash collateralized loans and cash collateralized loans; see, e.g., *infra* note 786. Different commercial data vendors may use different methodologies for this conversion, which would make it difficult to combine and compare information about borrowing costs across different datasets.

⁷⁶⁹ Borrowing costs in the Customer market are often contractually negotiated in the brokerage agreement between a customer and their broker-dealer. It is common for these brokerage agreements to stipulate a fixed rate for general collateral stocks and some predetermined process to determine rates for stocks on special, such as referencing Wholesale market rates plus some mark-up. For this reason, there is uncertainty regarding how strong the correlation might be between Wholesale and Customer borrowing costs, particularly for general collateral stocks.

⁷⁷⁰ One commenter stated that, “while the Proposal stated that purchasing multiple vendor systems is expensive, there was no quantification of actual vendor costs. Nor was there data provided on how many firms actually use multiple vendors” (see S3 Partners Letter, at 4). The Commission cannot provide such analysis because we do not have, and commenters did not provide, typical costs paid to vendors for such data. The Commission understands that such pricing is dynamic and individualized, and is generally not aware of publicly available price lists or client lists.

⁷⁶² See *infra* of this part for a discussion of investors’ incentives related to voluntarily contributing data to commercial datasets, and why this may result in systematic differences between those that choose to contribute as compared to those that do not.

⁷⁶³ See Heckman (1990), *supra* note 761.

⁷⁶⁴ One commenter stated that lending agents frequently provide their clients with benchmark reports based on market data, and that beneficial owners currently benefit from substantial information obtained from lending agents. See RMA Letter, at 2; see also *supra* note 721 and *infra* note 772 and corresponding text. However, even if this is the case, many beneficial owners do not have access to securities lending data, particularly give-to-get Wholesale data, and so could likely not independently benchmark transactions.

market survey data. Consequently, the largest and most centrally connected broker-dealers and lending programs likely have access to better information about the current state of the lending market than other participants, including their customers, the beneficial owners, and end borrowers. This asymmetric information between those on the periphery of the lending market and those in the center, who have access to both Wholesale and Customer market commercial datasets as well as queried data from their connections, may lead to inferior terms for those on the periphery in the form of lower performance and less favorable prices for beneficial owners and end borrowers.⁷⁷¹ Because of the above-described issues with the comprehensiveness and accessibility of existing commercial datasets, the availability of commercial data products for the securities lending market does not alleviate this information asymmetry.

One commenter disagreed with the Commission's view that there are information asymmetries between those in the center of the lending markets and beneficial owners and borrowers on the periphery, because beneficial owners benefit from the information obtained by their lending agents.⁷⁷² However, the Commission believes that, even if lending agents provide beneficial owners with benchmark reports based on commercial securities lending data, this would not eliminate all information asymmetries. The lending agent, or other centrally located entity, has access to the raw data, as well as the potential to influence that data through their own contributions of data to commercial data vendors, whereas the beneficial owner would need to rely on a subset of the processed data that their lending agent chooses to provide to them, if any.

In addition to the specific problem of information asymmetry between various market participants, the lack of comprehensive and widely available data on securities lending activity likely means that the prices at which

securities loans take place are not efficient, relative to the hypothetical case in which complete information about securities lending activity were widely available. Asymmetric information in general deters outsiders from entering the market, as they anticipate not being able to transact on the same terms. This limits both liquidity (because fewer participants enter to transact) and price discovery (because not all information enters prices). Moreover, even lenders with many connections in the securities lending market lack a complete picture of the lending market, implying that the loan prices that they quote may not be completely efficient.

Commenters stated that the lending market for U.S. Government securities is already transparent "because there is sufficient liquidity and demand for loans of these types of securities on platforms and venues that have a high degree of transparency."⁷⁷³ However, the commenters did not provide additional explanation as to why a high degree of liquidity would entail a transparent market, or additional details regarding the transparency of the platforms and venues that trade in U.S. Government securities.

The Commission believes that information asymmetries may still be present in the lending market for U.S. Government securities. Some information about U.S. Government securities loans is available from the commercial securities lending datasets described above. In addition, the Commission understands that information about loans of U.S. Government securities that are awarded to primary dealers through the Federal Reserve Bank of New York's System Open Market Account (SOMA) portfolio is available from the Federal Reserve Bank of New York.⁷⁷⁴ While volume

and rate information from these auctions may be informative to participants about benchmark lending rates, these data do not contain information about activity in the broader U.S. Government securities lending market. Furthermore, certain aggregate data from the Federal Reserve's FR 2004 reports, which collect weekly and daily position, transaction, financing, and fails data of primary dealers in U.S. Government securities and other selected fixed income securities, are published in the Federal Reserve Bank of New York's press release, "Weekly Release of Primary Dealer Transactions."⁷⁷⁵ This dataset contains aggregate volume information about securities lent and borrowed by primary dealers. It does not contain information about lending rates, and also does not contain information about the U.S. Government loans of market participants other than primary dealers.

Furthermore, some market participants may be able to infer some information about the securities lending market from the market for repos;⁷⁷⁶ this is particularly the case for securities with a very active repo market, such as U.S. Government securities. A fixed-

collateral amount, and the identity of the counterparty, *see* Fed. Res. Bank of N.Y., "Historical Transaction Data," available at https://www.newyorkfed.org/markets/omo_transaction_data, last visited Aug. 23, 2023.

⁷⁷⁵ The Federal Reserve's weekly Form FR 2004 provides weekly volume statistics about primary dealers' financing activity in U.S. Government securities, including aggregated volumes in securities lending and repo. *See* Fed. Res. Bank of N.Y., "Primary Dealer Statistics," available at <https://www.newyorkfed.org/markets/courtparties/primary-dealers-statistics>, last visited Aug. 23, 2023.

⁷⁷⁶ In a repo, one party sells an asset, usually a Treasury security or other fixed-income security, to another party with an agreement to repurchase the asset at a later date at a slightly higher price. Repos are a common form of short-term corporate financing. In a repo, the party selling the security is similar to the lender in a securities lending agreement; the party purchasing the security is similar to a borrower in cash collateralized securities lending. In both cases, the transaction is facilitated by cash transferring from the purchaser (borrower) to the seller (lender). In a securities loan, the cash is in the form of collateral while in a repo transaction the cash is payment for the security. In both cases, the purchaser or borrower becomes the legal owner of the security. To unwind the repo or securities loan, cash transfers back to the purchaser in terms of the repurchase cost for a repo or in the form of returned collateral in a securities loan. Repos and securities loans differ in that repos typically are primarily used for short-term financing while securities loans typically are used to gain access to the security itself. Also loans generally allow the lender to recall the security on demand while repos do not. Additionally, the cash received by the seller of a repo is often not re-invested but is used to finance the operations of a company whereas the cash received in a securities loan is generally re-invested in low risk fixed-income securities for the life of the loan. *See, e.g.,* Gary Gorton & Andrew Metrick, *Securitized Banking and the Run on Repo*, 104 J. Fin. Econ 425 (2012).

⁷⁷¹ For example, broker-dealers acting on behalf of customers have an incentive to lend from their inventory, even if lower cost borrowing options exists, because they keep the whole lending fee in such a transaction. The limited data available to the end borrower about the state of the lending market make it difficult for the end borrower to monitor the performance of its broker-dealer for situations like this.

⁷⁷² *See* RMA Letter, at 6 (stating "[w]hile the Proposing Release repeatedly asserts that information asymmetries exist between those 'in the center' of the lending markets and beneficial owners and borrowers on the 'periphery,' in point of fact beneficial owners currently benefit from substantial information obtained by Lending Agents acting on their behalf and pricing remains highly competitive").

⁷⁷³ *See, e.g.,* RMA Letter, at 16; IIB Letter, at 6.

⁷⁷⁴ Through its System Open Market Account (SOMA) portfolio, the Federal Reserve Bank of New York awards U.S. Government securities loans to primary dealers (*i.e.*, financial institutions that are permitted to trade directly with the Federal Reserve System) that have elected to participate in the program based on competitive bidding in a multiple price auction held each business day at noon. Participation by primary dealers is entirely voluntary and summary results are released to the public following each day's auction. *See* Fed. Res. Bank of N.Y., "Securities Lending," available at <https://www.newyorkfed.org/markets/domestic-market-operations/monetary-policy-implementation/securities-lending>, last visited Aug. 23, 2023. For a list of current primary dealers, *see* <https://www.newyorkfed.org/markets/primarydealers>. These data include both daily and historical data on aggregate volumes and rates, as well as transaction-by-transaction data disseminated with a two-year lag. The latter dataset contains identifying information for the security lent (*e.g.*, CUSIP), as well as the lending fee,

term cash collateralized securities loan is economically similar to a repo. Consequently, an investor wishing to gather information about fixed-term loans in the securities lending market could use prevailing terms in the repo market to infer information about borrowing costs for the same securities. However, as majority of securities loans do not have a fixed term,⁷⁷⁷ information from the repo market would only be useful for a small subset of securities loans.

3. Characteristics of the Securities Lending Market

The value of securities available to be loaned generally far exceeds the total value on loan. The OFR Pilot Survey documents that in 2015 only about 10 percent of the value of securities available for lending were on loan.⁷⁷⁸ However, for a specific security it is not always the case that shares available to loan far exceeds shares on loan. For some securities, particularly highly shorted securities, it can be extremely difficult and expensive to find securities to borrow. Securities that are difficult to borrow are said to be “on special” and can have average borrowing costs many times higher than a security that is not on special.⁷⁷⁹

Securities loans also exhibit a wide range of borrowing costs for the same security on the same day. The range of borrowing costs for the same security can be influenced by a number of characteristics, such as the creditworthiness of the borrower, the type of collateral used, and the terms of

the loan.⁷⁸⁰ As discussed in further detail below, the range of borrowing costs likely also represents asymmetric information between the parties to the loan negotiation, such that one party is able to charge a higher price than would be possible if the other party had better information regarding the current loan prices for that security.⁷⁸¹ It may also represent a general lack of price efficiency stemming from incomplete information, as market participants operate without a clear view of the market as a whole.

Table 1 provides descriptive statistics illustrating these characteristics of the securities lending market. The data come from Fidelity National Information Services, Inc. (FIS) and reflect conditions in the Wholesale market for U.S. equity loans on the same days as the OFR Pilot Survey,⁷⁸² for the sample of lenders that provide data to FIS.⁷⁸³

Panel A of Table 1 provides the distribution of utilization rates (defined as the percent of shares currently on loan relative to the total number of shares available for lending). This panel highlights that utilization rates are highly positively skewed. For most stocks supply significantly outstrips demand with median utilization rates of approximately 12 percent. For stocks at the 90th percentile, utilization rates are near 70 percent, implying that an investor seeking to find shares of such a stock to borrow may have a difficult time doing so.

Table 1 only presents utilization rates for equity lending transactions.

However, at least one commenter states that utilization rates vary significantly across asset classes, stating that data from the OFR Pilot Survey show that utilization rates are lower for more individualized securities, such as corporate bonds.⁷⁸⁴ Meanwhile, referencing the OFR Pilot Survey, the commenter pointed out that the utilization rate for U.S. Treasuries and agencies is higher than that of equities.⁷⁸⁵

Panel B of Table 1, which presents borrowing costs in term of lending fees,⁷⁸⁶ shows that the lending fees paid for equity loans exhibit a wide range.⁷⁸⁷ Stocks that are on special can have fees many times higher than the median stock. Specifically, stocks at the 90th percentile of lending fees have an average lending fee of 7 percent per year while the median stock has a lending fee of about 0.6 percent per year. Even when loans involve the same stock, and on the same day, there can be a significant range in fees paid to borrow securities.

Panel C of Table 1 highlights the range of lending fees charged for the same stock on the same day. The range in fees is defined as the difference in the maximum and minimum fees reported to FIS for loans of the same stock on the same day. This range can be quite substantial. For the median stock the range is about three percentage points, or approximately five times the median fee charged for securities lending transactions.

TABLE 1—DISTRIBUTION OF LENDING FEES FOR U.S. COMMON STOCKS *

	p10	p20	p30	p40	Median	Mean	p60	p70	p80	p90	N
Panel A: Distribution of Utilization Rates											
9–Oct–15	1.02	2.94	5.42	8.28	12.06	22.70	17.21	24.83	39.35	68.98	3,638

⁷⁷⁷ The OFR Pilot Survey (*supra* note 136, at 9) estimates that 81% of the loans in their data were open loans for which no maturity date is specified.

⁷⁷⁸ See OFR Pilot Survey, *supra* note 136. Note that the number of shares available for loan must be interpreted carefully. The Commission understands that some beneficial owners may report a supply of shares available that, if borrowed, would exceed the total amount of securities lending they are willing to engage in, so that not all shares reported as available could in fact be borrowed at once. Investment companies that engage in securities lending consistent with SEC staff's current guidance generally limit securities lending to no more than one third of the value of their portfolio on loan at a given point in time. Some investment companies may set individual portfolio limits lower.

⁷⁷⁹ In contrast, easy-to-borrow stocks are often referred to as “general collateral” stocks, which tend to have lower borrowing costs.

⁷⁸⁰ See *supra* note 732 for additional factors pointed out by commenters that could be important drivers of borrowing costs.

⁷⁸¹ See *supra* Part IX.B.2 for a discussion of information asymmetries in the securities lending market, specifically between end borrowers and broker-dealers and between beneficial owners and lending programs. See also *supra* note 771 for an example.

⁷⁸² We limited our sample to the same period of time as the OFR Pilot Survey (Oct. 9, 2015, Nov. 10, 2015, and Dec. 31, 2015) for ease of comparison. Additionally, while the data presented here is limited to equity loans, final Rule 10c–1a applies to loans of both equity and fixed-income securities. The Commission believes that there is a similar lack of transparency for fixed-income loans and equity loans, and thus the same economic structure likely applies to both the fixed-income and equity lending markets.

⁷⁸³ FIS data are collected using a give-to-get model and thus is unavailable for many entities other than those that provide their data to FIS.

⁷⁸⁴ The commenter states that “the corporate and asset-backed debt markets in particular are characterized by relatively small issuance sizes and substantial differences in instrument characteristics,” and that “while the number of publicly traded equity securities of U.S. issuers is around 3,600, there are over two million unique issuances of corporate and government bonds and asset-backed securities in circulation.” See RMA Letter, at 16.

⁷⁸⁵ See RMA Letter, at 16.

⁷⁸⁶ FIS converts rebate rates to fees using by subtracting the rebate rate from the Federal funds rate. See *supra* note 731 and the footnote of Table 1.

⁷⁸⁷ This result is consistent with the academic literature. See, e.g., Dixon, et al., (2021), *supra* note 746. Also consistent with the academic literature, average fees for each stock each day are computed by FIS as the share weighted average fee across all loans outstanding reported to FIS for a given stock on a given day. Stocks are sorted by average fee and percentiles are determined.

TABLE 1—DISTRIBUTION OF LENDING FEES FOR U.S. COMMON STOCKS*—Continued

	p10	p20	p30	p40	Median	Mean	p60	p70	p80	p90	N
10–Nov–15	0.94	2.82	5.18	8.19	11.72	22.51	16.87	24.59	38.59	68.10	3,638
31–Dec–15	0.75	2.35	4.52	7.31	11.17	22.25	16.49	25.02	40.42	67.64	3,639
Panel B: Distribution of Average Lending Fees											
9–Oct–15	0.48	0.56	0.58	0.6	0.65	3.76	0.76	1.24	2.62	7.07	3,727
10–Nov–15	0.47	0.56	0.59	0.61	0.66	3.77	0.77	1.32	2.76	7.36	3,725
31–Dec–15	0.37	0.46	0.5	0.54	0.58	3.86	0.66	1.12	2.77	7.51	3,725
Panel C: Distribution of Range of Lending Fees											
9–Oct–15	1.01	1.35	1.85	2.27	2.85	8.42	3.57	5.21	7.76	10.41	3,727
10–Nov–15	0.93	1.31	1.81	2.36	2.98	8.39	3.78	5.51	7.73	11.16	3,725
31–Dec–15	1.15	1.48	1.84	2.25	2.68	8.20	3.43	4.20	6.36	11.41	3,725

* This table provides descriptive statistics using data from FIS on securities lending fees and utilization rates for U.S. Common stocks during sample period that matches the OFR Pilot Survey's sample dates (Oct. 9, 2015, Nov. 10, 2015, and Dec. 31, 2015). For loans collateralized by cash, rebate rates are converted to fees using the conventional method of subtracting the rebate rate from the Federal funds rate. Fees are converted to annual percent. N reports the number of observations from which FIS has reported the relevant statistics. Panel A shows the distribution of utilization rates, where the utilization rate is computed as the percent of shares on loan relative to total shares available for lending. Panel B provides estimates of the distribution of average lending fees for each stock and provides percentile thresholds for lending fees. Since there is a distribution of fees levied for the same stock on the same day, the average fee is computed as the value weighted average fee across all loans for a given stock on a given day. Panel C shows statistics for the range of fees levied for the same stock on the same day defined as the maximum fee minus the minimum fee. In all panels 'Mean' is equal-weighted.

One commenter argued that the Proposing Release offered “no evidence to suggest that lending fees broker-dealers charge are so meaningfully different (after controlling for various commercial factors).”⁷⁸⁸ As the Commission acknowledged in the Proposing Release and continues to acknowledge here, there are a number of factors that can drive variations in borrowing costs including, *e.g.*, the creditworthiness of the borrower.⁷⁸⁹ However, the Commission is unaware of the existence of data that would allow for a full analysis of all possible factors contributing to borrowing costs, and the commenter did not provide any roadmap for performing such an analysis accurately. That the observed range in borrowing costs is likely driven, at least in part, by asymmetric information and a general lack of price efficiency in the securities lending market is supported by academic literature, which finds that asymmetric information drives dispersion in prices, particularly in opaque markets with limited transparency.⁷⁹⁰ One

implication of the results from this literature is that price dispersion should be higher when transparency is lower. Indeed, there is evidence that the dispersion in borrowing costs is higher in securities lending markets with less transparency, in which information asymmetry is expected to be higher. For example, the OFR Pilot Survey shows that the range of lending fees is higher in the U.S. equity lending market than it is in the U.S. Treasury/Agency lending market, where transparency is arguably higher.⁷⁹¹

Furthermore, the Commission views it as unlikely that one of the pricing factors frequently mentioned by commenters, namely the creditworthiness or counterparty risk of the borrower,⁷⁹² can fully explain the large range in borrowing costs. Table 1 shows that the median range of fees is about 400 percent larger than the median fee itself—implying that some investors were paying at least four times as much to borrow the same security on

the same day as other investors.⁷⁹³ Based on staff experience, securities loans are virtually always fully collateralized, and so counterparty risk is unlikely to be sufficient to explain such a large dispersion in borrowing costs.

Other commenters expressed support for the notion that price dispersions in the securities lending market were due to information asymmetries and a lack of informational efficiency.⁷⁹⁴ While at least one commenter questioned the need to improve transparency in the corporate bond and U.S. Treasury/Agency lending market due to structural differences between those markets and the equity market,⁷⁹⁵ there is evidence that there is a dispersion of borrowing costs within these asset classes as well. Information from the OFR Pilot Survey indicate a large dispersion of lending fees and rebates across all asset classes, including for U.S. Treasury/Agency and corporate bond securities.⁷⁹⁶ For the reasons discussed above, the Commission believes that the observed variation in borrowing costs in these

⁷⁸⁸ See Citadel Letter, at 10.

⁷⁸⁹ See Proposing Release, 86 FR 69833.

⁷⁹⁰ See, *e.g.*, Richard C. Green, *Presidential Address: Issuers, Underwriter Syndicates, and Aftermarket Transparency*, 62 J. Fin. 1529 (2007), whose theoretical model shows that, in opaque dealer markets, if the costs of gathering price information are high for some investors, this can result in price dispersion. One key feature of this model is that “the dealings of a particular customer with a dealer are not transparent to other customers,” at 1542. See also Richard C. Green, et al., *Dealer Intermediation and Price Behavior in the Aftermarket for New Bond Issues* (EFA 2006 Zurich Meetings Paper, June 17, 2006) 86 J. Fin. Econ 643, available at <https://ssrn.com/abstract=909352> (retrieved from SSRN Elsevier database), who argue

that differences in investors’ access to information about municipal bond prices leads to a high level of price dispersion.

⁷⁹¹ Specifically, using data from Table 8 of the OFR Pilot Survey and defining the range in lending fees as the difference between the 95th percentile and the 5th percentile, the range in lending fees, averaged across the three days in the OFR Pilot Survey sample, is around 303% of the mean lending fee in the equity lending market, and 234% of the mean lending fee in the Treasury lending market. See *supra* Part IX.B.2 for further discussion of why transparency may be higher in the Treasury lending market.

⁷⁹² See, *e.g.*, HMA Letter at 2, Overdahl Letter at 6, and ISLA Letter at 2.

⁷⁹³ The OFR Pilot Survey at Table 8 provides similar statistics and finds similar dispersion for U.S. Equities.

⁷⁹⁴ See, *e.g.*, James J. Angel Letter, at 2 (expressing his belief that the increased transparency of the rule would reduce price dispersion in the securities lending market implying that a lack of transparency currently causes some of the currently experienced dispersion in fees).

⁷⁹⁵ See RMA Letter, at 16.

⁷⁹⁶ See Table 8 and Table 9 in the OFR Pilot Survey which shows, for example that on October 9, 2015, the dispersion between the 5th and 95th percentile fee for treasuries was 200% of the mean fee, for corporate bonds it was 111%, and for equities it was 319%.

markets is likely also at least partially driven by asymmetric information and a general lack of price efficiency in the securities lending market.

4. Structure of the Securities Lending Market

The securities lending market is made up of borrowers, lenders, and intermediaries that can facilitate a transaction. End borrowers can borrow securities either through their broker-dealers, or by themselves if they maintain their own relationships with lending programs. If they borrow through their broker-dealer, then they transact in the Customer market. If they maintain their own relationships and borrow directly from lending programs, then they transact in the Wholesale market.⁷⁹⁷ Beneficial owners can either supply shares to the lending market by contracting with a lending program, or they can run their own lending program and lend directly to entities such as large hedge funds with which they maintain relationships. In either case,

such a transaction occurs in the Wholesale market. Lenders can also be broker-dealers who lend to end borrowers. These lenders transact in the Customer market.

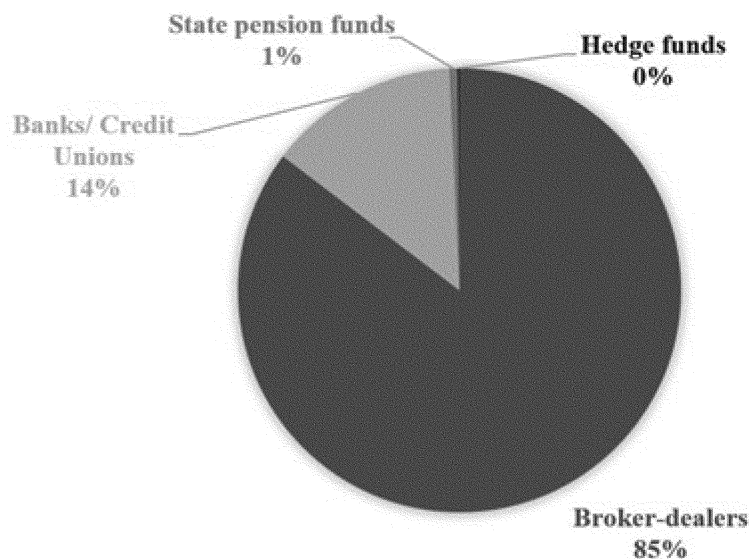
A market participant such as a short seller wishing to borrow shares usually does so through its broker-dealer, who offers to find shares to borrow as part of its suite of services offered to customers. A broker-dealer may start by providing a security loan to its customer with shares from its own inventory or out of another customer's margin account.⁷⁹⁸ The Commission understands that in order to facilitate the amount of borrowing customers wish to do, a broker-dealer will sometimes have to find other sources of shares. To that end, broker-dealers maintain securities lending relationships with customers in fully paid accounts as well as relationships with various external lending programs.

Additionally, some large institutions, such as banks, credit unions, pension funds, and hedge funds, choose to

maintain their own relationships with lending programs. These entities bypass broker-dealers to search for borrowable shares themselves. This option is not feasible for smaller institutions, who lack both the scale to make it cost effective, and the creditworthiness to be an acceptable counterparty for the lending programs in the absence of an intermediary, *e.g.*, a broker-dealer.

The OFR Pilot Survey estimated that there were approximately \$1 trillion of shares on loan.⁷⁹⁹ The OFR primarily focused on the Wholesale market, and consequently the overwhelming majority of borrowers were broker-dealers; the OFR Pilot Survey does not provide much insight into who the end borrowers are for securities lent by broker-dealers. Figure 1 provides the fraction of total securities on loan by type of borrower based on the OFR Pilot Survey across three trading days in 2015.⁸⁰⁰

Figure 1 Fraction of shares on loan by borrower type (2015)



Source: OFR Pilot Survey of Agent Securities Lending Activity

There is currently no common source that those seeking security loans can use to find shares available to lend, which is why broker-dealers rely on relationships with lending programs to secure loans. This situation has

contributed to high search costs in this market.⁸⁰¹ High search costs imply that transactions cannot take place without a costly effort to find a favorable counterparty. The need for such costly effort can inhibit market efficiency.

One commenter stated that the level of opacity in the securities lending

market does not lead to high search cost or inhibit the efficiency of the securities lending market, because the level of detail in data provided by data vendors has improved drastically, the number of data vendors in the market has been growing, and the vast majority of parties in securities lending markets have

⁷⁹⁷ See *supra* note 708 for further discussion of the distinction between Wholesale and Customer loans.

⁷⁹⁸ The notion that broker-dealers will first source shares from internal inventory before accessing lending markets was mentioned in the Proposing

Release (see Proposing Release, 86 FR 69834) and was supported by at least one comment. See, *e.g.*, James J. Angel Letter, at 4 (stating that if "the broker has shares available for lending from its customer margin accounts, it does not need to go out and borrow any more shares.").

⁷⁹⁹ See OFR Pilot Survey at Table 1.

⁸⁰⁰ These dates are Oct. 9, 2015, Nov. 10, 2015, and Dec. 31, 2015.

⁸⁰¹ See, *e.g.*, Kolasinski (2013), *supra* note 736.

access to one or more sources of data.⁸⁰² While these facts are generally associated with declining search costs and increased efficiency, they do not, by themselves, imply low search costs or an efficient market. As discussed above, the Commission continues to believe that the datasets provided by commercial data vendors are characterized by incomplete and potentially biased data.⁸⁰³ As a result, market participants that want information on whether a given loan price or quote is competitive, or how a given lending agent or broker-dealer is performing relative to a benchmark, may need to consult multiple datasets, if they have access to such data, or request and receive multiple quotes in order to confirm that a given quote is consistent with market conditions. A need to consult multiple sources of information implies high search costs. When the cost of acquiring additional information is high, it may not be economical to acquire the information, resulting in less efficient terms for loans. The Proposing Release also cited academic research characterizing the securities lending market as having high search costs, which was not rebutted by the commenter.⁸⁰⁴ Consequently, the Commission continues to believe that, despite the availability of commercial datasets, opacity in the securities lending market contributes to high search costs and inefficiencies in that market.⁸⁰⁵

Broker-dealers possess some market power over their customers. Generally, broker-dealers assist investors in finding shares to borrow as part of a suite of services and the cost of switching to a new broker-dealer can be high. This relationship can make it difficult for investors to change broker-dealers if they underperform in one area because it is not just a securities lending relationship that would be changed, but the whole suite of broker-dealer services that would be affected.⁸⁰⁶

Additionally, the relationship nature of the lending market favors larger

broker-dealers who can maintain high-volume relationships with more lending programs. The limited availability of comprehensive data makes it difficult for customers to evaluate the performance of broker-dealers.⁸⁰⁷ Customers as well as lenders thus rely on relationships and reputation, a situation that also tends to favor larger broker-dealers.

The primary sources of shares to loan in the Wholesale market are long-term investors such as investment firms, pension and endowment funds, governmental entities, and insurance companies. These entities generally make their shares available to lend either through a lending program run by a lending agent or by running their own lending program. Broker-dealers borrow shares from lending programs in order to facilitate clearing and settlement on a net-basis, though they may additionally source shares for this purpose from their own inventory, from fully paid shares, and from customer margin accounts.⁸⁰⁸

As described above, a beneficial owner seeking to lend shares will generally provide those shares to a lending agent, who runs a lending program. There are two broad categories of lending programs: custodian banks and third-party lending programs. In the case of custodian banks, the lending program is generally offered as part of their general custodian services.

Both types of lending programs will generally pool shares across accounts with which they have lending agreements to create a common pool of shares available to lend. As shares are lent out, the revenue earned from the pool of shares is generally distributed across all accounts contributing shares to the pool of shares on loan on a pro-rata basis. Pooled lending programs generally split the fees generated from lending with the beneficial owners. Based on the staff's experience, the Commission believes that the lending program will usually take about a third of the fees earned. In the case of

custodian banks, the custodian bank may, rather than return the lending revenue directly to the beneficial owner, instead apply the beneficial owner's portion of the lending revenue to other fees charged by the custodian bank for other services.

Lending programs typically indemnify the beneficial owner from default by the borrower. This indemnity gives the lending program an incentive to ensure the creditworthiness of the borrower, and a lending program may assess higher fees to borrowers it deems as less creditworthy.

Over the past two decades, auction-based security lending has become an alternative for lender-borrower interactions. In this setting, unlike with the directed lending programs, positions of different beneficial owners are not pooled to cater to security-specific demand from borrowers. Instead, after determining the desired income streams, the lender's entire portfolio, or its segments, are offered via blind single-bid auctions.

In some cases, a beneficial owner may choose to set up its own lending program. This course is more common among very large funds that have the resources to build up the expertise necessary to operate a lending program.⁸⁰⁹

The current relationship and network structure of lending programs and broker-dealers favors larger lending programs that have the resources to maintain relationships with more and larger broker-dealers. Thus, the Commission believes that the market for lending services is likely dominated by a few large lending programs, including those run by the large custodian banks.

The OFR Pilot Survey estimated that as of the latter part of 2015 there were approximately \$9.5 trillion worth of shares available for lending.⁸¹⁰ Figure 2 provides a breakout of the percent of shares available for lending provided by the various entities.

⁸⁰² See IHS Markit Letter, at 13.

⁸⁰³ See *supra* Part IX.B.2 for further discussion of issues related to the current availability and comprehensiveness of securities lending data.

⁸⁰⁴ See Kolasinski (2013), *supra* note 736, cited in the Proposing Release with regard to search costs. See Proposing Release, 86 FR 69805, 69831, and 69832.

⁸⁰⁵ See discussion on this point in *supra* Parts IX.B.2 and IX.B.3.

⁸⁰⁶ Some entities, such as some hedge funds, have multiple prime brokers. For such institutions it

would be less difficult to switch between broker-dealers if one is performing poorly as they could redirect securities lending business to their top performing prime-broker.

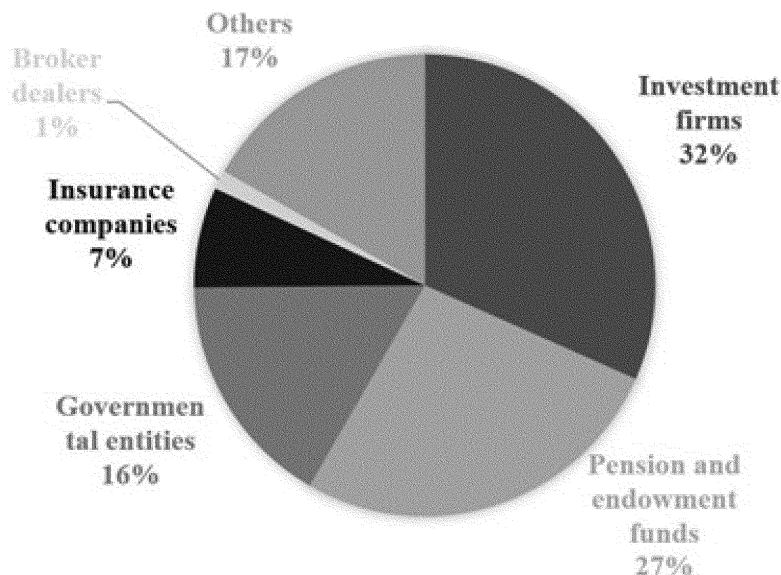
⁸⁰⁷ See *supra* Part IX.B.2 for further discussion of issues related to the current availability and comprehensiveness of securities lending data.

⁸⁰⁸ See *supra* note 798 and corresponding text for further discussion of broker-dealers' sources of shares for securities loans.

⁸⁰⁹ Based on a review of N-CEN reports, the Commission estimates that 226 (out of 684) lenders do not employ a lending agent. See *infra* Part X.

Most of these lenders are likely to operate their own lending programs.

⁸¹⁰ Commercial vendors typically report a value for securities available to loan that is larger than what is reported in the OFR Pilot Survey. This difference is likely due to sample construction. The commercial vendors likely have a larger sample of lending programs to draw from, particularly the lending programs based outside of the U.S. See also *supra* note 778 for a discussion of issues related to estimating the number of shares available for lending.

Figure 2: Sources of lendable shares (2015)

Source: OFR Pilot Survey of Agent Securities Lending Activity

5. Structure of the Market for Securities Lending Data and Analytics

The market to collect and disseminate securities lending data is an outgrowth of the market for securities lending market analytics.⁸¹¹ This market consists of a few established vendors that specialize in geographic areas (*i.e.*, U.S. and non-U.S.) but seek to compete in all geographic areas. Most vendors collect the data to support the analysis business in which they provide data-based service to institutions and other lending programs. Others collect data through their facilitation of security loans. As such, the data vendor business is often an outgrowth of another business. The Commission understands that the current practice by commercial data vendors is to provide preliminary statistics on the same day based on the intraday data collected by the vendors, while the main data are disseminated one day later.

The Commission believes that the data provided by the various data vendors operating in the give-to-get Wholesale data market are largely comparable.⁸¹² However, the entities

providing data to the vendors are also their customers. This relationship limits the market power of the vendors with respect to their clients who provide data but results in the clients' incentives limiting the competitiveness of the market.⁸¹³ This results in the market being largely inaccessible for many entities that could use the data for their own benefit or the benefit of the market as a whole.⁸¹⁴

The give-to-get model for securities lending data is a significant barrier to entry to any firm seeking to provide analytics services regarding Wholesale loans. Firms cannot provide analytics services without data, and the biggest three data vendors have established relationships with data contributors to collect data. Such data contributors have an incentive to also control who can access that data. Consequently, the Commission understands that the market for securities lending data and securities lending analytics in the Wholesale space is largely concentrated among the three biggest data vendors.

One commenter stated that the give-to-get model is "is not the industry standard" in the securities lending data market and pointed out that there are some commercial securities lending datasets that are available to all subscribers.⁸¹⁵ The Commission

understands that the collection of these data largely relies on surveying Customer market participants about their borrowing experiences. Data vendors then aggregate and sell these data, or derivative products that combine the survey data with other data sources to provide derived metrics in areas such as short selling. For example, the Commission staff understands that, based on interactions with vendors of such data, that the customer market survey data are used largely as an input to proprietary algorithms that combine information from multiple data sources—such as FINRA's bimonthly short interest—to produce a short selling metric that is then used by consumers.⁸¹⁶ Building relationships with a large number of Customer market participants is a significant barrier to entry and thus the Commission understands that data provision and analytics regarding customer market survey data is concentrated among the top two biggest data vendors.

6. Short Selling Transparency

Multiple commenters stated that granular securities lending data generally provide information about investors' short selling positions and strategies.⁸¹⁷ This section provides

⁸¹¹ See the business model descriptions in IHS Markit's 2021 comment letter responding to FINRA's Regulatory Notice 21-19, available at https://www.finra.org/sites/default/files/NoticeComment/IHS%20Markit_Paul%20Wilson_21-19_9.30.2021%20-%20IHS%20Cmt%20Ltr%20re%20FINRA%20RFC%20Short%20Interest%20Position%20Reporting.pdf.

⁸¹² See Truong X. Duong, et al., *The Information Value of Stock Lending Fees: Are Lenders Price Takers?*, 21 Rev. Fin. 2353, 2353–2377 (2017) ("Duong, et al., (2017)"), who provide a comparative analysis of the datasets of two of the main

commercial data vendors and find very high correlations between the values presented in the different datasets.

⁸¹³ See *supra* Part IX.B.2 for further discussions of data providers' incentives when providing data to data vendors under a give-to-get model.

⁸¹⁴ See *supra* Part IX.B.2 for further discussion of the current limits to transparency in the securities lending market.

⁸¹⁵ See S3 Partners Letter, at 5.

⁸¹⁶ See *infra* Part IX.B.6 for further discussion of FINRA's bimonthly short interest data.

⁸¹⁷ See, e.g., Overdahl Letter, at 4, 9; Citadel Letter, at 5–6. One commenter stated their belief that the rule would not provide further transparency into the short interest market because "not all securities loan trades facilitate a short sale, and that the securities lending market is not a mirror of the short interest market"; See IHS Markit Letter, at 3. See *supra* Part IX.B.1 for a discussion

information about existing sources of short selling data to facilitate an analysis of the impact of the Rule on short selling transparency.

Securities Lending Data

Because of the need to borrow securities to facilitate a short sale, securities lending data can be used to gain insight into short interest and short sentiment, and market participants use both give-to-get Wholesale data and customer market survey data on Customer loans to gain insights into short selling. For example, some academics have used securities lending data to study short selling in published research.⁸¹⁸ Additionally, while access to Wholesale market data is generally limited,⁸¹⁹ the Commission understands that some third-party data providers combine Wholesale market data with other sources of short selling data, such as bimonthly short interest data, to provide retail clients with estimated short selling metrics. The Commission also understands that commercial data vendors use securities lending data as an input to proprietary algorithms that combine information from multiple data sources—such as biweekly short interest—to produce a short selling metric that is then used by consumers.

Data on Wholesale securities loans provide only a noisy approximation of short interest at the security level. This is because Wholesale loans are made largely to facilitate clearing and settlement on a net basis at a clearing broker, rather than by transaction or position. Thus, Wholesale loans are not traceable to individual short sellers. Further, the Commission understands that broker-dealers will usually source shares to meet their net clearing and settlement requirements from other sources before engaging in Wholesale loans.⁸²⁰

of the potential reasons for borrowing and lending securities apart from to facilitate a short trade.

⁸¹⁸ See, e.g., Steven Lecce, et al., *The Impact of Naked Short Selling on the Securities Lending and Equity Market* (Macquarie Business School Research Paper, Feb. 1, 2012) at 83, available at <https://ssrn.com/abstract=3591994> (retrieved from SSRN Elsevier database) stating that “securities lending is a commonly used proxy for the level of covered short selling”; see also, e.g., Gene D’Avolio, *The Market for Borrowing Stock*, 66 J. Fin. Econ. 271 (2002).

⁸¹⁹ See *supra* Part IX.B.2 for further discussion of the give-to-get model.

⁸²⁰ These sources include, e.g., their own inventory, customer margin accounts, and fully paid accounts at the broker-dealer with lending agreements in place. See *supra* note 798 and corresponding text for further discussion. Also, the fact that give-to-get Wholesale market data are not comprehensive (see *supra* Part IX.B.2 for further discussion), means that there is additional noise with regards to using Wholesale market data to estimate short sale information.

The Commission believes that information about Customer loans is more likely to be informative about short selling activity than information about Wholesale loans.⁸²¹ This is because, unlike Wholesale loans, Customer loans are used to facilitate individual short positions. The size of a Customer loan when first created is the same as the size of a short position as of the end of the day on which the short position was created. Should the customer increase or decrease the size of their short position, the Commission understands that the original loan would be modified accordingly. Thus, individual Customer loans can be tracked to reveal the size and changes in individual short positions. However, existing Customer market datasets, like Wholesale market datasets, lack comprehensiveness.⁸²²

Most commercially available datasets are currently produced with a one-day lag. As a result of the difference in settlement cycles between the equity and securities lending market, there is therefore typically a three-day lag between the availability of the securities lending data and the change in short interest that corresponds to the securities loans.⁸²³

Bimonthly Short Interest Data From FINRA

One of the primary data sources for information about aggregate short positions is the bimonthly short interest data collected by FINRA.⁸²⁴ FINRA collects aggregate short interest information in individual securities on a bimonthly basis as the total number of shares sold short in a given stock as of

⁸²¹ This is also supported by one commenter, who states that, “there is a perfect correlation between a short sale and the associated Short Sale Linked Activity, which facilitates the customer fulfilling the delivery obligations arising from the short sale.” See Citadel Letter, at 5. The commenter states that by “Short Sale Linked Activity,” they are referring to what the Proposing Release calls the “retail market.” See Citadel Letter, at 1. This is equivalent to what is referred to as the Customer market in this release.

⁸²² See *supra* Part IX.B.2 for further discussion of why the Commission believes that Customer market survey datasets are not comprehensive.

⁸²³ See *supra* note 738 and corresponding text. This lag will decrease to two days when equity settlement moves to T+1 on May 28, 2024.

⁸²⁴ See, e.g., Division of Economic and Risk Analysis, *Short Sale Position and Transaction Reporting* 6–7, (June 5, 2014), at 17–18, available at <https://www.sec.gov/files/short-sale-position-and-transaction-reporting0.pdf>. This is a study of the Staff of the U.S. Securities and Exchange Commission, which represents the views of Commission staff, and is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of this study and, like all staff statements, it has no legal force or effect, does not alter or amend applicable law, and creates no new or additional obligations for any person.

the middle and end of each month.⁸²⁵ In the case of U.S. exchange-listed stocks, FINRA shares the data with the listing exchange.⁸²⁶ FINRA then publishes short interest data for all exchange-listed and OTC equity securities on its Equity Short Interest Data page free for the investing public.⁸²⁷ Specifically, aggregate positions in each security are provided for publication on the seventh business day after the reporting settlement date.⁸²⁸

FINRA computes short interest using information it receives from its broker-dealer members pursuant to FINRA Rule 4560 reflecting all trades cleared through clearing broker-dealers.⁸²⁹ FINRA Rule 4560 generally requires that broker-dealers that are FINRA members report “short positions” in customer and proprietary firm accounts in all equity securities twice a month through FINRA’s web-based Regulation Filing Applications (RFA) system.⁸³⁰ FINRA defines “short positions” for this purpose simply as those resulting from “short sales” as defined in Rule 200(a) of Regulation SHO under the Exchange Act.⁸³¹ Member firms must report their short positions to FINRA regardless of position size.⁸³²

These short interest data are widely available and are used by academics and other market participants. These short interest data are found to predict future stock and market returns over the

⁸²⁵ Specifically, the mid-month short interest report is based on short positions held on the settlement date of the 15th of each month or, if the 15th falls on a weekend or holiday, the previous business day. The end-of-month short interest report is based on short positions held on the last business day of the month on which transactions settle. See FINRA, *Equity Short Interest Data Catalog*, available at <https://www.finra.org/finra-data/browse-catalog/equity-short-interest>, last visited Aug. 23, 2023.

⁸²⁶ See FINRA, *Short Interest—What It Is, What It Is Not* (Jan. 25, 2023), available at <http://www.finra.org/investors/insights/short-interest>.

⁸²⁷ See *id.* See also FINRA, *Equity Short Interest Data*, available at <https://www.finra.org/finra-data/browse-catalog/equity-short-interest/data>, last visited Aug. 24, 2023.

⁸²⁸ See FINRA *Equity Short Interest Data Catalog*, *supra* note 825. See also FINRA, *Short Interest Reporting*, available at <https://www.finra.org/filing-reporting/regulatory-filing-systems/short-interest>.

⁸²⁹ *Id.* (Short interest for a listed security at any date reported by FINRA is “a snapshot of the total open short positions in a security existing on the books and records of brokerage firms on a given date.”).

⁸³⁰ FINRA Rule 4560 excludes short sales in “restricted equity securities,” as defined in Rule 144, from the reporting requirement.

⁸³¹ See FINRA Rule 4560(b)(1). See *supra* note 301 for the definition of a short sale.

⁸³² See FINRA, *Short Interest Reporting Instructions* (reporting instructions to FINRA member firms), available at <https://www.finra.org/filing-reporting/short-interest/regulation-filing-applications-instructions>, last visited Aug. 23, 2023.

monthly and annual horizons, suggesting that the bimonthly short interest data capture short selling strategies based on fundamental research.⁸³³ However, the transparency offered by these data is limited in at least two ways. First, the information content is delayed by at least seven business days, and also does not provide insight into the timing with which short positions are established or covered within the two-week reporting period. This precludes the possibility of understanding the behavior of aggregate short selling in the two weeks leading up to the reporting date of the positions. Second, given that the data are aggregated at the security level, they prevent the public from understanding certain aspects of the underlying proprietary short selling strategies. For example, the data can't inform on whether short positions are distributed across a large or small number of market participants.

Short Selling Volume and Transaction Data From SROs

This section discusses data that exist on daily and intraday short volume data, which provide different information relative to the bimonthly short interest data discussed above.⁸³⁴ The bimonthly short interest data provides an aggregate measure of outstanding short interest whereas the data discussed in this section provides information about the flow of short sales in the market. It is less useful in determining total short interest outstanding because it is not accompanied by data regarding when short sales are covered but allows market participants to observe the actual trades of short sellers.

Since 2009, many SROs have been publishing two short selling datasets, including same-day publication of daily aggregated short sale volume in individual securities⁸³⁵ and publication

of short sale transaction information with a delay of up to two months.⁸³⁶ Some SROs make the historical daily short volume data available to market participants at a fee.⁸³⁷

Despite offering higher granularity, there is a concern that the SRO short volume data may over-represent the total volume of short sales occurring in the market. This is because Regulation SHO provides specific criteria regarding what is a long sale.⁸³⁸ If a market participant is unclear whether their trade would meet all the requirements at settlement to be marked a long sale, then they may choose to mark the trade as short to not run afoul of Regulation SHO requirements, even if the trade is likely economically equivalent to a long sale.⁸³⁹ For instance, the market

security on all short sale trades executed and reported to a FINRA reporting facility during normal market hours) and FINRA, *Information Notice: Publication of Daily and Monthly Short Sale Reports* (Sept. 29, 2009), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120044.pdf>.

⁸³⁶ See FINRA, *Monthly Short Sale Transaction Files*, available at <https://www.finra.org/finra-data/browse-catalog/short-sale-volume-data/monthly-short-sale-volume-files> (providing detailed trade activity of all short sale trades reported to a consolidated tape), last visited Aug. 24, 2023. See also Investor.gov, *Short Sale Volume and Transaction Data*, available at <https://www.sec.gov/answers/shortsalevolume.htm>. Additional transaction data have been available at various times, including transaction data from the Regulation SHO Pilot, which have been discontinued by most exchanges in July 2007 when the uptick rule was removed. See Release No. 34-55970 (June 28, 2007), 72 FR 36348 (July 3, 2007), available at <https://www.sec.gov/rules/final/2007/34-55970.pdf>. The Pilot data comprised short selling records available from each of nine markets: American Stock Exchange, Archipelago Exchange, Boston Stock Exchange, Chicago Stock Exchange, NASD, Nasdaq Stock Market, New York Stock Exchange, National Stock Exchange, and the Philadelphia Stock Exchange. See SEC Division of Trading and Markets, *Regulation SHO Pilot Data FAQ*, available at <https://www.sec.gov/spotlight/shopilot.htm#pilotfaq>.

⁸³⁷ See, e.g., NYSE.com, *TAQ Group Short Sale & Short Volume*, available at <https://www.nyse.com/market-data/historical/taq-nyse-group-short-sales> (for short sale data relating to all NYSE owned exchanges). See *Nasdaqtrader.com*, *Short Sale Volume and Transaction Reports*, available at <https://nasdaqtrader.com/Trader.aspx?id=shortsale> (for short sale data for Nasdaq exchanges); See also Chicago Board Options Exchange (Cboe.com), *U.S. Equity Short Volume and Trades* (for Cboe exchanges), available at <https://datashop.cboe.com/us-equity-short-volume-and-trades>.

⁸³⁸ Rule 200(g) of Regulation SHO specifies when an order can be marked as long. See also Section III.B (adopting release of Regulation SHO), available at <https://www.sec.gov/rules/final/34-50103.htm#VI>.

⁸³⁹ See *Proposed rule: Short Position and Short Activity Reporting by Institutional Investment Managers*, Release No. 34-94313 (Feb. 25, 2022) 87 FR 14950, 14989 (Mar. 16, 2022) at note 230 (citing 2009 Letter from SIFMA commenting on an alternative short sale price test, and expressing concern that compliance with Regulation SHO short selling marking requirements “will result in a substantial over-marking of orders as “short” in

participant may be deemed to own the security but does not reasonably believe they can deliver the security in time for settlement, and thereby must mark the order as short regardless of their ownership of the security. Aggregate short selling volume data and short selling transactions data typically have different lags with which they are available, though aggregate short selling volume data can be disseminated as early as the same day of the short sale.⁸⁴⁰

B. Economic Effects of the Final Rule

1. Benefits of Increased Transparency in the Securities Lending Market

The Commission believes that the primary impact of final Rule 10c-1a will be to increase transparency in the securities lending market through improvements to the comprehensiveness, breadth, accuracy,⁸⁴¹ and accessibility of securities lending data. These impacts will reduce information asymmetries in the securities lending market and improve informational efficiency leading to a more efficient securities lending market.⁸⁴²

Final Rule 10c-1a will reduce information asymmetries and improve informational efficiency in three ways. First, the data provided by final Rule 10c-1a will be more comprehensive than the data currently offered by commercial data vendors because it will not rely on voluntary data submissions but will result from mandated disclosure from both the Wholesale and Customer segments of the market.⁸⁴³ Second, Rule 10c-1a data will improve

situations where firms are, in fact, “long” the securities being sold”).

⁸⁴⁰ For example, FINRA posts daily aggregate short volume data for each security no later than 6:00 p.m. ET of the same day on the relevant trade date; see FINRA, *Daily Short Sale Volume Files*, *supra* note 835. Meanwhile, FINRA posts files including the transaction time, price, and number of shares for every off-exchange short sale transaction in an exchange-listed stock only on a monthly basis; see FINRA, *Monthly Short Sale Volume Files*, *supra* note 836. See also FINRA, *Information Notice 5/10/19: Understanding Short Sale Volume Data on FINRA's website* (May 10, 2019), available at <https://www.finra.org/rules-guidance/notices/information-notice-051019>.

⁸⁴¹ Accuracy in this sense refers to less potential bias in the loans reported and thus in the statistics obtained from the loans reported. See *supra* Part IX.B.2 for a discussion of bias in existing securities lending datasets and how this can lead to inaccurate inference.

⁸⁴² The Commission expects that the benefits of final Rule 10c-1a will be similar for all reportable securities lending markets that have a similar need for additional market transparency. It is possible that some markets may be more transparent than others. See *infra* note 958 for further discussion.

⁸⁴³ See *supra* Part IX.B.2 for further discussion of selection issues in commercial securities lending databases based on voluntary data submissions.

⁸³³ See, e.g., Peter N. Dixon & Eric K. Kelley, *Business Cycle Variation in Short Selling Strategies: Picking During Expansions and Timing During Recessions*, 57 J. Fin. Quantitative Analysis 3018 (2022); see also Ekkehart Boehmer, et al., *The Good News in Short Interest*, 96 J. Fin. Econ., 80–97 (2010); Stephen Figlewski, *The Informational Effects of Restrictions on Short Sales: Some Empirical Evidence*, 16 J. Fin. Quantitative Analysis 463 (1981).

⁸³⁴ See *supra* Part IX.B.6 for more information about FINRA's bimonthly short interest data.

⁸³⁵ See Division of Economic Research and Analysis, Securities and Exchange Commission (DERA), *Short Sale Volume and Transaction Data* (June 5, 2014), available at <https://www.sec.gov/answers/shortsalevolume.htm>; (showing hyperlinks to the websites where SROs publish these data). See also FINRA, *Daily Short Sale Volume Files*, available at <https://www.finra.org/finra-data/browse-catalog/short-sale-volume-data/daily-short-sale-volume-files> (providing aggregated volume by

informational efficiency by including certain data fields that are not currently offered by commercial data vendors, contributing to the breadth of available securities lending data. In addition, Rule 10c-1a data will contain detailed security loan modification information. Third, the final rule will expand the accessibility of the data by allowing all market participants to access Rule 10c-1a data, possibly subject to a fee.⁸⁴⁴

The increased transparency from final Rule 10c-1a will result in several notable economic benefits. First, the final rule will reduce information asymmetries, which will benefit investors by reducing borrowing costs, increasing price efficiency, and increasing competition between broker-dealers and lending programs.⁸⁴⁵ Second, by reducing the borrowing costs for some securities, the final rule will lower the cost of short selling these securities and improve market efficiency. Third, improvements in the information available to various market participants will lead to a variety of benefits for these participants, including increased profits and reduced costs of business due to easier access to information and more informed decisions.

Reduction in Information Asymmetry

The Commission believes that the transparency created by final Rule 10c-1a will reduce information asymmetries between more centrally connected securities lending market participants and those on the periphery. Specifically, it will reduce the information asymmetries between broker-dealers and end borrowers, and between beneficial owners and lending programs. This will result in increased competition between dealers and between lending programs, ultimately leading to better loan terms for some securities.⁸⁴⁶

The Commission believes that the transparency created by the final rule will benefit end borrowers by reducing the information disadvantage they have with their broker-dealers when borrowing shares. Most security loans

obtained by end borrowers are facilitated through broker-dealers.⁸⁴⁷ Rule 10c-1a data will allow end borrowers to determine the extent to which their broker-dealers are obtaining terms that are better, worse, or consistent with current market conditions for loans with similar characteristics. It will facilitate this comparison by providing comprehensive transaction-by-transaction information about the cost to borrow and other loan characteristics that are currently mostly unavailable to end borrowers.⁸⁴⁸ For example, end borrowers will be able to compare the lending terms provided by their broker-dealers to the terms of similar loans, such as loans with the same collateral and borrower types. End borrowers will also be able to compare loans of similar sizes, though with a delay of 20 business days. The Commission believes that, despite the delay in dissemination, loan size information will still be useful for end borrowers, who can use this information to compare the prices of their loans to other loans with similar terms (e.g., size, collateral type, loan type, etc.), that were effected approximately one month prior. Additionally, to the extent that an RNSA publicly disseminates daily volume-weighted cost-to-borrow statistics as part of its requirement to disseminate daily aggregate information, these statistics will provide end borrowers with access to information about loan prices that incorporates information about loan size information even prior to the public dissemination of loan sizes.⁸⁴⁹

Similarly, the Commission believes that the final rule will benefit beneficial owners by reducing their information

disadvantage with respect to their lending programs. By allowing beneficial owners to more easily benchmark their lending programs through access to data on loan prices and other characteristics of recently transacted security loans, as well as the statistics provided by an RNSA on the next business day, the final rule will provide beneficial owners with an improved ability to determine the quality of the loans that their lending program executes on their behalf relative to other loans with similar characteristics. The ability to view the cost to borrow in both the Customer markets and Wholesale markets will also provide beneficial owners with additional information that they can use to benchmark the performance of their lending programs.⁸⁵⁰

Financial institutions such as banks and broker-dealers use the securities lending market in order to manage collateral needed for other transactions.⁸⁵¹ These entities can face the same asymmetric information concerns as do end borrowers and beneficial owners, and thus an increase in market transparency may lead financial institutions to receive better loan terms, and thus improve their ability to manage collateral. Banks also borrow securities to manage their balance sheets,⁸⁵² and the Commission believes that this too will become easier as a result of the final Rule 10c-1a due to a more competitive lending market, leading to the benefit of improved balance sheet management by banks.

At the same time, as access to securities lending data increases, competition for securities lending analytics may increase as well.⁸⁵³ Increased competition for and availability of securities lending analytics would further reduce information asymmetries by reducing the cost of and increasing access to securities lending analytics for both end borrowers and beneficial owners.

If an end borrower or beneficial owner believes that a particular broker-dealer or lending agent is consistently underperforming, the final rule will provide that market participant with the

⁸⁴⁴ See *infra* Part IX.C.3 for a discussion of the fees that an RNSA could charge to data consumers. See also *supra* Part VII.K.3 for further discussion of final Rule 10c-1a(i), which allows an RNSA to “establish and collect reasonable fees, pursuant to rules that are promulgated pursuant to section 19(b) and Rule 19b-4 of the Exchange Act.”

⁸⁴⁵ Consequently, some market participants may see returns decrease due to more competitive fee pricing, which may lower securities lending revenues for some lenders. See *infra* Part IX.C.4 for further discussion.

⁸⁴⁶ A reduction in the cost to borrow may result in lower securities lending revenues for some lenders. See *infra* Part IX.C.4 for further discussion.

⁸⁴⁷ See *supra* Part IX.B.4 for further information about the market for borrowing services.

⁸⁴⁸ See *supra* Part IX.B.2 discussing the lack of comprehensiveness of both Customer market data collected through Customer market surveys and Wholesale market data collected using a give-to-get model, the latter of which is also often unavailable to end borrowers due to usage restrictions.

⁸⁴⁹ See final Rule 10c-1a(g)(5), requiring an RNSA to disseminate aggregated daily information. In general, the ability of market participants to use the aggregate information provided by an RNSA to compare loan rates across similar loans may depend on the specific form of loan rate information that an RNSA chooses to publish. For example, if an RNSA chooses to publish cost to borrow statistics that are very granular (e.g., it provides separate statistics for Customer and Wholesale loans and/or according to other loan characteristics), then end borrowers would be able to benchmark their transactions to these statistics with increased accuracy. To the extent that an RNSA chooses to publish less granular statistics, then the end borrower could still benchmark relative to the cost to borrow statistics provided by an RNSA, but the benchmark would be noisier. See also *infra* Part IX.C.1 for further discussion of the Commission’s uncertainty related to an RNSA’s discretion.

⁸⁵⁰ See, e.g., *supra* note 767 and corresponding text describing how a market participant engaged in Wholesale lending stated in an interview that they feel unable to benchmark the performance of their lending programs using commercial data because they have very little insight into the Customer market.

⁸⁵¹ See *supra* Part IX.B.1 for further discussion of financial institutions’ use of securities loans for collateral and balance sheet management.

⁸⁵² See *id.*

⁸⁵³ See *infra* Part IX.D.2 for a discussion of the expected impact of the final rule on competition for securities lending data analytics services.

tools to identify such underperformance and address it with their broker-dealer or lending agent, or to find a new broker-dealer or lending agent.⁸⁵⁴ For example, a beneficial owner or end borrower could use the transaction-by-transaction Rule 10c-1a data to create a bespoke benchmark of recently transacted loans that are similar to a loan they wish to effect, and compare this benchmark to the terms offered by their lending agent or broker dealer for that loan. A beneficial owner or end borrower could also use the daily information disseminated by an RNSA about the distribution of loan prices to assess how the terms offered by their broker-dealer or lending agent compare more generally to the distribution of recently transacted loans in the same security. An increased ability to compare loan performance will increase competition between broker-dealers and between lending agents, which will ultimately improve lending terms for both end borrowers and beneficial owners.⁸⁵⁵

The Commission expects improved terms to be concentrated among securities that are “on special” and have higher borrowing costs. This is because general collateral securities lending is a low margin business and lending supply for these securities far outstrips lending demand.⁸⁵⁶ Combined, these two factors mean that there is likely not much room for fees to improve for general collateral securities.⁸⁵⁷ As securities become on special (*i.e.*, harder to borrow), lending rates and utilization rates increase. Higher utilization rates mean that there are fewer shares available to borrow and lend. In this environment, high search

costs and asymmetric information are significant contributors to both the level and dispersion of fees, and reducing asymmetric information has a better chance of leading to better terms.⁸⁵⁸ Beneficial owners that currently lend shares of hard-to-borrow securities for rates that are consistently below the market average could receive higher lending rates for these securities as their lending agents both have better access to information and become more accountable for their performance due to beneficial owners also having access to the same information. Similarly, end borrowers whose borrowing costs are currently higher than the market average for hard-to-borrow securities may see their borrowing costs decrease as both their broker-dealers’ information access and their ability to monitor to their broker-dealers improve. These two effects suggest that the dispersion of borrowing costs for hard-to-borrow securities will diminish.

That transparency can result in improved market quality is consistent with the experience in other markets. The implementation of TRACE improved transparency in the corporate bond market, and research has shown that TRACE lowered the average cost of transacting and increased competition between dealers in this market.⁸⁵⁹ Additionally, recent research from Brazil has shown that improving securities lending transparency led to lower fees, increased liquidity, and

increased price efficiency in that country.⁸⁶⁰ In both cases, researchers have identified reduced information asymmetry as a key mechanism leading to improved market outcomes.⁸⁶¹

While some commenters supported the applicability of evidence from TRACE,⁸⁶² other commenters questioned the applicability of evidence from TRACE⁸⁶³ and from the Brazilian policy change.⁸⁶⁴ Specifically, commenters argued that, because bond transactions are irrevocable and fungible, the identity and characteristics of the counterparty are less relevant to prices in bond transactions than in securities loans, and thus the Commission’s reliance on TRACE studies to draw inferences about the securities lending market is misplaced.⁸⁶⁵ At least one commenter disputed the Commission’s use of the Brazilian policy change to draw inferences about the potential benefits of proposed Rule 10c-1 because the Brazilian policy “did not involve the trade-by-trade disclosure of stock lending terms” and is thus not comparable to the Rule.⁸⁶⁶ The Commission continues to believe that both events provide meaningful information about the potential impacts of the final Rule 10c-1, as evidence from both events illustrates how a reduction in asymmetric information between market participants has the effect of improving market quality.

First, the introduction of TRACE, which introduced transaction-by-transaction transparency into a market that previously did not have such transparency, represents a policy change that is markedly similar to that under the final Rule 10c-1a. The Commission acknowledges that the market setting for TRACE is different from that of final Rule 10c-1a, for example, because of the

⁸⁵⁸ See, e.g., Kolasinski (2013) (finding that when demand for lendable shares outstrips supply, lending fees increase and the dispersion of lending fees is high, particularly when search costs are high).

⁸⁵⁹ See, e.g., Amy K. Edwards, et al., *Corporate Bond Market Transaction Costs and Transparency*, 62 J. Fin. 1421, 1421–1451 (2007); Michael Goldstein, et al., *Transparency and Liquidity: A Controlled Experiment on Corporate Bonds*, 20 Rev. Fin. Stud. 235 (2007); Hendrik Bessembinder, et al., *Market Transparency, Liquidity Externalities, and Institutional Trading Costs in Corporate Bonds*, 82 J. Fin. Econ. 251 (2006); and Hendrik Bessembinder & William Maxwell, *Markets: Transparency and the Corporate Bond Market*, 22 J. Econ. Perspectives 217 (2008) (“Bessembinder & Maxwell (2008)”). In addition to these papers, the Proposing Release also cited a paper showing a lower dispersion of transaction costs in the corporate bond market following the introduction of TRACE; see Proposing Release, 86 FR 69837 note 222 and corresponding text. Since the Proposing Release the Commission has become aware that this result has been removed from a more recent version of the paper after results suggested “that reduced price dispersion is more likely attributable to market changes other than transparency”; see Michael A. Goldstein, et al., *Dealer Behavior and the Trading of Newly Issued Corporate Bonds*, (June 21, 2021), at 19 n.21, available at <https://ssrn.com/abstract=1022356> (retrieved from SSRN Elsevier database). Nonetheless, the general result that information asymmetries can lead to price dispersion in fixed-income and dealer markets has been well-documented in other literature; see, e.g., the papers cited in *supra* note 790.

⁸⁵⁴ One commenter questioned the usefulness of transaction-by-transaction reporting and asserted that the Proposing Release did not explain how an investor would make use of these data (see Citadel Letter, at 9). This part, along with Part VI.C.1.a in the Proposing Release, discuss the ways in which investors could use the data. The Commission acknowledges that not every factor affecting prices, such as counterparty risk, is accounted for in the data provided by the final rule. See *infra* in this part for further discussion. Furthermore, the ability of end borrowers to switch broker-dealers may be limited by switching costs; see *infra* in this part for further discussion on switching costs. At least one commenter expressed concern that the proposed rule may result in increased costs when switching lending agents. See CSFME Letter 1, at 5. See *infra* Part IX.C.4 for further discussion.

⁸⁵⁵ See *infra* Part IX.D.2 for a discussion of the expected impact of the final rule on competition between broker-dealers and between lending programs.

⁸⁵⁶ See, e.g., State Street Letter, at 5; See also RMA Letter, at 5, 8 (discussing low margins in securities lending more generally); See also *infra* Part IX.C.4 for additional discussion.

⁸⁵⁷ See Panel A of Table 1 in *supra* Part IX.B.3, showing that for most stocks the lending supply significantly outstrips demand with median utilization rates of approximately 12%.

⁸⁶⁰ See Fábio Cereda, et al., *Price Transparency in OTC Equity Lending Markets: Evidence from a Loan Fee Benchmark*, 143 J. Fin. Econ. 569, 569–592 (2022) (“Cereda (2022)”).

⁸⁶¹ See, e.g., Bessembinder & Maxwell (2008), at 226, stating that the results from the academic literature on the introduction of TRACE shows that it “reduced dealers’ information advantage relative to customers,” and that, “with transaction reporting, customers are able to assess the competitiveness of their own trade price by comparing it to recent and subsequent transactions in the same and similar issues.” See also Cereda (2022), at 587, stating that their results are consistent with the idea that “[g]ood benchmarks mitigate search frictions by lowering the informational asymmetry among market participants.”

⁸⁶² See James J. Angel Letter, at 2.

⁸⁶³ See, e.g., Overdahl Letter, at 6; Citadel Letter, at 8. At least one commenter stated that the evidence from TRACE was applicable.

⁸⁶⁴ See Overdahl Letter, at 5–7.

⁸⁶⁵ See Overdahl Letter, at 6.

⁸⁶⁶ See Overdahl Letter, at 7.

importance of counterparty risk in securities loans prices as compared to prices of corporate bonds.⁸⁶⁷ However, the fact that corporate bond prices are less sensitive to the identities of the counterparties than securities loans does not invalidate using TRACE to illustrate the effect of decreasing information asymmetry. Instead, it simply implies that the baseline dispersion in corporate bond prices prior to TRACE was likely less than it currently is in the securities lending market.⁸⁶⁸

Second, while the Brazilian study takes place in a similar market setting as Rule 10c-1a (*i.e.*, the securities lending market) it is true that the policy details differ. In particular, the Brazilian policy change involved an increase in transparency not through the creation of a transaction-by-transaction report, but through an increase in the informativeness of an available loan fee “benchmark.”⁸⁶⁹ However, despite the differences in details, the policy had a similar target to that of Rule 10c-1a: namely, an improvement in the transparency of the securities lending market.⁸⁷⁰ The Brazilian study shows that this increase in transparency

improved market quality through the economic channel of reduced information asymmetry. This study is thus directly relevant for final Rule 10c-1a, as the Commission expects that many of the economic effects of the rule will be realized through the same economic channel (*i.e.*, a reduction in information asymmetry).

Additionally, in support of their concern over the applicability of TRACE research, one commenter stated that, “while there is no reason for the supply of corporate bonds to decrease in response to increased trade transparency, greater transparency in the securities lending market may well reduce the lending supply.”⁸⁷¹ This commenter cited industry research showing that increased short selling transparency can decrease beneficial owners’ willingness to lend shares,⁸⁷² as well as academic research calling into question the applicability of TRACE to securities lending “since greater loan fee transparency could reduce the lending supply.”⁸⁷³

The Commission believes that the industry study cited by the commenter has empirical limitations that make it difficult to extract robust empirical conclusions from the study. These limitations are acknowledged by the author of the study; specifically, the author states that, during the sample period, which occurs during the height of the 2008 financial crisis, “equity markets were in a relatively disordered state,” and that “such extreme change in markets has the consequence of making it complicated to establish a control group of stocks such that all variables, except regulatory variables, remain constant. This, in effect, makes it difficult to attribute causality solely to the regulatory variables.”⁸⁷⁴ The Commission agrees that the extreme market volatility during 2008–2009 increases the likelihood that the decrease in beneficial owners’ appetite to lend out shares documented by the author may have been driven by other market events concurrent to but distinct from changes to regulatory regime for

short selling and, as a result, “causality is still difficult to prove.”⁸⁷⁵

The Brazilian study, also cited by the commenters, occurred during a less volatile period rendering potentially cleaner empirical results. The authors of that study indeed suggest that the loan supply could decrease “if the lower loan fees received by lenders were not sufficient to cover the potential losses from not selling a stock when shorting activity increases.”⁸⁷⁶ However, later in that same paragraph, the authors reject this hypothesis and conclude that their results were not consistent with increased transparency affecting liquidity in the lending market.⁸⁷⁷

Improved Market Quality Due to Lower Short Selling Costs

The Commission expects that final Rule 10c-1a will produce countervailing effects through its impact on short selling, but ultimately that the net result will be positive. On one hand, the final rule will benefit short sellers by lower borrowing costs for securities that are hard to borrow, which will improve market quality through increased price efficiency, managerial oversight, and liquidity.⁸⁷⁸ On the other hand, the final rule could potentially harm market quality by making it easier for other investors to discern short sellers’ trading strategies, thereby discouraging the costly fundamental research that underlies some short selling strategies.⁸⁷⁹ On balance, the Commission expects that the final rule, which delays the dissemination of loan volume information by 20 business days, is not likely to significantly expand market participants’ abilities to discern short selling strategies.

The Commission expects that final Rule 10c-1a will lower short selling costs by decreasing borrowing costs, especially for hard-to-borrow securities.⁸⁸⁰ Academic research

⁸⁶⁷ See, e.g., discussions in *supra* Part IX.B.3, acknowledging that a variety of factors can drive the pricing of securities loans, including counterparty risk. The Commission also acknowledged this in the Proposing Release by noting that counterparty characteristics played a role in pricing loans; See Proposing Release, 86 FR 69831. See also Proposing Release, 86 FR 69837, stating that “the data would allow end borrowers to determine the extent to which their broker-dealer is obtaining terms that are better, worse, or consistent for current market conditions for loans with *similar* characteristics” (emphasis added).

⁸⁶⁸ See *supra* note 790 for a discussion of theoretical and empirical evidence that information asymmetry drives dispersion in prices. It could also be the case that securities lending transactions are more sensitive to idiosyncratic factors, such as “the identities of the transacting parties” as mentioned by a commenter (see Overdahl Letter, at 6), because there is a lack of transparency in the market about what a standardized price for a given set of loan characteristics should be, which could drive idiosyncrasies in loan prices. If prevailing market prices become more generally available, it could be the case that an increase in competition lessens the importance of idiosyncratic factors for the pricing of securities loans. In this case, final Rule 10c-1a may make the securities lending market behave more similarly to more fungible markets such as the corporate bond market, making an analysis of TRACE more applicable to the securities lending market.

⁸⁶⁹ According to the authors, this loan fee benchmark is publicly reported by a centralized platform maintained by the Brazilian Stock Exchange, on which all securities lending transactions are registered by brokers. See Cereda (2020), at 570.

⁸⁷⁰ See Cereda (2020), at 570, referencing statements from the Brazilian stock exchange that “. . . the purpose of this change is to make the securities lending service ever more transparent, in order to attract more securities lenders and borrowers and to meet the demand of institutional investors.”

⁸⁷¹ See Overdahl Letter, at 6.

⁸⁷² See Overdahl Letter, at 6, citing *The Effects of Short-Selling Public Disclosure Regimes on Equity Markets* (2010), OliverWyman.com, at 4, 16–17, available at <https://www.oliverwyman.com/our-expertise/insights/2010/feb/the-effects-of-short-selling-public-disclosure-regimes-on-equity.html>.

⁸⁷³ See Overdahl Letter, at 9, citing Cereda et al. (2022).

⁸⁷⁴ See Oliver Wyman, *supra* note 872, at 11. Specifically, the report examines a short selling ban that took place in the UK between Sept. 18, 2008, and Jan. 16, 2009, and compares this to a “pre-ban” period between Jan. 1, 2008, and Sept. 17, 2008, and a “post-ban” period beginning on Jan. 17, 2009.

⁸⁷⁵ See *id.*

⁸⁷⁶ See Cereda (2022), at 571. Specifically, the authors state that their “findings, however, indicate that the increased transparency had positive effects overall; it reduced loan fees, increased lending volume, did not affect lenders’ total revenue, and favored more efficient lenders.”

⁸⁷⁷ See *id.*

⁸⁷⁸ See *supra* in this part for a discussion on why the Commission expects the economic effects of the final rule to be concentrated among hard-to-borrow stocks.

⁸⁷⁹ See, e.g., Overdahl Letter, at 3; Citadel Letter, at 5–7, 11; MFA Letter 3, at 3–4, 8.

⁸⁸⁰ See discussions in above and below in this part regarding the impact of the final rule on borrowing costs. This effect may be concentrated among stocks that are “on special” and have higher borrowing costs, in which there are more opportunities for an increase in price efficiency to lower fees. See *supra* in this part for a discussion on why the Commission expects the economic

indicates that, when short selling costs diminish, investors increase their fundamental research because it is easier to trade on any negative information that they uncover (e.g., poor earnings).⁸⁸¹ This increase in fundamental research may in turn lead to better investment decisions by these investors.⁸⁸² Additionally, by facilitating more research, the final rule will benefit market participants by improving price discovery. Academic research shows that short sellers, through their research, contribute to price efficiency by gathering and trading on relevant private information.⁸⁸³

Short sellers also serve as valuable monitors of management. Extant research has demonstrated that when management knows that short sellers may be studying their firms, they are less likely to engage in inappropriate or value-destroying behavior.⁸⁸⁴ Research also indicates that when short selling becomes easier the effectiveness of short sellers as monitors increases.⁸⁸⁵

Reducing the costs of short selling may also have the benefit of increasing liquidity in the underlying securities markets. Short sellers are key contributors to liquidity in both equity and options markets and existing research shows that, when short selling is constrained by tightness in the securities lending market, the stock market is less liquid.⁸⁸⁶ Lower short selling costs could have potential benefits for options market liquidity as well. Securities lending affects liquidity in the options market through its impact

on how easily options market makers can delta hedge.⁸⁸⁷ Less costly delta hedging may therefore increase liquidity in the options market. Also, since some price discovery occurs in the options market, to the extent that the final rule increases the ease with which investors can trade in options, the proposal may further enhance price efficiency in the options market.⁸⁸⁸

Commenters to the proposed Rule 10c-1, which did not include a delay in the dissemination of any information that would be collected under the rule, expressed concern that the dissemination of Rule 10c-1a data could harm short sellers, and thus U.S. financial and capital markets in general, and that this outcome was not analyzed in the Proposing Release.⁸⁸⁹ Some commenters expressed concern that information about Customer loans collected under the rule in particular could be used to determine individual short positions with a high degree of accuracy,⁸⁹⁰ and that this could result in harm to short sellers,⁸⁹¹ resulting in

negative outcomes for market quality, such as reductions in liquidity, price efficiency and shareholder engagement.⁸⁹²

The Commission acknowledges these commenters' concerns about the effect of proposed Rule 10c-1 on short sellers, and believes that these concerns are mitigated by the final rule's inclusion of a delay in disseminating loan size information.⁸⁹³ Specifically, the Commission acknowledges that activity in certain segments of the securities lending market are tightly linked to short selling positions, in particular the market for Customer loans.⁸⁹⁴ Thus, the sum of loans identified in Rule 10c-1a data as being to "a customer (if the person lending securities is a broker or dealer)"⁸⁹⁵ could give a strong indication of aggregate short interest. However, under the final rule, this information will only be directly available to Rule 10c-1a data consumers after a delay of 20 business days,⁸⁹⁶ which significantly reduces the novelty of this information compared to the proposed rule. In particular, this delay means that the loan size information, which is the portion of the data most

effects of the final rule to be concentrated among hard-to-borrow stocks.

⁸⁸¹ See Dixon, et al., (2021), *supra* note 746 and Peter Dixon, *Why Do Short Selling Bans Increase Adverse Selection and Decrease Price Efficiency?* Rev. Asset Pricing Stud. 122 (2021) ("Dixon (2021)"). It is not necessary that the information uncovered by this research be negative in nature for this to be true. The possibility of easier securities borrowing ensures that if the information happens to be negative, it will still be profitable. Thus, the risk of engaging in costly research decreases and more information, both positive and negative, is uncovered as a result.

⁸⁸² See *infra* this part for further discussion on how increased information for participants in the securities lending market may increase the profitability of some investors' trading strategies more generally.

⁸⁸³ See, e.g., Jesse Blocher, et al., *Connecting Two Markets: An Equilibrium Framework for Shorts, Longs and Stock Loans*, 108 J. Fin. Econ. 302, 302–22 (2021) and Dixon (2021) *supra* note 881.

⁸⁸⁴ See, e.g., Eric C. Chang, et al., *Does Short-Selling Threat Discipline Managers in Mergers and Acquisitions Decisions?*, J. Acct. & Econ. 101223 (2019). See also Massimo Massa, et al., *The Invisible Hand of Short Selling: Does Short Selling Discipline Earnings Management?*, 28 Rev. Fin. Stud. 1701 (2015).

⁸⁸⁵ See, e.g., Vivian W. Fang, et al., *Short Selling and Earnings Management: A Controlled Experiment*, 71 J. Fin. 1251 (2016).

⁸⁸⁶ See Dixon, et al. (2021), *supra* note 746.

⁸⁸⁷ See *supra* Part IX.B.1 for a discussion of option market makers' use of securities lending markets to engage in delta hedging.

⁸⁸⁸ See, e.g., David Easley, et al., *Option Volume and Stock Prices: Evidence on Where Informed Traders Trade*, 53 J. Fin. 431, 431–65 (1998); Jun Pan & Allen M. Potoshman, *The Information in Option Volume for Future Stock Prices*, 19 Rev. Fin. Stud. 871 (2006); Sophie Ni, et al., *Stock Price Clustering on Option Expiration Dates*, 78 J. Fin. Econ. 49 (2005).

⁸⁸⁹ See, e.g., Overdahl Letter, at 9–11; Citadel Letter, at 5–7; AIMA Letter 2, at 2; CCMR Letter, at 1; AIMA Letter 3, at 2; MFA Letter 3, at 3–4, 8. The Proposing Release acknowledged that the Rule could diminish the value of collecting and trading on negative information by revealing some new short selling information to the market, and that these dynamics could mitigate some of the benefits discussed. See Proposing Release, Part VI.C.1.c.

⁸⁹⁰ See, e.g., Citadel Letter, at 5; Overdahl Letter, at 4; SIFMA AMG Letter, at 5. Other commenters expressed concern that the data provided under proposed Rule 10c-1 could allow for reverse engineering of trading strategies more generally; see, e.g., MFA Letter 1, at 8; MFA Letter 2, at 5; RMA Letter, at 18.

⁸⁹¹ Commenters pointed to a number of ways that short sellers could be harmed, including increased costs to establishing short positions, particularly large positions that require time to build up (see, e.g., Citadel at 6), and increased risks of copycat strategies (see, e.g., Overdahl Letter, at 9–10; Citadel Letter, at 6; MFA Letter 1, at 7; AIMA Letter 2, at 2–3), frontrunning (see, e.g., SBAI Letter, at 2), issuer retaliation (see, e.g., Citadel Letter, at 6), negative impacts on activities that rely on short selling for hedging purposes (see, e.g., Citadel Letter, at 6), and short squeezes (see, e.g., Citadel Letter, at 6; Overdahl Letter, at 11; MFA Letter 1, at 7; S3 Partners Letter, at 7). One commenter cites a number of academic studies supporting the notion that disclosure of short selling positions can be harmful to markets, including Truong X. Duong et al., *The Costs and Benefits of Short Sale Disclosure*, 53 J. Banking & Fin. 124 (2015) and Stephan Jank, et al., *Flying Under the Radar: The Effects of Short-Sale Disclosure Rules on Investor Behavior and Stock Prices*, J. Fin. Econ. 209 (2021) (see Overdahl Letter, at 8).

⁸⁹² See, e.g., Citadel Letter, at 6; MFA Letter 1, at 2 and 7; SIFMA AMG Letter, at 5 and 7; SIFMA Letter 1, at 12, 15; AIMA Letter 1, at 2; Overdahl Letter, at 4; CCMR Letter, at 1. One commenter referred to increased short selling disclosure as a wealth transfer that is not necessarily welfare enhancing. See Overdahl Letter, at 3.

⁸⁹³ The proposed rule, which commenters expressed concern, would have required market participants to report transactions to an RNSA within 15 minutes of the terms being settled with an RNSA disseminating the data to the public as soon as practicable thereafter.

⁸⁹⁴ See *supra* Part IX.B.6 for further discussion of why the market for Customer loans is tightly linked to short selling positions.

⁸⁹⁵ See 17 CFR 240.10c-1a(c)(7) ("final Rule 10c-1a(c)(7)"), which requires a covered person to report, for a covered securities loan, whether the borrower is a broker or dealer, a customer (if the person lending securities is a broker or dealer), a clearing agency, a bank, a custodian, or other person. While most loans that facilitate short sales will likely be associated the category of borrowers that are "a customer (if the person lending securities is a broker or dealer)," not all will. Some large market participants do not use broker-dealers as an intermediary when sourcing loans; instead, they maintain relationships directly with lending programs to source shares when they wish to sell short. These transactions would show up in the data as a loan to "other person." Lastly, to the extent that a broker-dealer borrows shares to facilitate their own short selling, the loan would show up in the data as a loan to a "broker or dealer." However, by summing up all loans to "a customer (if the person lending securities is a broker or dealer)" and "other person," market participants could likely estimate outstanding short interest with considerable accuracy.

⁸⁹⁶ Note that, the difference in settlement cycles between the equity and lending markets means that the size of equity loans that facilitate short sales won't be made public until approximately 22 business days after the short sale occurs in the stock market. See *supra* note 738 and corresponding text.

directly related to short selling activity, disseminated under final Rule 10c-1a will generally be less timely than pre-existing sources of short selling transparency, such as FINRA's bimonthly short interest data.⁸⁹⁷

Additionally, the Commission does not believe that market participants will have more timely access to indicators of aggregate short interest from the daily information disseminated by an RNSA pertaining to the aggregate transaction activity for each reportable security.⁸⁹⁸ This is because the term "aggregate transaction activity" refers to information pertaining to the absolute value of transactions, and excludes information that could reveal net transaction activity information.⁸⁹⁹ Therefore, it would not be possible to use this information to discern information about, for example, changes in net short sale positions.

The loan amount data disseminated under final Rule 10c-1a will provide some novel information about short positions, although only on a look-back basis after the 20-business-day dissemination delay has lapsed. In particular, since each loan likely relates to a unique market participant, the public dissemination of such transaction-by-transaction volume data under final Rule 10c-1a, albeit delayed, will provide an indication of the distribution of short sentiment, *i.e.*, whether short interest is concentrated among a few short sellers with large positions, or whether it is spread out over many short sellers.⁹⁰⁰ It can also give an indication about when individual market participants increased or decreased their short positions by examining the change in the size of a loan from the reported data. As most currently available sources of short selling information only contain information about aggregated short selling activity,⁹⁰¹ this could represent an increase in the granularity of market participants' information about past short positions and, in this way, could provide information about short sellers' strategies. Specifically, market

participants could examine the historical securities lending data to try to identify factors that may be indicative of short selling activity. However, it is not clear that such an analysis, which would be inherently noisy, would provide actionable insights into future short selling activity that could harm short sellers' abilities to profit from negative information.

Economic Effects From Improved Securities Lending Data Quality

The Commission believes that final Rule 10c-1a will increase the information about the state of the securities lending markets that is generally available to market participants. As discussed in this section, increased information will result in benefits in the form of better decision-making by investors, beneficial owners and other market participants, reduced costs of business for broker-dealers, improved performance and reduced costs for lending programs, new business opportunities for data vendors, improvements to shareholder monitoring and, ultimately, improved market stability and price discovery both in the securities lending market and the market for the underlying security.⁹⁰²

Overall, the data provided by the final rule will significantly improve market participants' views into lending rates for various securities. It does so first through the comprehensiveness of the data. By mandating the disclosure of certain information about all securities loans, the data provided by the Rule will be comprehensive and thus not prone to biases that occur due to non-random observations.⁹⁰³ Comprehensive reporting also means that the data provided by the final rule covers both the Wholesale and Customer segments of the market, allowing market participants to compare trends in both markets simultaneously. The data will also be more granular than existing data. In addition to information about the size

of the loan and the loan fee, the data provided by the final rule contains a number of other data fields which allow market participants to parse the data to analyze the subset of transactions that are most relevant to their needs.

There are a few dimensions where data provided by commercial data providers may be similar to or provide information not provided by the Rule. The data provided by the final rule is disseminated next day, which is similar to the timeliness of much of the data provided by the commercial data providers except that some commercial data providers offer subsets of intraday transaction data that is timelier than the data provided by the final rule. Additionally, the data provided by the Rule masks loan size for 20 business days. Consequently, existing data providers' information regarding shares on loan will be considerably timelier than the data provided by the Rule. Lastly, the Rule does not provide information about utilization rates, and so market participants wishing to observe utilization rates will need to maintain access to commercial datasets.

First, the improvement in securities lending rate information and the ability to create bespoke benchmarks will improve the quality of information that market participants rely on to make decisions regarding investment strategies that require borrowing securities and the cost of those strategies.⁹⁰⁴ An increase in the quality of information regarding the costs of borrowing a security may decrease risk and thereby increase the risk-adjusted profits of pursuing investment strategies that require borrowing securities, such as short sales.⁹⁰⁵ For example, prior to a short sale transaction, the end borrower will be able to get a better sense of the likely costs associated with such an investment strategy by examining the data regarding recently transacted securities loans, as well as information provided by an RNSA about aggregate transaction activity and cost to borrow.⁹⁰⁶

Access to Rule 10c-1a data may also benefit investors by enabling them to make more informed decisions about whether to buy, hold, or sell a given

⁸⁹⁷ See *supra* Part IX.B.6 for a discussion of the FINRA bimonthly short interest data which are made available for publication on the seventh business day after the reporting settlement dates, which occurs bimonthly.

⁸⁹⁸ See final Rule 10c-1a(g)(5), requiring an RNSA to disseminate aggregated daily information.

⁸⁹⁹ See *supra* Part VII.J for further discussion.

⁹⁰⁰ Note that this may only be possible with noise to the extent that some borrowers, such as institutional investors, break their loans up across multiple prime brokers. See *supra* note 806 for more information about the use of multiple prime brokers by some institutional investors.

⁹⁰¹ See discussion of the FINRA bimonthly short interest data and SRO short selling volume and transaction data above in Part IX.B.6.

⁹⁰² One commenter expressed concern that the Proposing Release did not explain how market participants would use the data (See Citadel Letter, at 9). However, the Proposing Release provided specific examples of how the data could be used (See Proposing Release, 86 FR 69829, 69836, 69840). These examples, and more, are also provided throughout the current Economic Analysis and particularly in this part. Similarly, some commenters expressed concern that the Proposing Release did not identify who, other than regulators, would benefit from certain data (see, e.g., ICI Letter 1, at 9). However, the same discussions of how market participants would use the data also provide discussions of how various market participants would benefit from the data. In this vein, this part discusses a variety of uses and benefits of Rule 10c-1a data.

⁹⁰³ See *supra* Part IX.B.2 for additional discussion of bias in existing securities lending data.

⁹⁰⁴ See *supra* in this part for a discussion of how the final rule will improve transparency through increased comprehensiveness, breadth, and accessibility of securities lending data.

⁹⁰⁵ See *supra* this part for further discussion of the expected economic effects of the final rule through its impact on short selling.

⁹⁰⁶ See *infra* this part for a discussion of the Commission's uncertainty regarding how the aggregated information disseminated by an RNSA will compare to currently available data and the range of analyses that market participants will be able to perform using this information.

security. This will occur as they will have increased certainty regarding lending rates and which securities are most likely to be profitably lent or not, leading to better risk allocations, investment decisions, and ultimately risk-adjusted returns. Extant research has demonstrated that securities lending data have information relevant to the prices of the underlying security.⁹⁰⁷ By making securities lending information both more granular and more accessible for market participants, final Rule 10c–1a will enable investors to utilize data to gain insights into the underlying security. As investors become more informed, their investment decisions are expected to improve.

Additionally, an improved view of current lending market conditions for various securities may help inform beneficial owners in making better decisions concerning which shares to make available for lending, potentially leading to more profitable lending. For example, to the extent that beneficial owners do not currently have a clear means of determining which securities have high average lending rates Rule 10c–1a data may alert them about securities with high borrowing costs, which would enable them to better optimize which shares in their portfolio to make available for lending.⁹⁰⁸ Furthermore, as a result of having better access to information about the securities lending market, financial institutions will be able to improve their collateral and balance sheet management.⁹⁰⁹

Second, a clearer understanding of lending market conditions, and specifically lending market rates, facilitated by the dissemination of Rule 10c–1a data may benefit broker-dealers by decreasing the search costs incurred to obtain a locate in order to facilitate

a short sale on behalf of a customer.⁹¹⁰ The increase in transparency under the final rule will allow broker-dealers to better ascertain current prevailing lending rates for security loans with certain characteristics prior to calling lending programs to get competing quotes. Broker-dealers tend to find loans for their customers through the network of lending programs with which they have relationships, after they have exhausted their own inventory and customer margin accounts.⁹¹¹ Rule 10c–1a data will enable them to determine with greater ease whether a quote from a lending program is competitive. It is possible that new broker-dealers may choose to enter the market for lending services⁹¹² because of this reduction in cost, which may further increase competition between broker-dealers.⁹¹³

Third, final Rule 10c–1a will benefit lending programs by providing a means by which they may improve the performance of their lending. Rule 10c–1a data will provide lending programs with a source of securities lending market data that is more comprehensive than existing commercial data. With these data, the lending programs will have an improved ability to determine prevailing market conditions as they compete to lend shares, which may improve their lending performance.

Fourth, more comprehensive, granular, and accessible securities lending information may also lead to additional business opportunities for commercial securities lending data vendors.⁹¹⁴ In addition to data products, commercial data vendors also provide analytics to their customers,⁹¹⁵ and may be able to support these analytics data services with the data provided by the final rule. Further, because the commercial data vendors would be less dependent on their data providers for data, they may be able to provide

analytics to more market participants. This may result in increased competition for data analytics services as the barriers to entry for providing analytics services decline and new entrants compete to provide analytics services.⁹¹⁶ While this effect may lower what the data vendors can charge for analytics services, to the extent that the commercial data vendors offer their customers other securities lending services, such as execution services, the final rule may enhance their other business lines by providing more comprehensive data to support other securities lending market services. To the extent that there is a demand for covered persons to contract privately with third party vendors to assist in reporting under final Rule 10c–1a, this would likely also lead to additional business opportunities for commercial securities lending data vendors, as these vendors already have experience with handling and disseminating securities lending data and could leverage that experience to offer such services to customers.⁹¹⁷

Ultimately, the improved information access will result in improved market quality in the security lending market. More informed investment decisions facilitated by the final rule may improve market stability by allowing investors to better manage risk. Furthermore, as all participants in the securities lending market will be able to obtain better data on that market, utilize the insights contained in the data, and then improve their decisions based on it, the price discovery process will improve. This will lead to more efficient prices for securities loans.⁹¹⁸ This improved information access may also improve price discovery in the market for the securities underlying the security loans, as information about the underlying security will have a greater opportunity to incorporate into the price of the underlying security.⁹¹⁹

The requirement to report all of the data elements under paragraph (c) the first time the modification of a “day-one” loan (that is, loans in existence

⁹⁰⁷ See Duong, et al. (2017) *supra* note 812. This study shows that, after controlling for the level of short selling, securities lending fees are predictive of future stock returns with higher fees associated with lower future returns. These results imply that, all things equal, lenders charge higher fees to lend their shares when they have negative information about a company. See also Kaitlin Hendrix & Gavin Crabb, *Borrowing Fees and Expected Stock Returns* (Nov. 6, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3726227 (retrieved from SSRN Elsevier database).

⁹⁰⁸ This decision can be important because beneficial owners that engage in securities lending activities consistent with the SEC staff's current guidance limit the portion of their portfolios that can be on loan at any point in time. See *supra* note 778. This additional information may help a beneficial owner that is close to its program limit optimally choose which shares to make available for lending.

⁹⁰⁹ See *supra* Part IX.B.1 for further discussion of the use of securities lending by financial institutions for collateral and balance sheet management.

⁹¹⁰ Regulation SHO requires a broker-dealer to have reasonable grounds to believe that a security can be borrowed so that it can be delivered on the date delivery is due before effecting a short sale order in any equity security. This “locate” must be made and documented prior to effecting the short sale. See 17 CFR 242.203(b)(1) and (2). See also Key Points about Regulation SHO, available at <https://www.sec.gov/investor/pubs/regsho.htm>.

⁹¹¹ See *supra* note 798 discussing broker-dealers' preferences for sourcing shares for loans. See also *supra* Parts IX.B.1 and IX.B.4 discussing the role of broker-dealers in facilitating borrowing by customers.

⁹¹² See *supra* Part IX.B.4 for further discussion of the market for lending services.

⁹¹³ See *infra* Part IX.D.2 for further discussion of the expected effects of the final rule on competition between broker-dealers.

⁹¹⁴ The Commission acknowledges that the final rule may also result in lost revenue for commercial securities lending data vendors. See *infra* Part IX.C.4 for further discussion.

⁹¹⁵ See *supra* Part IX.B.5.

⁹¹⁶ See *infra* Part IX.D.2 for further discussion of the expected effects of the final rule on competition for securities lending data analytics services.

⁹¹⁷ While covered persons can use third party vendors to help prepare their reports, such vendors would not be reporting agents under final Rule 10c–1a. See *supra* Part VII.B.2.

⁹¹⁸ This effect may be concentrated among stocks that are “on special” and have higher borrowing costs, in which there are more opportunities for an increase in price efficiency to lower fees. See *supra* in this part for a discussion on why the Commission expects the economic effects of the final rule to be concentrated among hard-to-borrow stocks.

⁹¹⁹ See *infra* Part IX.D.1 for further discussion of the expected effects of the final rule on price efficiency.

prior to the final rule's reporting date for covered persons) occurs will avoid the exclusion of certain loan information during the early phases of implementation.⁹²⁰ This will enhance the extent to which Rule 10c–1a data improves informational efficiency during the earlier phases of implementation. In the Wholesale market lending largely facilitates clearing and settlement, and for commonly lent securities it is possible that a broker dealer could have a continuous need to borrow the security. In this case the broker dealer likely would enter into a loan that is kept open for an extended period of time, but with frequent size and/or rate modifications to match their ongoing settlement needs and market conditions.⁹²¹ Therefore, absent such a requirement, all the terms of such a lending arrangement would not be fully reportable unless the existing loan is closed out and a new one is opened. It could take a considerable amount of time for this to occur and thus the data collected by the Rule would lack the full context for such loans until they were closed and then re-entered into. The lack of information about these loans would harm data quality because it would render the data less complete and would thus limit market participants' ability to determine conditions in the lending market and would thus mitigate the benefits described in this section. Ensuring that these loans are included upon their first modification improves the quality of the data in the earlier phases of reporting which would in turn speed up the time when the benefits articulated will become fully available to market participants.

Potential Limits to Benefits and Sources of Uncertainty

Commenters mentioned a number of factors that may limit the extent to which the rule increases transparency in the securities lending market, and thereby limit the associated benefits as well. However, despite these potential limitations, the Commission expects that final Rule 10c–1a will improve the transparency and efficiency of the securities lending market, which will improve market participants' access to

information and lower their information asymmetry.

Commenters noted that loan fees are determined by a variety of factors, some of which are not directly included in Rule 10c–1a data.⁹²² Though the Commission believes that the final rule will improve market participants' ability to compare loans, the Commission recognizes that the data provided will not include information about all of the factors that are relevant to the pricing of securities loans. As such, two loans may appear to be similar based on the Rule 10c–1a data but may not have the same fees due to factors not recorded in the data, such as the counterparty risk or the stability of the portfolio. Some commenters expressed concern that failing to provide all information relevant to pricing would lead the data to be either not useful, potentially misleading, or even harmful.⁹²³

The Commission recognized in the Proposing Releases and continues to acknowledge that Rule 10c–1a data will not contain all information needed to perfectly price loans.⁹²⁴ However, compared to the baseline level of information available to market participants, the more granular,

comprehensive, and accessible data provided by the final rule will improve market participants' abilities to compare loans and provide numerous benefits to market participants.⁹²⁵ The Commission does not believe that this information will be misleading or harmful because, as the commenters make clear, it is well understood in this market that the pricing of loans is determined by many factors.⁹²⁶ Knowing this, beneficial owners and end borrowers will be able to use this information to create, for example, an expected range of borrowing costs and use these data to facilitate conversations with their lending agent or broker dealer about why certain loans have prices that they do, or why a specific loan falls where it does in the distribution of similar loans. Further, to the extent that the distribution of borrowing costs provides information that is relevant to stock prices, this information alone could improve price efficiency in the underlying securities market.⁹²⁷

One commenter questioned the utility of information about borrowing costs, asserting their belief that the cost to borrow is not as important to the execution of short sale strategies as whether there are shares available to borrow.⁹²⁸ The Proposing Release acknowledged that information on shares available is useful to markets.⁹²⁹ Rule 10c–1a data will not specifically provide information on shares available. Market participants seeking such information may need to contract with current commercial data vendors, if they can, for estimates of shares available and utilization rates. However, since borrowing costs are correlated with the ease of locating securities to borrow, the improved access to fee information provided by the final rule will provide market participants with increased information regarding the availability of shares to lend.⁹³⁰

⁹²⁰ Several commenters sought clarification on issues related to "day-one" loans. See *supra* note 429 and corresponding text for a discussion of and response to these commenters.

⁹²¹ For example, FIS data on returned securities suggest that while the average security returned in the Wholesale market had been on loan for about a month, some loans were open for up to a year or more. See also Blackrock Letter, at 9 and *supra* note 434 and surrounding text.

⁹²² See, e.g., Citadel Letter, at 9; Overdahl Letter, at 6; RMA Letter, at 6; MFA Letter 1, at 5; SIFMA Letter 1, at 15. See also *supra* note 780 and corresponding text.

⁹²³ See, e.g., Citadel Letter, at 9, stating that the "Commission does not explain why it would be useful for one investor to know what another investor paid on a loan without knowing any of the material facts of the other investor's relationship with its broker-dealer." Similarly, see RMA Letter, at 6 (stating that "there is no reason to believe that securities lending transactions are fully fungible or that pricing can be represented in a single 'spot' market price"); see Overdahl Letter, at 6 (stating that "the fact that one market participant borrowed a security at a certain rate is not necessarily informative about the value of a loan with a different market participant."). Furthermore, several commenters expressed concern that such information could be misleading. See, e.g., MFA Letter 1, at 9 (stating that, since "rates in the [Customer] Market are based on many variables specific to a broker-dealer-client contractual relationship," transaction-by-transaction loan data "may actually result in a distorted representation of the actual market."). See also ISLA Letter, at 2, who similarly state that fee/rebate data "may create an unrealistic and misleading portrayal of prevailing rates." See also SIFMA Letter 1, at 14, stating that "intraday loan-by-loan data can be misleading based on circumstances unique to certain securities loan transactions." See also *supra* note 732 and corresponding text for a discussion of the variety of factors that can affect the pricing of securities loans. Other commenters expressed their opinion that pricing information would be valuable to market participants. See, e.g., James J. Angel Letter, at 2–3.

⁹²⁴ See, e.g., Proposing Release, 86 FR 69839, recognizing that benefits would be somewhat limited by the fact that the data does not contain "all information necessary to perfectly compare the fees on different loans," but concluding that "the proposed Rule improves the ability to compare loans."

⁹²⁵ See *supra* in this part for a discussion of these benefits.

⁹²⁶ See, e.g., the information provided by commenters in *supra* note 732.

⁹²⁷ See, e.g., Duong, et al. (2017), who find that information derived from securities lending data can be used to predict stock returns.

⁹²⁸ See S3 Partners Letter, at 9 (stating that "We do not believe the Commission has explored if the costs to borrow are material to the execution of a short sale strategy. We believe a bigger issue may be the lack of shares to borrow, not the cost of borrowing."); Other commenters, however, did believe that loan pricing information would provide useful and meaningful information. See, e.g., PM Letter 2, at 3; and James J. Angel Letter, at 1.

⁹²⁹ See, e.g., Proposing Release, 86 FR 69834, 69840.

⁹³⁰ See Kolasinski (2013) *supra* note 736 (writing on the link between the cost to borrow and availability of shares to lend).

Some commenters expressed concern that the data may be too granular to be directly usable by market participants,⁹³¹ and at least one commenter expressed concern that the final rule could increase information asymmetries if the complexity of the data are such that only the largest and most sophisticated market participants would be able to benefit.⁹³² The Commission is mindful that the reports prepared according to the final rule will contain a large volume of statistical data, and as a result it may be difficult for some market participants to review and digest the reports. However, by requiring reporting entities to report transaction-level information in a uniform manner rather than aggregated data, the final rule will make it possible for market participants and other interested parties to make their own determinations about how to group securities or loans when comparing across loan transactions. Requiring more detailed data will also help ameliorate potential concerns about overly general statistics, or about the specific categorization of loans and selection of aggregated metrics, by allowing market participants and other interested parties to conduct their own analysis based on alternative categorizations of the underlying data. Should certain market participants not have the means to directly analyze the detailed statistics, third parties, such as commercial securities lending data vendors, likely will respond to the needs of investors by analyzing the disclosures and producing more digestible information using the data.⁹³³ Additionally, this concern is mitigated somewhat by the requirement that an RNSA provide information about the distribution of loan rates at the security level,⁹³⁴ which could be more easily used similar to current data models.

One commenter suggested that the inclusion of short positions data would lead to double counting and could confuse market participants.⁹³⁵ Short positions are not required to be reported, but loans from a broker-dealer to an end customer—such as might support a short position—will be marked in the data as loans to a

“customer (if the lender is a broker-dealer).” The Commission does not believe that the inclusion of such data constitutes double counting because a loan from a broker-dealer to their customer (e.g., to facilitate a short sale and where the broker-dealer is the lender) is a distinct economic activity from a loan that the broker-dealer may engage in as the borrower (e.g., to meet their own clearing and settlement obligations).⁹³⁶ The Commission does not believe that such data will lead to confusion because these loans are marked in the data in a way that allows market participants to separate customer loans from other loans in their analysis.

One commenter suggested that including rebate data could lead to confusion because rebates are often fixed to benchmarks that can change from day to day, potentially leading to many, perhaps daily, modifications of the loan needing to be submitted and that the volume of these data could confuse market participants.⁹³⁷ The extent to which the commenter’s concern is realized will be determined by how an RNSA chooses to structure the reporting of this variable.⁹³⁸ For instance, if an RNSA chooses to allow market participants to report a spread and a benchmark, then no modifications would be required to be reported from day to day unless there were a change in the negotiated spread or benchmark. However, if an RNSA chooses to require market participants to report the total fee, then market participants would be required to report changes to the fee if the benchmark changes, which could require daily revisions.⁹³⁹ However, the Commission does not believe that this will cause confusion. The Commission expects that market participants know that rebates can change regularly and thus revisions would not be unexpected. Further, gathering loan modification data is important to facilitate the accurate computation of statistics regarding the cost to borrow by an RNSA and other market participants.

At least one commenter suggested that some of the benefits of the Rule from reducing information asymmetries may be limited as a result of switching costs.⁹⁴⁰ The Commission acknowledges

that the cost of switching to a new broker-dealer can be high,⁹⁴¹ and that high switching costs may make it more difficult for some end borrowers to easily switch their broker-dealer for one that would offer them better terms on a loan.⁹⁴² However, at the same time, by increasing end borrowers’ access to comprehensive information about the securities lending market, final Rule 10c–1a will improve end borrowers’ ability to determine which broker-dealers are offering better loan terms, as well as to negotiate better terms with broker-dealers. Both of these will increase the benefits to end borrowers from switching broker-dealers. Holding switching costs constant,⁹⁴³ final Rule 10c–1a could thus still result in more end borrowers finding it beneficial to switch to better-performing broker-dealers. Furthermore, as discussed in the Proposing Release,⁹⁴⁴ even for those borrowers for which switching broker-dealers would not be cost effective, the data would provide benchmark statistics that may enable smaller borrowers to select higher performing broker-dealers initially.

The benefits of the final rule may be limited if the rule results in a reduction

acknowledges this possibility and discusses further below in Part IX.C.4. *See also* S3 Partners Letter, at 9, stating “[p]rice transparency does not change a borrower’s need to execute a short sale strategy with the brokers that they already have existing agreements with.” *See also supra* in this part for a discussion of studies of the introduction of TRACE and the impact of transparency on price.

⁹⁴¹ *See supra* Part IX.B.4 for a discussion of costs related to switching broker-dealers.

⁹⁴² However, several factors may mitigate high switching costs. For example, some institutional investors are likely to have multiple prime brokers, which would facilitate the transfer of business to better-performing broker-dealers (*see supra* note 806), and, for individual investors, transferring between retail brokers may be less costly, for example, because some retail brokers will compensate new customers for transfer fees that their outgoing broker-dealer may charge them. *See, e.g.,* Chad Morris, *ACAT Fee: Account Transfer Fee in 2023*, Brokerage-Review.com, available at <https://www.brokerage-review.com/discount-broker/acat-account-transfer-fees.aspx>, last visited Aug. 28, 2023 (providing a list of fees for different brokers). The effect of switching costs on competition may also depend on the variability of the quality of broker-dealers’ lending services over time. For example, if the quality of any broker-dealer’s lending quality varies significantly over time, customers of those broker-dealers may find it optimal to switch between broker-dealers with some frequency, which would increase their overall switching costs. On the other hand, if the quality of broker-dealers’ lending services is relatively constant over time, the number of times that a customer would optimally want to switch between broker-dealers would likely be more limited, and in this case switching costs may be a relatively small and/or short-term friction.

⁹⁴³ At least one commenter expressed concern that the proposed rule may result in increased costs when switching lending agents. *See* CSFME Letter 1, at 5.

⁹⁴⁴ *See* Proposing Release, 86 FR 69837 n.221.

⁹³¹ *See, e.g.,* IHS Markit Letter, at 13; RMA Letter, at 18.

⁹³² *See* IHS Markit Letter, at 14.

⁹³³ *See supra* Part IX.B.5 for a discussion of commercial data vendors’ current offering of securities lending data analytics services, and above in this part for a discussion of the expected effects of the final rule on creating new business opportunities for providers of securities lending data analytics services.

⁹³⁴ *See* final Rule 10c–1a(g)(5), requiring an RNSA to disseminate aggregated daily information.

⁹³⁵ *See* MFA Letter 3, at 4.

⁹³⁶ *See supra* Part IX.B.2.

⁹³⁷ *See* MFA Letter 3, at 5.

⁹³⁸ *See supra* Part VII.F.1 for additional discussion of the reporting of this data.

⁹³⁹ *See* the last paragraph of Part VII.F.1 and surrounding text for additional discussion of the latitude granted to an RNSA in determining the specific format required for the loan cost information.

⁹⁴⁰ *See, e.g.,* Citadel Letter, at 8. One commenter suggested that switching costs between lenders and lending agents could increase because of the rule; *See* CSFME Letter 1, at 5. The Commission

in the supply of securities loans. A lower supply of securities loans, for example, could weaken or even counteract the rule's expected effect on lowering borrowing costs.⁹⁴⁵ As previously discussed, the Commission believes that the empirical evidence does not show an increase in securities lending transparency would result in a decrease in the supply of securities loans.⁹⁴⁶ However, another possibility that was pointed out by commenters is that the supply of securities loans could decrease if compliance costs are passed on to lenders and beneficial owners, who are then less willing or able to participate in the securities lending market as a result.⁹⁴⁷ The Commission recognizes that some market participants, including beneficial owners, may experience reduced revenue from securities lending as a result of the rule.⁹⁴⁸ However, the Commission expects that beneficial owners and lenders will for the most part benefit from the final rule, as a result of increased information about the securities lending market and reduced information asymmetry.⁹⁴⁹ This benefit, which could even encourage more beneficial owners and lenders to enter the securities lending market, would serve to mitigate an increase in cost and a subsequent decrease in lending, to the extent that it would occur.

One commenter stated that securities lending data would be less useful for corporate bonds and asset-backed securities (ABS) because, due to the "the greater diversity of bond characteristics, data from one set of bonds cannot be as easily used as benchmarks for others," and as a result "there is little indication that data from corporate bond or ABS lending transactions would be sufficiently useful to justify the reporting costs."⁹⁵⁰ As discussed above, the Commission acknowledges that the data provided will not include information about all of the factors that are relevant to the pricing of securities loans. It is possible

that this limitation on the benefits may be higher for certain infrequently loaned securities, such as corporate bonds. However, the Commission believes that, even for less liquid lending markets, Rule 10c-1a will still reduce information asymmetries and improve pricing efficiency by facilitating better benchmarking than is currently possible, and thus will represent an improvement relative to the baseline similar to other assets discussed. For example, market participants will be able to use Rule 10c-1a data to pool information across similar securities and/or similar time horizons to create their own bespoke benchmarks for loan terms.

The commenter also stated that securities lending data would be less useful for U.S. Government securities because "the market for these products is already fairly transparent," and thus "imposing reporting obligations would not provide sufficient additional data to justify the compliance burden."⁹⁵¹ As discussed in the Baseline, the Commission believes that information asymmetries in the lending market for U.S. Government securities loans are unlikely to be fully addressed by the currently available datasets, and thus this market will ultimately still benefit from an increase in transparency.⁹⁵²

While the adoption of final Rule 10c-1a will lead to benefits from an overall increase in transparency, the Commission acknowledges that, in some areas, there is uncertainty as to how the information content of Rule 10c-1a data will compare to that of existing data. The requirement for an RNSA to disseminate daily information about aggregate transaction activity and distribution of loan rates will also provide market participants with information about the securities lending market.⁹⁵³ However, how the aggregate information disseminated by an RNSA will compare to the information available from current commercially available datasets, and the range of analyses that market participants will be

able to perform using this information, will depend on the specific aggregate statistics that an RNSA chooses to publish.

The Commission bases its estimates on an RNSA providing daily information that is at least as informative as comparable statistics that are currently provided by the commercial datasets. This is because, consistent with section 19(b) of the Exchange Act, any changes to an RNSA rules required by final Rule 10c-1a, including its Rule 10c-1a information collection and dissemination practices, would have to be filed with the Commission pursuant to section 19(b) and Rule 19b-4 prior to implementation.⁹⁵⁴ Such rules would also be subject to public comment.⁹⁵⁵ This process offers market participants the opportunity to provide feedback on the potential specific statistical form of the aggregated daily information based on, *e.g.*, their experience using information from commercial datasets. As such, the daily information provided by an RNSA could be at least as informative as those statistics provided by current data providers. Therefore, at a minimum, the Commission expects that the final rule will result in a positive benefit to market participants in the form of increased securities lending market transparency. This is because, while the aggregate information released by an RNSA may be the same or similar to what is currently provided by commercial datasets, the comprehensiveness and accessibility of the Rule 10c-1a data is expected to be better than that of commercial data, such that aggregate information produced using Rule 10c-1a data can be expected to be better than that produced using currently available commercial data.⁹⁵⁶

2. Regulatory Benefits

Final Rule 10c-1a will improve upon current data sources by providing an RNSA (*i.e.*, FINRA)⁹⁵⁷ and the

⁹⁴⁵ See *supra* in this part for discussions of the Commission's expectation that the final rule will lower borrowing costs for some securities.

⁹⁴⁶ See *supra* in this part for further discussion for this literature.

⁹⁴⁷ See, *e.g.*, State Street Letter, at 4, stating that "greater costs are also likely to create additional disincentives for institutional investors to participate in the securities lending market, with broadly negative implications for liquidity."

⁹⁴⁸ See *infra* Part IX.C.4 for further discussion of the expected effect of the final rule on securities lending revenues.

⁹⁴⁹ See *supra* in this part for a discussion of the expected benefits of the final rule from reduced information asymmetry between beneficial owners and lending programs.

⁹⁵⁰ See RMA Letter, at 16.

⁹⁵¹ See RMA Letter, at 16.

⁹⁵² See *supra* Part IX.B.2 for further discussion of the Commission's understanding of the current state of transparency in the market for U.S. Government securities lending. The Commission also acknowledges that, in addition to the market for U.S. Government securities lending, there may be other securities lending markets with higher transparency. However, the Commission believes the regulatory benefits discussed in this part will still apply, as will the benefits for data consumers from the additional context provided by the Rule 10c-1a data, such as information about whether the borrower is a broker or dealer, a customer (if the person lending securities is a broker or dealer), a clearing agency, a bank, a custodian, or other person.

⁹⁵³ See final Rule 10c-1a(g)(5).

⁹⁵⁴ See *supra* Part II.J for further discussion of how the final rule handles RNSA Rules to administer the collection of information.

⁹⁵⁵ 15 U.S.C. 78s(b). See also FINRA, *FINRA Rulemaking Process*, available at <https://www.finra.org/rules-guidance/rulemaking-process>, last visited Aug. 24, 2023.

⁹⁵⁶ See *supra* Part IX.B.2 for a discussion of issues related to the currently available commercial securities lending datasets. For example, in contrast to commercial datasets, since it is not based on voluntary submissions, final Rule 10c-1a data will be less likely to be prone to bias, and thus aggregate information that is constructed using final Rule 10c-1a data will be less prone to biases as well.

⁹⁵⁷ Currently, FINRA is the only RNSA. Although the final rule applies to "an RNSA," this portion of our analysis describes benefits to and involving

Commission access to securities lending information that identifies the parties to the loans, indicates when a broker-dealer loans its own securities to its customers, and indicates whether the purpose of such a loan was to close out a failure to deliver.⁹⁵⁸ Further, the improved access and comprehensiveness and reduced bias of the publicly available data will also accrue to FINRA and the Commission, as well as any other regulators using these data. This access will benefit investors by enhancing regulatory tools employed to promote fair and orderly securities markets. In particular, investors may benefit from improved surveillance and enforcement uses, market reconstruction uses, and market research uses.

Surveillance and Enforcement Uses

The party identities and purpose information⁹⁵⁹ may facilitate better surveillance by FINRA for regulatory compliance by its members, and may improve its ability to enforce such regulations. Additionally, FINRA will be able to notify another regulator as permitted.

For example, for FINRA, the information on whether the security is loaned from a broker-dealer's securities inventory to its customer⁹⁶⁰ may assist FINRA in determining whether a broker-dealer is charging lending fees or paying rebates commensurate with the market. Thus, beneficial owners and end borrowers, who engage in securities lending transactions, will be better protected against potential unfair pricing of securities loans by broker-dealers. In addition, FINRA can use the data more generally to assist in its surveillance of FINRA Rules 4314, 4320, and 4330 regarding securities lending and short selling that primarily intend to reduce information asymmetry in the securities lending markets. For instance, the final rule can help FINRA identify broker-dealers who tend to lend to or borrow from non-FINRA members to examine compliance with provisions of FINRA Rules 4314 and 4330 that entail agreement, disclosure, and other requirements for this activity. In addition, the information on how much borrowing particular FINRA members engage in can assist FINRA in identifying which broker-dealers to examine for compliance with FINRA Rule 4320, which contains short sale delivery requirements. These types of

activities will better protect investors by helping to ensure that entities engaging in certain securities lending transactions are authorized to do so and are in compliance with applicable regulations. FINRA can also use the information to monitor when broker-dealers are building up risk, thereby protecting broker-dealers' customers against potential instabilities. FINRA can use data on the identity and activity of its members to provide an early warning with regard to the behavior of its members during a short squeeze.

Additionally, the information on whether the loan is being used to close out a fail to deliver⁹⁶¹ is relevant to Rule 204 compliance. Importantly, being able to estimate the securities lending revenues and costs of particular participants may help to fine tune disgorgement estimations. The Commission and FINRA can also use Rule 10c-1a data to oversee broker-dealer compliance with Exchange Act Rule 15c3-3.⁹⁶²

The Commission believes that the requirement pursuant to Rule 10c-1a to identify all parties to securities lending transactions with LEIs, if such parties have LEIs, will facilitate the Commission and FINRA's efforts to monitor securities lending.⁹⁶³ Reporting of LEIs by legal entity securities loan participants that have LEIs will help provide a more precise and consistent means of identification for loan participants as compared to using loan participant names and, if available, CRDs, IARD Numbers, or MPIDs.⁹⁶⁴ In that regard, obtaining an LEI requires that an entity's identity be verified by a third party upon issuance of the LEI and upon annual renewal of the LEI.⁹⁶⁵ Additionally, LEIs contain "Level 2"

information about the linkages between the entities being identified and their parent and child entities,⁹⁶⁶ which can better enable Commission staff and market participants to understand the relationships between various firms with an eye toward potential aggregations of risk. Furthermore, requiring LEI disclosure for loan participants that have LEIs also will facilitate the linkage of data reported about securities loans with any relevant data, such as data on short sales or positions, from other sources.⁹⁶⁷ However, because the Commission is not requiring loan participants without LEIs to obtain and report them, the aforementioned benefits will only arise for reported securities loans in which participants have LEIs.

One commenter expressed concern that, to the extent that there is a wide variance in interpretation of data, the rule could result in "false positive" enforcement actions.⁹⁶⁸ Conversely, the Commission believes that improvements in securities lending data will enhance the ability of FINRA and the Commission to oversee the securities lending market and more efficiently detect potential rule violations, such as those described above. This will result in more targeted actions, which will benefit market participants by resulting in more efficient oversight.

Market Reconstruction Uses

Final Rule 10c-1a may help regulators reconstruct market events. For example, in January 2021, trading in so-called "meme" stocks led to many questions about securities lending being asked by lawmakers, investors, and the media as well as calls by some for increased regulation in some areas.⁹⁶⁹ Rule 10c-1a data will allow for more detailed evaluations of such events in the future

⁹⁶¹ See final Rule 10c-1a(e)(3).

⁹⁶² See 17 CFR 240.15c3-3.

⁹⁶³ Examples of other regulatory entities and jurisdictions that use LEIs include the U.S. Commodity Futures Trading Commission ("CFTC"), Alberta Securities Commission (Canada), European Markets and Securities Authority, and Monetary Authority of Singapore. See Global LEI Foundation, *Regulatory Use of the LEI* (Aug. 21, 2023), available at <https://www.gleif.org/en/lei-solutions/regulatory-use-of-the-lei>.

⁹⁶⁴ More than 2.2 million LEIs have been issued. See Office of Fin. Res., Legal Entity Identifier, available at <https://www.financialresearch.gov/data/legal-entity-identifier/>, last visited Aug. 23, 2023.

⁹⁶⁵ See *Global LEI System*, LEIROC.com, available at <https://www.leiroc.org/lei.htm>, last visited Aug. 23, 2023. Information associated with the LEI includes the "official name of the legal entity as recorded in the official registers[.]" the entity's address, country of incorporation, and the "legal form of the entity." See Financial Stability Board ("FSB"), *Options to Improve Adoption of the LEI, in Particular for Use in Cross-Border Payments* (July 7, 2022), available at <https://www.fsb.org/2022/07/options-to-improve-adoption-of-the-lei-in-particular-for-use-in-cross-border-payments/>.

⁹⁶⁶ See Global LEI Foundation, *Level 2 Data: Who Owns Whom*, available at <https://www.gleif.org/en/lei-data/access-and-use-lei-data/level-2-data-who-owns-whom>, last visited Aug. 22, 2023.

⁹⁶⁷ For example, the European Union's SFTR requires legal entity parties to securities financing transactions to provide their own LEIs and the LEIs of their counterparties to trade repositories. See *ESMA Updates Its Statement on the Implementation of LEI Requirements for Third-Country Issuers Under the SFTR Reporting Regime* (Apr. 13, 2021), available at <https://www.esma.europa.eu/press-news/esma-news/esma-updates-its-lei-statement>. The EU has numerous LEI requirements for entities operating in its securities markets, including, inter alia, for credit and financial institutions (pursuant to the Capital Requirements Regulation) and for fund and fund managers (pursuant to the Alternative Investment Funds Directive). See *id.* Likewise, as mentioned, the CFTC requires counterparties identify themselves to the agency with LEIs in connection with swap trades, including long-and-short equity index swap trades. See 17 CFR 45.6.

⁹⁶⁸ See S3 Partners Letter, at 8.

⁹⁶⁹ See, e.g., Proposing Release, 86 FR 69803 n.11.

FINRA so that we can discuss specific FINRA Rules and practices that will be affected.

⁹⁵⁸ See final Rule 10c-1a(e).

⁹⁵⁹ See *id.*

⁹⁶⁰ See 17 CFR 240.10c-1a(e)(2) ("final Rule 10c-1a(e)(2)").

than was possible with existing data during January 2021. For example, January 2021 information on market participants' securities lending activity would have provided FINRA and Commission staff a more timely and comprehensive view of who was entering into new loans and who was no longer borrowing securities. This would have facilitated a deeper understanding of how the events were or were not impacting market participants. Such analyses can help determine if further regulatory intervention in markets is warranted and can inform the nature of any intervention.

Market Research Uses

Greater access and more comprehensive data on the securities

lending market will improve the quality and expand the scope of research by both academics and regulators, which will better inform the regulators. In particular, improving the information available for their policy decisions will promote fair, orderly, and efficient markets and the protection of investors. For example, the data could facilitate research on the effectiveness of regulations such as Regulation SHO or FINRA Rules 4320 and 4330.

Additionally, research conducted by academic researchers and market participants could also improve the value of public comment letters on Commission and FINRA proposals, which will also better inform policy decisions.

3. Direct Compliance Costs

Final Rule 10c–1a will require various entities to enter into contracts and develop recording and reporting systems to comply with the final rule. This section provides estimates of those costs. We note that the Commission has provided certain estimates for purposes of compliance with the Paperwork Reduction Act of 1995 (“PRA”), as further discussed below, in Part X. Those estimates, while useful to understanding the collection of information burden associated with the final rules, do not purport to reflect the full economic costs associated with making the required disclosures.

TABLE 2—TOTAL QUANTIFIED COMPLIANCE COSTS

	#	Total initial industry cost	Total annual industry cost
Covered Persons and Reporting Agents	609	^a \$522,590,000	^b \$233,260,000
RNSA	1	^c 3,880,000	^d 2,760,000

^a\$522,590,000 = sum of estimates in *infra* Table 3 note m and Table 4 note h. The Commission estimates the wage rate associated with these burden hours based on salary information for the securities information compiled by SIFMA. The estimated wage figure for attorneys, for example, is based on published rates for attorneys, modified to account for a 1,800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead yielding an effective hourly rate for 2013 of \$380 for attorneys. See Securities Industry and Financial Markets Association, Management & Professional Earnings in the Securities Industry—2013. These estimates are adjusted for an inflation rate of 29.89% based on the Bureau of Labor Statistics data on CPI-U between Sept. 2013 and May 2023. See U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*, available at https://www.bls.gov/data/inflation_calculator.htm. Therefore, the current inflation-adjusted effective hourly wage rates are estimated at \$494 ($\$380 \times 1.2989$) for attorneys, \$409 ($\$315 \times 1.2989$) for compliance managers, \$338 ($\$260 \times 1.2989$) for senior systems analysts, and \$83 ($\$64 \times 1.2989$) for compliance clerks.

^b\$233,260,000 = estimate in *infra* Table 3 note n.

^c10,924 hours $\times$ (0.75 $\times$ \$338/hour + 0.25 $\times$ \$409/hour) = \$3,880,000. See *infra* note 1196 and note a.

^d7739.5 hours $\times$ (0.75 $\times$ \$338/hour + 0.25 $\times$ \$409/hour) + 52 hours $\times$ \$83/hour = \$2,760,000. See *infra* note 1199 and note a.

Table 2 shows that the Commission believes that final Rule 10c–1a will impose a one-time cost of \$3.88 million and ongoing expenses of \$2.76 million on FINRA, the only RNSA. An RNSA will incur these costs to develop systems to take and disseminate data required by the final rule. These include larger costs associated with creating and maintaining the infrastructure to enable providing covered persons and reporting agents to provide an RNSA with Rule 10c–1a information and

entering into written agreements with providing covered persons and reporting agents, as well as smaller costs associated with providing such information to the public.⁹⁷⁰ These costs will be somewhat mitigated by the fact that final Rule 10c–1a requires an RNSA to disseminate the data “as soon as practicable,”⁹⁷¹ which gives an RNSA some flexibility to build systems that mitigate costs.

Table 2 also shows that covered persons and reporting agents will, in

aggregate, incur roughly \$523 million in initial costs and \$233 million annually in ongoing costs to comply with the final rule.⁹⁷² These costs come from costs to develop and maintain systems and from costs to enter into agreements.⁹⁷³ Tables 3 and 4 break these costs down by those incurred by reporting agents, and by covered persons based on the decision by covered persons to self-report or use a reporting agent.

⁹⁷⁰ As discussed in *supra* Part VII.B.2, covered persons, including persons that are not RNSA members, that elect not to use a reporting agent are responsible for providing the Rule 10c–1a information to an RNSA directly and may do so without becoming RNSA members. Therefore, these costs may include costs to an RNSA of establishing connections to persons that are not members of an RNSA.

⁹⁷¹ See final Rule 10c–1a(g)(1).

⁹⁷² As discussed in *supra* Part VII.A, the Commission is adopting an exception to the general approach that reporting requirements do not apply to the borrower in a securities lending transaction,

specifying that the borrower is responsible for the reporting obligation in the instance of a broker or dealer borrowing fully paid or excess margin securities from a customer; see final Rule 10c–1a(j)(1). Absent this exception, reporting obligations may have fallen on broker-dealer customers who may not have timely access to the required information, and may have less familiarity with reporting information to an RNSA than their broker or dealer; see *supra* note 145.

⁹⁷³ The Commission expects that the costs associated with developing a reporting system to be lower under the final rule as compared to the proposed rule as a result of the change from the

proposed rule to impose an end-of-day reporting requirement. As described by some commenters, an intraday reporting framework would have required substantial technology development and cost for those providing covered persons and reporting agents that may have lacked the capacity to do so. See, e.g., SBAI Letter, at 1, and IHS Markit, at 13. Removing the intraday reporting requirement removes the need for those providing covered persons to acquire this capacity, thus lowering at least their initial burden associated with system design and configuration. See *supra* Part IX.B.1 for further discussion.

TABLE 3—QUANTIFIED COMPLIANCE COSTS FOR SYSTEMS DEVELOPMENT AND MAINTENANCE INCURRED BY LENDERS AND REPORTING AGENTS

	#	Total initial industry cost (millions)	Total annual industry cost (millions)
Providing Covered Persons ^a	^b 255	^c \$272.01	^d \$122.40
Non-Providing Covered Persons ^e	^f 248	^g 132.27	^h 59.52
Reporting Agents ⁱ	^j 106	^k 113.07	^l 51.34
Total	609	^m 517.34	ⁿ 233.26

^a Providing covered persons would provide information directly to an RNSA.

^b The estimated number of providing covered persons includes 4 broker-dealer intermediaries, 217 persons that effect a covered securities loan as the lender when an intermediary is not used, and 34 broker-dealers borrowing fully paid or excess margin securities. *See infra* Part X.

^c 3,000 hours × 255 × (0.75 × \$338/hour + 0.25 × \$409/hour) ≈ \$272,010,000. *See infra* note 1157 and *supra* Table 2 note a.

^d 1,350 hours × 255 × (0.75 × \$338/hour + 0.25 × \$409/hour) ≈ \$122,400,000. *See infra* note 1161 and *supra* Table 2 note a.

^e Non-providing covered persons would use a reporting agent to provide information to an RNSA.

^f The estimated number of non-providing covered persons would include 31 non-broker-dealer intermediaries and 217 persons that effect a covered securities loan as the lender when an intermediary is not used. *See infra* Part X.

^g 1,500 hours × 248 × (0.75 × \$338/hour + 0.25 × \$409/hour) ≈ \$132,270,000. *See infra* note 1163 and *supra* Table 2 note a.

^h 675 hours × 248 × (0.75 × \$338/hour + 0.25 × \$409/hour) ≈ \$59,520,000. *See infra* note 1167 and *supra* Table 2 note a.

ⁱ Reporting agents would provide information directly to an RNSA.

^j The number of reporting agents includes 97 broker-dealers and 9 clearing agencies. *See infra* Part X.

^k 3,000 hours × 106 × (0.75 × \$338/hour + 0.25 × \$409/hour) ≈ \$113,070,000. *See infra* note 1180 and *supra* Table 2 note a.

^l 1,350 hours × 106 × (0.75 × \$338/hour + 0.25 × \$409/hour) + 52 hours × 106 × \$83/hour ≈ \$51,340,000. *See infra* notes 1181 and 1191 *supra* Table 2 note a.

^m \$517.34 million ≈ sum of estimates in *supra* notes c, g, and k.

ⁿ \$233.26 million ≈ sum of estimates in *supra* notes d, h, and l.

Table 3 shows that covered persons and reporting agents would incur an aggregate of roughly \$517 million in initial costs and \$233 million annually in ongoing costs to develop and maintain systems for reporting securities lending information. These include larger costs associated with developing and reconfiguring their current systems to capture the required data elements, as well as smaller costs

associated with implementing changes and monitoring systems, most of which would be incurred by covered persons who provide the Rule 10c-1a information to an RNSA instead of relying on a reporting agent to do so.⁹⁷⁴ It is possible that some providing covered persons could privately contract with third party vendors to assist them with their reporting obligations.⁹⁷⁵ The potential for third

party vendors, such as existing securities lending data vendors, to leverage their existing experience with collecting and disseminating securities lending data as well as economics of scale could result in lower compliance costs. If this is the case, the compliance costs for providing covered persons could be lower than what is reflected in Table 3.

TABLE 4—QUANTIFIED COMPLIANCE COSTS OF ENTERING INTO AGREEMENTS

	#	Agreement counterparty	Total initial industry cost	Total annual industry cost
Non-Providing Covered Persons ^a	^b 248	Reporting Agent	^c \$3,670,000	\$0
Reporting Agents ^d	^d 106	Person who Provides 10c-1a Information	^f 1,570,000	0
		RNSA	^g 8,800	0
Total	354		^h 5,250,000	0

^a *See supra* note Table 3 note e.

^b *See supra* note Table 3 note f.

^c 30 hours × 248 × \$494/hour ≈ \$3,670,000. *See infra* note 1171 and *supra* Table 2 note a.

^d *See supra* note Table 3 note i.

^e *See supra* note Table 3 note j.

^f 30 hours × 106 × \$494/hour ≈ \$1,570,000. *See infra* note 1185 and *supra* Table 2 note a.

^g 1 hour × 106 × \$83/hour ≈ \$8,800. *See infra* note 1188 and *supra* Table 2 note a.

^h \$5,250,000 ≈ sum of estimates in *supra* notes c, f, and g.

⁹⁷⁴ In addition, there may be costs for reporting entities associated with determining whether a loan is a covered securities loan according to final Rule 10c-1a(f)(2), including whether a particular security is a reportable security. However, these costs are likely to be negligible, as many covered persons and reporting agents, including broker-dealers, are already required to determine whether a security is reportable to the CAT, TRACE, or RTRS are part of their compliance with other regulatory obligations. The Commission believes that many covered persons that do not have the resources or expertise to determine whether a security is a reportable security will be likely to use reporting agents, who, as broker-dealers and/or clearing agencies, will

likely have access to this information. These costs may also include costs to covered persons that are not members of an RNSA of establishing connections to an RNSA. *See supra* note 970. We do not expect significant additional costs to result from the requirement to report information once a loan modification occurs after that loan qualifies for reporting. This is because the primary costs associated with the rule are those associated with developing and reconfiguring their current systems to capture the required data elements. The variable cost of each individual transmission to an RNSA is expected to be very small. This requirement is not expected to impact the need for reporting agents to develop and maintain systems for reporting

securities lending information, because reporting agents will be required to develop these systems to meet the other provisions of the final rule. Rather, this will simply require the inclusion of some additional data transfers that occur largely around the reporting date. Since the cost of individual transmissions are expected to be small, this aspect of the final rule is expected to have a small impact on the compliance costs of the rule.

⁹⁷⁵ Note that, while covered persons can use third party vendors to help prepare their reports, such vendors would not be reporting agents under final Rule 10c-1a. *See supra* Part VII.B.2.

Table 4 shows that covered persons and reporting agents will incur an aggregate of \$5.25 million in initial costs and \$0 annually in ongoing costs to enter into agreements for reporting securities lending information. These include costs associated with drafting, negotiating, and executing agreements with counterparties, most of which will be incurred by covered persons that directly employ a reporting agent. There will not be ongoing costs because, once an agreement is signed, there will be no need to modify the written agreement or take additional action after it is executed.

One commenter expressed concern some of the compliance costs incurred by lending agents could be passed along to lenders and beneficial owners, including funds and their shareholders.⁹⁷⁶ The Commission acknowledges that it is possible that some compliance costs may be passed along to beneficial owners, for instance, in the form of higher fees charged for lending services or lower pro-rated lending revenue.⁹⁷⁷ Compliance costs may also be passed along by broker-dealers to end borrowers in the form of higher borrowing costs.⁹⁷⁸ Ultimately, the extent to which either beneficial owners or end borrowers may bear some of the costs of complying with final Rule 10c-1a will depend on the extent to which covered persons, including lending agents and broker-dealers, pass on their compliance costs to their customers and/or split these costs across different types of customers. However, this effect is expected to be mitigated by the fact that the projected compliance costs of the final rule as a fraction of an estimate of the total lending fee revenue generated is likely small enough to be within the bounds of a positive profit margin.⁹⁷⁹

In addition to the above enumerated costs, the estimated 361 reporting entities (*i.e.*, providing covered persons and reporting agents), as well as subscribers to Rule 10c-1a data, may be

required to pay fees to an RNSA.⁹⁸⁰ The fees that these entities may be required to pay will depend on a number of factors, including the number of reporting entities and subscribers, along with how an RNSA will choose to split any such fees between these different types of entities.

Some commenters expressed concern that an RNSA would have monopoly pricing power over the resulting data.⁹⁸¹ However, any fee that an RNSA would charge must be consistent with the Exchange Act and rules thereunder, and are subject to Commission review, notice and public comment.⁹⁸² Consequently, the Commission believes that an RNSA is unlikely to exert monopoly pricing in terms of fees for the data, and that their fees will be reasonably related to costs. As shown in Table 2, the Commission expects an RNSA to incur ongoing costs of \$2.76 million per year. If the 361 providing covered persons and reporting agents were the only entities to subscribe to the data, dividing the cost incurred by an RNSA by the 361 entities results in an annual fee per reporting entity of approximately \$7,600, or approximately \$633 per month. This cost would decrease to the extent that entities other than covered persons choose to subscribe to Rule 10c-1a data, which would allow an RNSA to spread its costs across more entities. At the same time, this estimate represents a lower bound on the estimated fees levied by an RNSA as an RNSA likely will need to recoup some of the initial fixed costs associated with administering the data.⁹⁸³

⁹⁸⁰ One commenter stated that the “the estimated costs are understood to be incomplete” in the Proposing Release because “the RNSA (*i.e.*, FINRA) is also entitled to recover its costs from market participants who report securities lending transactions to the RNSA.” See CSFME Letter 1, at 4. However, this possibility was acknowledged by the Commission in the Proposing Release. See Proposing Release, 86 FR 69843, stating that “the estimated 409 reporting entities would also be required to pay reporting fees to the RNSA.”

⁹⁸¹ See, *e.g.*, Bloomberg L.P. Letter, at 4; HMA Letter, at 11.

⁹⁸² RNSA rule filings are subject to notice, comment and Commission review pursuant to section 19(b) of the Exchange Act and Rule 19b-4. An RNSA must demonstrate that proposed fees satisfy the Exchange Act requirements under section 15A(b), including that such proposed fees equitably allocate reasonable dues, fees and other charges among members and issuers and other persons using the SRO’s facilities. Further, such proposed fees cannot not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

⁹⁸³ The numbers provided in this section are estimates. To the extent the Commission has over- or underestimated burden hours or hourly costs, or the number of entities subject to each reporting requirement, the actual compliance costs may be higher or lower. However, the Commission views

One commenter stated that, by considering proposed Rule 10c-1 “in isolation” from other recent Commission rules, “the Commission is not providing a comprehensive picture of the compliance and other direct costs,” and that “these costs will aggregate and will burden market participants with higher costs when considered jointly.”⁹⁸⁴ But, consistent with its long-standing practice, the Commission’s economic analysis in each adopting release considers the incremental benefits and costs for the specific rule—that is, the benefits and costs stemming from that rule compared to the baseline. In doing so, the Commission acknowledges that in some cases resource limitations can lead to higher compliance costs when the compliance period of the rule being considered overlaps with the compliance period of other rules. In determining compliance periods, the Commission considers the benefits of the rules as well as the costs of delayed compliance periods and potential overlapping compliance periods.

We considered here whether recently adopted rules identified by commenters that affect market participants subject to the final rule⁹⁸⁵ have overlapping implementation timeframes with the final rule. We found, however, that the compliance dates for these rules do not

the estimates provided herein as best estimates based on the information currently available to the Commission.

⁹⁸⁴ See Overdahl Letter, at 15. Another commenter stated that because “[t]he resources of market participants are not infinite,” that commenter “believe[s] that unnecessary and aggressively timed regulatory changes will impact costs, complexity, competition and the ability of smaller market participants to enter into or remain in the markets.” ICI Letter 2, at 12. See also AIMA Letter 3, at 4 (recommending that rule adoptions “should be appropriately sequenced and their compliance periods appropriately aligned” so that “market participants” will not face “unnecessary costs”); Citadel Letter, at 10 (noting the Commission “has not assessed the cumulative impact of its myriad of recent position and activity disclosure-related proposals on market participants”).

⁹⁸⁵ Specifically, we considered the Amendments to Form N-PX Adoption, the Settlement Cycle Adoption, the May 2023 SEC Form PF Amending Release, and the Beneficial Ownership Amending Release. We expect that few if any entities subject to the May 2023 SEC Form PF Amending Release will face direct reporting obligations, and thus incur compliance costs, under final Rule 10c-1a. Form PF is required for private fund advisers. See *supra* Part IX.B. We do not expect private fund advisers to face direct implementation costs under final Rule 10c-1a, although we acknowledge that their lending programs and/or broker-dealers may pass along compliance costs to them. Entities subject to the Amendments to Form N-PX Adoption, the Settlement Cycle Adoption, or the Beneficial Ownership Amending Release could have reporting obligations under final Rule 10c-1a; however we anticipate no or little overlap between the implementation periods for those rules and this one.

⁹⁷⁶ See, *e.g.*, ICI Letter 1, at 10 (stating that “fund shareholders will absorb part of the substantial costs of Rule 10c-1 . . . these costs ultimately will come directly out of the pockets of beneficial owners, including funds and their shareholders, to the detriment of their long-term interests”). See also State Street Letter, at 5 (stating that the rule “approach has the practical effect of imposing all systems-related cost for the new reporting mandate solely on agent lenders and their clients (*i.e.*, institutional investors, such as pension plans and mutual funds)”).

⁹⁷⁷ See *supra* Part IX.B.4 for a description of the market for lending services.

⁹⁷⁸ This possibility is discussed further in *infra* Part IX.C.4.

⁹⁷⁹ See estimates in *infra* note 993.

significantly overlap with the expected industry compliance dates of final Rule 10c-1a,⁹⁸⁶ and therefore we do not expect significant effects on compliance costs arising from overlapping compliance periods. We acknowledge that to the extent such overlap occurs, there could be costs, but we do not expect these to be significant costs.⁹⁸⁷

The Commission does not believe that loan participants will incur costs associated with obtaining and renewing LEIs, because only those loan participants that have non-lapsed LEIs will be required to report them. One commenter stated that borrowers should be required to obtain an LEI if they do not already have one, because the lack of an LEI would make it more challenging to identify entities.⁹⁸⁸ We agree that wider LEI adoption and reporting would likely lead to more consistent and precise identification of legal entities, which could enhance analysis of the reported information.⁹⁸⁹ We also recognize that any mandatory LEI reporting requirement for LEI-eligible loan participants would also generate additional costs for loan participants that do not currently have them, although such costs would likely be modest.⁹⁹⁰

4. Other Costs

Increase in Borrowing Costs

The Commission acknowledged in the Proposing Release that increased compliance costs could lead to some consolidation in the securities lending market and impose some costs on market participants, including potentially higher prices associated with reduced competitive pressures.⁹⁹¹ However, the Commission believes that this effect by itself is unlikely to lead to

higher overall borrowing costs due to the fact that the value of securities available to be loaned generally far exceeds the total value on loan.⁹⁹² For general collateral securities, which make up the majority of loans, a modest decline in shares available to lend would not eliminate the slack in the market and thus would not likely increase fees. For securities “on special” with less available supply relative to demand, it is possible that a decline in shares available to lend could result in higher borrowing costs for some securities. However, the Commission believes that, to the extent that it occurs, these fee increases would likely be small and have minimal downstream economic effects. This minimal effect is expected for two reasons. First, the projected compliance cost of the final rule is a relatively small fraction of the likely total lending fee revenue generated, which makes it likely that most broker-dealers and lending programs would continue to earn a positive profit margin after accounting for these costs.⁹⁹³ Second, academic research suggests that very small increases in lending fees are unlikely to result in significant downstream economic effects.⁹⁹⁴ As a result, the

Commission expects that any increase in borrowing costs that may result from consolidation among broker-dealers or lending programs would be minimal, and therefore likely offset by a simultaneous decrease in borrowing costs due to improved transparency and efficiency in the securities lending market which, as described above, are expected to concentrate among stocks that are on special.⁹⁹⁵

Lower Revenues From Securities Lending

Commenters expressed concern that, to the extent that lenders are not able to pass on compliance costs to borrowers through increased fees, the rule could lead to decreased profit from securities lending for some market participants.⁹⁹⁶ However, the Commission estimates that, as the projected compliance cost of the final rule is a relatively small fraction of the likely total lending fee revenue generated, most market participants will continue to be able to earn a positive profit margin from securities lending.⁹⁹⁷

In addition, as acknowledged in the Proposing Release, a reduction in information asymmetry may result in reduced revenue for some broker-dealers and lending programs in at least two ways.⁹⁹⁸ First, a reduction in securities lending revenues could occur

⁹⁹² See Panel A of Table 1 above in Part IX.B.3, showing that for most stocks the lending supply significantly outstrips demand with median utilization rates of approximately 12%.

⁹⁹³ Averaging the fees across all three surveyed days from Table 8 of the OFR Pilot Survey and then multiplying those fees by the average dollar value of securities lent across all three days surveyed produces an estimated \$2.7 billion in lending fees collected in 2015. These fees only account for the Wholesale market, so multiplying this estimate by two to, conservatively, account for fees collected in the Customer market yields an estimate of \$5.4 billion in lending fees collected annually. See *supra*, in Part IX.C.3, the total direct compliance costs associated with the Rule are approximately \$236 million per year. Under a conservative assumption that 100% of the direct compliance costs will be transferred to borrowers in the form of higher fees spread equally across all loans, this would increase lending fees by \$236 million/\$5.4 billion ~ 4.7%. For perspective, for U.S. equities the OFR Pilot Survey reports the average lending fee across the three days surveyed was approximately 33 basis points (bps). A 4.7% increase in this lending fee would be an increase of 1.44 basis points. For U.S. Treasury/Agency securities, the average lending fee reported in the OFR Pilot Survey was approximately 16 bps. A 4.7% increase in this lending fee would be 0.70 bps. These numbers are estimates and could be somewhat higher or lower depending on various assumptions. If lenders absorb some of the direct compliance costs, the increase in fees will be smaller; if the total size of shares on loan increases, the increase would be smaller still. If the increase becomes concentrated among just a subset of stocks, such as general collateral stocks, the increase in fees would be larger. Regardless, these calculations illustrate that the economic magnitude of an increase in lending fees is likely to be small.

⁹⁹⁴ Research shows that an exogenous shock to the lending supply affects loan prices, but that the downstream effects of these fee changes are modest

or non-identifiable. See Dixon, et al. (2021), *supra* note 746. See also Steven N. Kaplan, Tobias J. Moskowitz, & Berk A. Sensoy, *The Effects of Stock Lending on Security Prices: An Experiment*, 68 J. Fin. 1891 (2013). The loan fee effects reported in these studies tend to be multiples of the potential loan fee effects discussed in this section. Consequently, the resulting economic impact of any such fee increase would also likely be correspondingly smaller.

⁹⁹⁵ See *supra* Part IX.C.1 discussing the expected effects of the final rule on lowering borrowing costs for investors, as well as for a discussion on why the Commission expects the economic effects of the final rule to be concentrated among hard-to-borrow stocks.

⁹⁹⁶ See, e.g., State Street Letter, at 5 (stating that “there is, in our view, no practical way for agent lenders to try to recuperate even a portion of these new costs from borrowers through changes to existing market pricing conventions. In effect therefore, the costs associated with the establishment and maintenance of the reporting system for securities lending transactions envisioned by the Commission will substantially narrow, if not eliminate, existing revenue streams for agent lenders and their clients in what is already a low margin business.”); See also RMA Letter, at 8 (stating that “for structural reasons, Lending Agents are also unlikely to be able to fully pass on the costs of implementation to borrowers.”); CSFME Letter 1, at 4–5 (stating that “most beneficial owners participate in securities lending to generate marginal income. If lenders are forced to bear the final cost of compliance with Rule 10c-1, they may find their margins so thin that they can no longer justify their lending activities, pulling their liquidity from the market.”).

⁹⁹⁷ See *supra* note 993 for a description of this estimate.

⁹⁹⁸ See Proposing Release, 86 FR 69837.

⁹⁸⁶ See *supra* Part VIII on the compliance date for this final rule, and *supra* notes 726 through 728 for compliance dates of other recent rules discussed here.

⁹⁸⁷ See also *infra* Part IX.D.2 (discussing possible effects of overlap on competition).

⁹⁸⁸ See IHS Markit Letter, at 9.

⁹⁸⁹ We note in this regard the recently enacted Financial Data Transparency Act of 2022, which directs the Commission and other financial regulators to establish data standards for collections of information. See James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, 117–263, tit. LVIII, 136 Stat. 2395, 3421–39 (2022).

⁹⁹⁰ A U.S. entity can currently obtain and renew an LEI from one of eleven LEI operating units. See Global Legal Entity Identifier Foundation, *Get an LEI: Find LEI Issuing Organizations*, available at <https://www.gleif.org/en/about-lei/get-an-lei-find-lei-issuing-organizations>, last visited Aug. 29, 2023. One LEI operating unit currently discloses an initial fee of \$60 and a renewal fee of \$40. See Bloomberg LEI, *Frequently Asked Questions*, “Fees, Payments & Taxes,” Bloomberg LEI v. 1.4.71, available at <https://lei.bloomberg.com/docs/faq/what-fees-are-involved>, last visited Aug. 29, 2023.

⁹⁹¹ See Proposing Release, 86 FR 69843.

because end borrowers and beneficial owners will have more information about the state of the lending market. As a result, broker-dealers and lending programs who consistently underperform, the market may lose customers to better-performing broker-dealers and lending programs or begin offering better terms to their customers. Both possibilities represent a reduction in revenue for some broker-dealers and lending programs. It is possible that some broker-dealers and lending programs may choose to exit some or all of the market for lending services as a result of this loss of revenue.⁹⁹⁹ The loss of revenue will in part be a transfer to the end borrowers and beneficial owners that switch to better-performing lending programs and better-performing broker-dealers, as well as the better-performing lending programs and broker-dealers that attract additional customers. The Commission is not able to quantify the potential loss in revenue that could occur for underperforming broker-dealers and lending programs because the Commission is not able to quantify the extent to which these broker-dealers and lending programs' current revenues are driven by asymmetric information.¹⁰⁰⁰

Second, lending programs may also experience reduced profitability through the lower rates offered by broker-dealers to their customers.¹⁰⁰¹ If a given lending program has become skilled in cultivating relationships with broker-dealers currently willing to pay higher fees, then the increased competition that broker-dealers face as a result of the rule may lead to lower overall fees being

charged for security loans—lowering the total lending revenue produced by securities lending.¹⁰⁰² While the Commission expects that beneficial owners will benefit from the final Rule as a result of the reduction in information asymmetry,¹⁰⁰³ in some cases lower lending revenues and potentially increased costs may reduce the revenue earned by some beneficial owners.¹⁰⁰⁴ As acknowledged in the Proposing Release, this would represent a partial transfer from beneficial owners to the end borrowers who may receive better terms on average as a result of decreased information asymmetries.¹⁰⁰⁵ Ultimately, the Commission is not able to quantify the net impact of the rule on beneficial owners' lending revenues, as the Commission is not able to quantify, among other items, the extent to which end borrowers may receive better terms on average as a result of decreased information asymmetries.¹⁰⁰⁶

Lower Revenues for Securities Lending Data Vendors

Commenters expressed concern that the increase in securities lending information provided by the rule will also result in costs in the form of lost revenue for commercial securities lending data vendors, which could lead some data vendors to pare back their product offerings.¹⁰⁰⁷ The Commission acknowledges that this may occur for a number of reasons. First, commercial data vendors may pare back their offerings if demand for their products decreases because their customers switch to using Rule 10c–1a data. Second, some market participants who currently contribute data under a give-to-get model may find it less worthwhile to do so when the rule provides an alternative source of data. This effect would diminish the quality of the give-to-get data currently provided by commercial data vendors and may lead to fewer market participants being willing to purchase the data. Both of these effects could result in lower revenues. To the extent that data

vendors do pare back their product offerings and/or if the quality of their data products are diminished, then this could reduce transparency in the securities lending market in cases where these datasets contain information that is not collected and disseminated by the final rule, such as utilization rates and shares available to lend.

The Commission believes that a potential mitigating factor that may reduce or even offset the severity of this loss in revenue will be that commercial data vendors may offset some of the impact of lowered demand for their data by enhancing their related data analytics businesses using Rule 10c–1a data.¹⁰⁰⁸ Furthermore, to the extent that customers value the availability of information about securities available to lend and utilization rates, the fact that commercial data vendors will continue to have superior access to this information¹⁰⁰⁹ will likely mitigate or even offset a decrease in demand, as investors would continue to purchase commercial datasets in order to gain access to this information. The Commission is unable to quantify the potential impact of the final rule on securities lending data vendors' revenues because this would require knowledge of the baseline level of such revenues, which the Commission does not have access to and about which commenters did not provide information.

Miscellaneous Costs

Some commenters expressed concern that the rule requires the reporting of sensitive information and thus could present a risk to individuals in the case of a data breach.¹⁰¹⁰ The Commission recognizes that the final rule collects sensitive information and that the costs of a data breach could be substantial.¹⁰¹¹ These costs include, but

⁹⁹⁹ See *infra* Part IX.D.2 for a discussion of the implications of the final rule for competition between broker-dealers.

¹⁰⁰⁰ As discussed in *supra* Part IX.B.3, the observed dispersion in loan fees may give a rough upper bound on the extent to which loan fees are driven by asymmetric information, which may provide some insights into a potential loss in revenue due to the reduction of asymmetric information. For example, the results from Table 1 showed that the most that some borrowers pay above the median market loan price for loans of the same security is around 400%. However, this would be an extreme upper bound, as the vast majority of borrowers, to the extent they overpay, would overpay less than 400% above median market prices, the dispersion loan fees is likely driven by factors other than asymmetric information (see *supra* note 789), and it is not necessarily the case that the final rule will fully eliminate the impact of asymmetric information on loan fees.

¹⁰⁰¹ See, e.g., ICI Letter 1, at 10 (stating that “fund shareholders will absorb part of the substantial costs of Rule 10c–1. . . these costs ultimately will come directly out of the pockets of beneficial owners, including funds and their shareholders, to the detriment of their long-term interests.”). Furthermore, while the Commission expects the net impact of the final rule on borrowing costs to be negative, see *supra* Part IX.C.4 for a discussion of the possibility that compliance costs may increase borrowing costs.

¹⁰⁰² See *id.*

¹⁰⁰³ See *supra* Part IX.C.1 for a discussion of how a decrease in information asymmetries will benefit end borrowers and beneficial owners.

¹⁰⁰⁴ See *supra* note 976 and corresponding text for a discussion of how compliance costs may affect beneficial owners to the extent that they are passed on to them by lending programs.

¹⁰⁰⁵ See Proposing Release, 86 FR 69837. See *supra* Part IX.C.1 for a discussion of the expected effects of the final rule on reducing information asymmetries between end borrowers and broker-dealers.

¹⁰⁰⁶ See *supra* note 1000 for further discussion of a potential rough estimate of the extent to which securities lending prices are driven by asymmetric information.

¹⁰⁰⁷ See, e.g., Overdahl Letter, at 4.

¹⁰⁰⁸ See *supra* Part IX.C.1 for further discussion of the expected effects of the final rule in creating new business opportunities for providers of securities lending data analytics services.

¹⁰⁰⁹ Note, however, that the information about shares available to lend collected by commercial data vendors is likely subject to the issues discussed in *supra* Part IX.B.2, including self-selection biases and a lack of comprehensiveness.

¹⁰¹⁰ See, e.g., IIB Letter, at 11; Charles Schwab Letter, at 2.

¹⁰¹¹ See, e.g., *Proposed Rule, Cybersecurity Risk Management Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants, the Municipal Securities Rulemaking Board, National Securities Associations, National Securities Exchanges, Security-Based Swap Data Repositories, Security-Based Swap Dealers, and Transfer Agents* (“Proposed Cybersecurity Rule”), 88 FR 20212 (Apr. 5, 2023) (“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

are not limited to, the following: (1) trading losses that could occur due to the revelation of private trading strategies or economic positions which may enable identifying and trading opportunistically around such strategies, such as facilitating a short squeeze; (2) business disruptions that could occur if the data breach results in temporary system down time; (3) data breach response costs as market participants must devote resources to determining how to respond to the data breach; and (4) reputational harm to an RNSA. While the potential costs of a breach, to the extent that one occurs could be severe, RNSAs, as well as ATSS and SROs, are currently subject to existing regulations that aim to improve the resiliency and oversight of securities market technology infrastructure, such as Regulation Systems Compliance and Integrity (“Regulation SCI”).¹⁰¹² Adherence to regulations that seek to ensure the resiliency and integrity of technology systems can reduce the probability of a data breach and mitigate the costs associated with a breach, should it occur.

Some commenters expressed concern that the rule could inhibit innovation in securities lending, such as the potential adoption of blockchain technology, by diverting resources away from innovation and towards compliance.¹⁰¹³ While such diversion is possible, we expect that market participants will continue to pursue innovation that creates a competitive advantage or for which there is a market demand. One commenter suggested that innovations such as blockchain technology could obviate the need for transaction reporting systems.¹⁰¹⁴ The Commission acknowledges this possibility; however, such innovations would need to overcome the market failures described earlier in this analysis.¹⁰¹⁵

One commenter expressed concern that, “with lenders dependent upon their agents for reporting to the RNSA, the rule could make it more difficult for lenders to switch agents.”¹⁰¹⁶ To the extent that there would be any bespoke reporting services offered by lending agents, it is possible that the final rule

could increase a lender’s dependence on their lending agent, and thus marginally increase their costs of switching agents. However, the Commission expects this increased cost, to the extent it occurs, to be minimal. The Commission expects that many covered persons, including lending agents, will rely on reporting agents to provide the Rule 10c–1a information directly to an RNSA. This would generally result in an unbundling of lending and reporting services, such that an increased dependence on a lending agent for their reporting services would be unlikely. To the extent that a lender requests or requires bespoke reporting services from their lending agent, that lender could examine such a service among the package of lending services—including reporting services—that a prospective agent offers, and decide accordingly while taking into account the potentially higher costs of switching to a new lending agent.

To the extent that there are entities that would like to serve as reporting agents but are not currently registered as broker-dealers,¹⁰¹⁷ the cost of registering as a broker-dealer may be another cost associated with the final rule.¹⁰¹⁸ However, the final rule does not require any entity to serve as a reporting agent, and as such this cost would only accrue to those entities that make the business decision to become a reporting agent. It is likely that an entity that is not currently registered as a broker or dealer will only make the business decision to become a reporting agent if they believe that the cost of registering as a broker-dealer is more than offset by the revenue that they will earn as a reporting agent.

5. Reduced Benefits From Alternative Arrangements

Economically Similar Arrangements

The Commission recognizes a risk that the comprehensiveness of Rule 10c–1a data, and hence the benefits that accrue due to the comprehensive nature of the data, could be diminished to the extent that market participants choose to use arrangements that are economically similar to securities lending agreements. For example, market participants may substitute repo for securities lending agreements.¹⁰¹⁹ This substitution may occur because a fixed term cash collateralized securities loan is economically very similar to a

repo.¹⁰²⁰ While the Commission is unaware of short sales of equities currently being facilitated by repo contracts, the Commission understands that in fixed-income it is fairly common for entities wishing to short sell a bond to facilitate that transaction with a repo instead of a securities loan.

The Commission believes that this risk varies across asset classes. In equities, the Commission believes that the current risk of such migration may be minimal because of the lack of a well-developed repo market for equities. However, this risk may increase if the market for equity repos becomes more developed in the future.¹⁰²¹ Among fixed-income securities the risk is substantially greater due to a well-developed repo market for fixed-income securities and the established practice of using both securities loans and repo transactions to facilitate short sales of fixed-income securities. In all asset classes, if the final Rule 10c–1a leads to improvements in the functioning of the securities lending market, then the risk of migration may diminish to the extent that improved efficiency in the securities lending market diminishes the incentive to transfer activity to potentially less developed repo markets.

Should this substitution affect a significant volume of securities lending, certain benefits and costs discussed above may decline. The less comprehensive data could reduce the extent to which the Rule reduces any biases or gaps in the data. For instance, market participants who use the data to price securities loans will have a less accurate and potentially biased view of the market, which will limit the benefits from increased transparency.¹⁰²² Additionally, regulators using the data to determine lending market conditions at the time of, for example, a Reg SHO

¹⁰²⁰ See *supra* note 777 for evidence of this from the OFR Pilot Survey.

¹⁰²¹ The Commission views it as unlikely that the equity repo market will develop to a similar extent as the fixed income repo market in the near future. Repos are primarily used for short term finance and due to the volatility of equities relative to fixed-income securities, equities are a significantly riskier collateral type, limiting their appeal as “collateral” for short term finance.

¹⁰²² See *supra* Part IX.C.1 for a discussion of expected benefits from the final rule related to increasing the transparency of the securities lending market. One commenter states that the benefits of the rule are likely to be limited for fixed-income (see RMA Letter, at 16; see also *supra* note 950), which, as discussed in this section, is also the asset class most likely to see circumvention through the use of repo markets. As discussed in *supra* Part IX.C.1, the Commission expects the fixed-income market to benefit from the final rule. However, to the extent that this asset class sees lower overall benefits from final Rule 10c–1a, this would also serve to limit the amount to which the benefits of final Rule 10c–1a would be lowered as a result of circumvention.

million.”) (citing Jennifer Rose Hale, *The Soaring Risks of Financial Services Cybercrime: By the Numbers*, Diligent (Apr. 9, 2021).

¹⁰¹² See 79 FR 72252. See also SEC, *Spotlight on Regulation SCI*, available at <https://www.sec.gov/spotlight/regulation-sci>.

¹⁰¹³ See, e.g., RMA Letter, at 8; ISLA Letter, at 3.

¹⁰¹⁴ See, e.g., RMA Letter, at 8 (stating that “financial technologies like blockchain that could ultimately obviate the need for special transaction reporting systems and make transactions viewable on their native ledgers.”).

¹⁰¹⁵ See *supra* Part IX.A.2.

¹⁰¹⁶ See CSFME Letter 1, at 5.

¹⁰¹⁷ One commenter that is not a broker-dealer requested that the Commission allow non-broker-dealers to become reporting agents because they already have connections to firms for the reporting of securities loans. See S3 Partners Letter, at 12.

¹⁰¹⁸ See final Rule 10c–1a(ii)(A), requiring a reporting agent to be a broker or dealer.

¹⁰¹⁹ See *supra* note 776 for a definition and discussion of repo contracts.

violation will be using less precise data—limiting the benefits of Reg SHO enforcement. On the other hand, such substitution could reduce compliance costs for some. Obviously, those substituting into repo will incur lower compliance costs from the final rule, including one-time implementation costs if they replace all securities lending with repo. Further, a significant substitution will reduce the ongoing costs of an RNSA because an RNSA will not have to collect and process as many transaction reports.

Cross-Border Application

One commenter expressed concern that “an overly broad or ambiguous reach of Proposed Rule 10c–1 could reduce liquidity and place U.S. intermediaries . . . at a competitive disadvantage,” because “market participants—particularly those outside of the United States—might determine to limit or cease trading or interacting with U.S. intermediaries (or leave the U.S. markets all together) in order to prevent public disclosure of their transactions.”¹⁰²³ The Commission acknowledges some market participants could be incentivized to restructure their activities to avoid reporting. Specifically, in an effort to avoid having their lending activities fall within the reach of section 10(c), participants could relocate overseas any of their current U.S.-based conduct that constitutes effecting, accepting, or facilitating a lending transaction. However, the Commission believes that this risk is low. As pointed out by the same commenter, there are disincentives for market participants to move lending activity outside of the U.S. market, including “the depth and liquidity of the U.S. market,” as well as few incentives for “U.S. asset managers to prefer non-U.S. lenders that are themselves subject to similar reporting requirements in their home jurisdictions.”¹⁰²⁴

C. Impact on Efficiency, Competition, and Capital Formation

1. Efficiency

In the securities lending market, the availability of Rule 10c–1a data for market participants will lead to more efficient prices for securities loans.¹⁰²⁵

¹⁰²³ See *supra* note 660, citing HSBC Letter 1.

¹⁰²⁴ See *supra* note 660, citing HSBC Letter 2.

¹⁰²⁵ See *supra* Part IX.C.1 for a discussion of how an increase in transparency in the securities lending market will improve market efficiency. More efficient prices do not imply that all securities loans will have the same price. There are many factors that affect the cost of a securities loan and can lead to a range of prices for securities loans. See *supra* note 780 and corresponding text.

The reduction in asymmetric information in the market for lending programs and broker-dealers may also make those markets more efficient.¹⁰²⁶ Additionally, the Commission believes that final Rule 10c–1a may have secondary effects that will increase price efficiency in the underlying securities markets and option markets.¹⁰²⁷ Also, the increased ease with which banks and other financial institutions will be able to manage collateral and balance sheets as a result of the final rule¹⁰²⁸ could lead to increased efficiency in their functioning and in those markets in which they play a role.

2. Competition

The Commission believes that the net impact of final Rule 10c–1a on competition is difficult to predict, in that some aspects will likely increase competition and some aspects will likely reduce competition. Competition will likely be impacted in the markets for broker-dealer services, lending programs, and securities lending data vendors.

The Commission believes that one effect from the final rule’s reduction of information asymmetry between end borrowers and broker-dealers, and between beneficial owners and lending programs, will be to increase competition between broker-dealers and between lending programs.¹⁰²⁹ A reduction in information asymmetry will permit better monitoring of the performance of these entities by their respective customers, and will likely force these entities to do more to match the performance of their competitors, to

¹⁰²⁶ See *supra* Part IX.C.1 for a discussion of the final rule’s expected benefits from reducing asymmetric information in the securities lending market.

¹⁰²⁷ See *supra* Part IX.C.1 for a discussion of the final rule’s expected benefits for markets related to the securities lending market, and for a discussion of the final rule’s benefits for the underlying securities market from reducing short selling costs.

¹⁰²⁸ See *supra* Part IX.C.1 for a discussion of the final rule’s expected benefits from improved financial management for financial institutions.

¹⁰²⁹ See *supra* Part IX.C.1 for a discussion of the expected effects of the rule in terms of reducing information asymmetries between end borrowers and broker-dealers, and between beneficial owners and lending programs. See also *supra* note 855 and corresponding text. The requirement to report information once a loan modification occurs after that loan qualifies for reporting will further support the benefits of the final rule, including reduced information asymmetries and enhanced price competition, by helping to ensure a level playing field during the earlier phases of implementation. This provision will prevent lenders that have a higher number of long-term loans that did not initially qualify for final Rule 10c–1a reporting from gaining a competitive advantage by being able to see the loans of other market participants without disclosing the terms of their own loans. See *supra* Part IX.C.1.

the extent that they do not already do so. One commenter stated that the effect of the final rule on competition between broker-dealers may be attenuated by the presence of high switching costs.¹⁰³⁰ The Commission does not believe that switching costs for most market participants are high enough such that this is a likely outcome.¹⁰³¹

Furthermore, the increased ability for broker-dealers to monitor conditions in the lending market may encourage new broker-dealers to enter the market, further increasing competition for broker-dealer services. This same argument may be true for platforms that engage in securities lending. Improved data may allow for better evaluation of the performance of such platforms and may also lower barriers to entry for new platforms, thus enhancing competition among securities lending platforms.

Commenters expressed concern that competition in the securities lending market could decrease if lenders are driven out of the market because of compliance costs.¹⁰³² The Commission does not believe that compliance costs are such that this would be a likely scenario because the projected compliance costs associated with final Rule 10c–1a are likely to be a relatively small fraction of total lending fee revenues.¹⁰³³ At the same time, the reduction in asymmetric information in the securities lending market that will result from the final rule may diminish broker-dealer and lending program profits to the extent that it reduces their current information advantage over their customers.¹⁰³⁴ To this end, some broker-dealers and lending programs whose profitability primarily depends on economic inefficiencies associated with asymmetric information may exit the market for facilitating securities loans.

The Commission also recognizes that, given the significant fixed costs of implementing the systems required by the final rule for lending programs to report to an RNSA, some smaller¹⁰³⁵

¹⁰³⁰ See Citadel Letter, at 8.

¹⁰³¹ See *supra* Part IX.C.1 for a discussion of why switching costs may be limited.

¹⁰³² See, e.g., RMA Letter, at 5.

¹⁰³³ See *supra* note 993 and corresponding text for an estimate of compliance costs as a fraction of securities lending revenues.

¹⁰³⁴ See *supra* Part IX.C.4 for further discussion. This was also acknowledged by the Commission in the Proposing Release; See Proposing Release, 86 FR 69837, stating that a “reduction in information asymmetry could result in reduced revenue for some broker-dealers and lending programs.”

¹⁰³⁵ The term “smaller” in the Economic Analysis does not mean that these are “small businesses” or “small entities” for purposes of the Regulatory Flexibility Act. See *infra* Part XI. Rather, smaller is meant to convey the size of these entities in relation

lending programs and broker-dealers may consolidate or exit the lending market. The Commission believes that a mitigating factor leading to less consolidation is that the current relationship and network structure of lending programs and broker-dealers already favors larger lending programs and broker-dealers who have the resources to maintain relationships with more and larger securities lending counterparties. Consequently, the Commission believes that the market for lending programs and broker-dealer security borrowing services is already likely dominated by larger lending programs and broker-dealers that the Commission does not believe will cease operating as a result of these fixed costs.¹⁰³⁶ The Commission recognizes that smaller lending agents may have unique business models that are not currently offered by competitors, but the Commission believes a competitor could create similar business models if demand were adequate.¹⁰³⁷

The Commission believes that the dissemination of Rule 10c-1a data collected under the final rule will change the competitive landscape for securities lending data analytics services by increasing opportunities for enhancing products and services that depend on securities lending data and lowering barriers to entry concerning who can provide those services.¹⁰³⁸ Increased competition in this space will likely lead to more options for consumers of analytics services, lower prices, and improved analytics services. The new information available through an RNA as a result of the final rule will

to larger market participants engaged in securities lending transactions.

¹⁰³⁶ An additional mitigating factor in the case of broker-dealers is that the Commission views it as likely that smaller broker-dealers currently contract with larger broker-dealers to help facilitate securities loans for their customers, and thus, may be able to easily contract with these larger broker-dealers to also act as a reporting agent on their behalf. This dynamic may limit the potential for new entrants to the broker-dealer space to compete with established broker-dealers.

¹⁰³⁷ The Commission believes that this effect will be enhanced under the final rule as compared to the proposed rule. While proposed Rule 10c-1 only allowed a “bank, clearing agency, broker, or dealer” to act as a lending agent or “intermediary” (see proposed Rule 10c-1(a)(1)(i)(A)), the final rule applies the term “intermediary” more broadly to “any person that effects a covered securities loan on behalf of the lender” (see final Rule 10c-1a(j)(1)(i)). Permitting other types of persons who can act as lending agents in addition to banks, clearing agencies, brokers, or dealers will support the ability of new lending agents to enter the market, promoting competition in the market for lending services.

¹⁰³⁸ See *supra* note 853 and corresponding text. However, the Commission acknowledges that the final rule may result in some loss of revenue or product quality for some commercial data vendors. See *supra* Part IX.C.4.

produce an alternative to existing data vendors’ commercial securities lending data products. Existing data vendors may retain a competitive advantage, however, as they will likely continue to have access to information on utilization rates and shares available for lending, which are not provided by the final rule.

Some commenters expressed concern that the rule would cause lending activity to migrate overseas to avoid the reporting obligation under final Rule 10c-1a, which would make the U.S. securities lending market less competitive.¹⁰³⁹ While it is possible that some market participants could move their activity to other jurisdictions in attempt to circumvent the reporting obligation of final Rule 10c-1a, the Commission believes that it is unlikely that this would occur on a large scale. This is because the final Rule imposes a reporting obligation on any qualifying loan regardless of whether the person is located abroad or is a non-U.S. person when the transaction occurs.¹⁰⁴⁰

In addition, as stated above, some commenters requested the Commission consider interactions between the economic effects of the proposed rule and other recent Commission rules, as well as practical realities such as implementation timelines. One commenter stated that because “[t]he resources of market participants are not infinite,” that commenter “believe[s] that [u]nnecessary and aggressively timed regulatory changes will impact costs, complexity, competition and the ability of smaller market participants to enter into or remain in the markets.”¹⁰⁴¹ As discussed above, the Commission acknowledges that simultaneous compliance periods may in some cases increase costs. This may be particularly true for smaller entities with more limited compliance resources. This effect can negatively impact competition because these entities may be less able to absorb or pass on these additional costs, making it more difficult for them to remain in business or compete. However, we determined that the rules highlighted by commenters either did not impose implementation costs on the same entities as this final rule and/or had compliance dates that did not significantly overlap with the expected industry compliance dates of this final rule, and therefore we do not expect these effects on competition to be

¹⁰³⁹ See, e.g., HSBC Letter 1, at 5.

¹⁰⁴⁰ See *supra* Part VII.M for further discussion of the cross-border applicability of final Rule 10c-1a.

¹⁰⁴¹ See ICI Letter 2, at 12. See also *supra* Part IX.B.6 for a description of related comments.

significant.¹⁰⁴² We acknowledge that to the extent such overlap (in scope or timing) occurs, there could be costs which could affect competition, but we do not expect these costs to be significant.

3. Capital Formation

The Commission believes that the impact of final Rule 10c-1a will have mostly positive effects on capital formation. In particular, improved price discovery in securities markets¹⁰⁴³ and improved balance sheet management by financial institutions¹⁰⁴⁴ could facilitate improvements in the provision of capital. In addition, to the extent that the final rule reduces the costs of short selling it may facilitate more effective discovery of negative information that in turn could lead to more efficient allocation of capital.¹⁰⁴⁵ However, to the extent that the Rule increases the cost of short selling for some stocks in some situations, it could also lead to less efficient allocation of capital in these instances.¹⁰⁴⁶

D. Alternatives

1. Report Loan Sizes Without a Delay

The Commission considered an alternative requiring that an RNA disseminate loan sizes at the same time as it disseminates all other loan information (*i.e.*, without a 20-business-day delay). This alternative would increase the timeliness of securities lending information available to the public, which could improve market quality by reducing information asymmetries as well as providing additional transparency to the securities lending market. However, it could also harm market quality by providing novel information about short positions with a greater timeliness than the short selling information that is currently available.¹⁰⁴⁷

To the extent that the aggregate cost-to-borrow statistics that an RNA publicly disseminates are volume-weighted, these statistics will provide end borrowers with access to

¹⁰⁴² See also *supra* Part IX.C.3.

¹⁰⁴³ See *supra* Part IX.C.1 for further discussion of the expected benefits of the final rule from increased transparency in the securities lending market, including improvements in price discovery. See also *supra* Part IX.D.1.

¹⁰⁴⁴ See *supra* Part IX.C.1 for further discussion of the expected benefits of the final rule related to improved financial management for financial institutions.

¹⁰⁴⁵ See *supra* Part IX.C.1.

¹⁰⁴⁶ See *supra* Part IX.C.1 discussing instances where the cost of short selling could increase, consistent with the views of some commenters.

¹⁰⁴⁷ See *supra* Part IX.B.6 for further discussion of the timeliness of current sources of short selling information.

information about loan prices that incorporates information about loan sizes even prior to the public dissemination of loan sizes.¹⁰⁴⁸ However, disseminating securities loan sizes as well as modifications of securities loan sizes on the next business day after a loan is effected or modified would allow market participants to produce their own custom cost-to-borrow metrics that are most tailored to their business needs. This would allow market participants to focus on the aspects of the market that are most relevant to their business needs. This effect would increase the benefits of final Rule 10c-1a from increased transparency in the securities lending market.¹⁰⁴⁹

However, the information could also be used to estimate short selling positions with more accuracy than is possible under the final rule. A market participant wishing to gain insight into short selling sentiment could aggregate the sizes of all open loans that are associated with categories of borrowers that are likely to be short sellers.¹⁰⁵⁰ If information about these loans is available the day after the loans are effected then, given the settlement cycles for equity short sales and equity loans,¹⁰⁵¹ this would be equivalent to three business days after an equity short sale took place. These data would be considerably timelier than existing short interest data such as the FINRA data. Additionally, market participants could follow individual short positions with a three-business-day lag for equity short positions. This is a capacity that is not possible using existing data. This could be accomplished by tracking individual loans that are marked as being to a customer if the lender is a broker dealer. While the identity of the borrower would not be available to the public, market participants could discern

whether changes in short interest were due to changes across many positions or few.

This additional information that market participants could extract about short selling could enable copycat investing strategies that seek to mimic what the short sellers do. This could increase the costs of establishing a short position, thus making it costlier for short sellers to profit from their research. If the profitability of research diminishes, there is the risk that less market research could be performed and, if this occurs, there could be negative impacts on market quality and corporate monitoring.¹⁰⁵²

2. Alternative Timeframes for Reporting or Dissemination

The Commission also considered an alternative requiring different timeframes for reporting or disseminating the securities lending transaction information.

First, the Commission considered requiring covered persons to provide an RNA with Rule 10c-1a information earlier than the end of each business day on which a covered securities loan is affected.¹⁰⁵³ For example, the Commission could require covered persons to provide an RNA with information about a loan within a fixed period after the loan has been effected, such as 15 minutes. This alternative would increase the timeliness of securities lending information, potentially increasing some of the benefits of final Rule 10c-1a, such as regulators' access to this information for regulatory and surveillance use.¹⁰⁵⁴ Furthermore, if an RNA were required to make the information publicly available as soon as practicable after an, e.g., 15-minute reporting timeframe, this could increase the benefits of the final rule for transparency in the securities lending market by making the data available up to one business day sooner than under the final rule.¹⁰⁵⁵ It would, however, likely increase compliance costs to an RNA as they would be required to build out systems capable of intraday dissemination.

At the same time, several commenters pointed out numerous costs associated with more timely and frequent reporting. For example, some

commenters suggested many loan terms are not finalized until the end of the day,¹⁰⁵⁶ and so a 15 minute reporting requirement increases the risk that the data provided by the final rule could be less accurate and more prone to errors that would later have to be corrected, which would mitigate the usefulness of the final rule. This alternative would also require greater compliance costs because, as commenters also pointed out, securities lending systems would need greater adaptations to comply with a more stringent reporting time horizon.¹⁰⁵⁷

The Commission could also require covered persons to provide an RNA with Rule 10c-1a information later than the end of each business day on which a covered securities loan is effected, for example, by the end of the next business day after a covered securities loan is effected. This alternative may lead to lower compliance costs, as reporting entities would have more time to prepare the Rule 10c-1a information for reporting; however, the Commission believes that longer reporting horizons would likely not decrease the cost substantially due to the automated nature of the securities lending transactions and the need to build out systems regardless. Furthermore, a longer reporting horizon would delay the dissemination and availability of securities loan information, potentially reducing some of the benefits of the final rule.

In general, because securities loan terms cannot be disseminated until after they are reported, alternative reporting timeframes reflect different tradeoffs between the value of disseminating security loan terms close to the time that the loan is effected, and the compliance costs associated with reporting loans at shorter time horizons.

The Commission also considered alternatives requiring an RNA to distribute the collected data required in paragraph (c) at different horizons, such

¹⁰⁴⁸ If an RNA chooses to publish cost to borrow statistics that are very granular and, for example, provide separate statistics for Customer and Wholesale loans and/or according to other loan characteristics, then end borrowers would be able to benchmark their transactions to these statistics with increased accuracy. To the extent that an RNA chooses to publish less granular statistics, then the end borrower could still benchmark relative to the cost to borrow statistics provided by an RNA, but the benchmark would be noisier.

¹⁰⁴⁹ See *supra* Part IX.C.1 for further discussion of the expected benefits of the final rule from increasing the transparency of the securities lending market.

¹⁰⁵⁰ See *supra* note 895 and corresponding text for more information about, since activity in the Customer market for securities loans are tightly linked to short selling positions, the sum of loans identified in the Rule 10c-1a data as being to "a customer (if the person lending securities is a broker or dealer)" could give a strong indication of aggregate short interest.

¹⁰⁵¹ See *supra* note 738 and corresponding text.

¹⁰⁵² See *supra* Part IX.C.1 for further discussion of the potential negative consequences of revealing short sellers' strategies.

¹⁰⁵³ See final Rule 10c-1a(c).

¹⁰⁵⁴ See *supra* Part IX.C.2 for further discussion of the regulatory benefits of the final rule.

¹⁰⁵⁵ See *supra* Part IX.C.1 for further discussion of the expected benefits of the final rule from increasing transparency in the securities lending market.

¹⁰⁵⁶ See, e.g., SIFMA AMG Letter, at 4 (stating that "the securities lending market is not an 'intraday market,' as the terms are not settled at the exact time a loan 'is agreed to by the parties.' Rather, terms such as collateral type, fees, and even loan size are worked out between the parties before ultimately being settled, typically at the end of the business day"); Charles Schwab Letter, at 2 (stating that "some loans are not finalized until the end of the trading day"); BlackRock Letter, at 2 (stating that "the nature of the securities lending markets poses a number of logistical hurdles that will make intraday reporting impractical").

¹⁰⁵⁷ See, e.g., IHS Markit Letter, at 13 (stating that "most lenders will not be able to meet the 15-minute requirement without substantial technology development and cost"); Charles Schwab Letter, at 2 (stating that "the proposed 15-minute reporting window would . . . [create] a significant operational burden on firms").

as by the end of the following day.¹⁰⁵⁸ This alternative would allow an RNSA to process the data during regular business hours, potentially limiting the amount of data validation an RNSA could perform prior to distributing the data. However, this would delay market participants' abilities to benefit from Rule 10c-1a data by at least a business day. Furthermore, given the automated nature of the data, the compliance costs associated with this alternative are not likely to be significantly lower than those associated with the final rule. Alternative dissemination timeframes reflect different tradeoffs between price discovery and price efficiency benefits on one hand and harmful information leakage on the other, as well as the cost of reporting at a faster or slower horizon.

An alternative dissemination timeline could require delayed dissemination of size information about large loans (*i.e.*, loans larger than a certain size threshold) while disseminating size information about smaller loans the next business day. This alternative would provide more information to the market than the final rule because it would not mask the size of smaller loans, and thus could enhance the final rule's benefits due to increased transparency.¹⁰⁵⁹ However, this alternative would increase the amount of novel information about short positions that the market could learn from Rule 10c-1a data, which would increase the risk of negative effects due to over-exposing short selling information.¹⁰⁶⁰ This alternative would also increase the complexity of the Rule as determinations would need to be made regarding the optimal threshold size level, as well as how to handle loan modifications that could potentially move a given loan size above or below the given threshold.

3. Only Require Dissemination of Aggregate or Wholesale Statistics

The Commission also considered an alternative whereby an RNSA would produce only aggregate statistics and no transaction-by-transaction reports.¹⁰⁶¹

Specifically, an RNSA could aggregate transaction data elements and produce various aggregated statistics at the end of the business day following the date that the loans were effectuated, without disseminating the raw transaction-by-transaction data.

This alternative would not change the reporting requirements for covered persons relative to the final rule and thus would have the same initial and ongoing compliance costs as the final rule for covered persons. This alternative would be somewhat less costly to implement for an RNSA than the final rule, which requires an RNSA to produce daily aggregate information,¹⁰⁶² similar to this alternative, but also requires dissemination of loan-by-loan information, which this alternative would not do.

This alternative would increase the amount of information available to the public relative to the baseline and thus would mitigate information asymmetries relative to the baseline. Aggregate statistics would also make it more difficult for market participants to use the data to discern information about short positions, which would reduce the risk of exposing short selling strategies relative to the adopted Rule.¹⁰⁶³

However, only having daily aggregate data would not provide the same transparency benefits as final Rule 10c-1a. Without comprehensive transaction data, it would be more difficult for market participants to study and understand pricing dynamics in the securities lending market. The alternative would also make it more difficult for end investors to determine if the terms that their broker-dealer offers are consistent with current market terms for similar loans, rendering it more difficult for investors to evaluate the performance of their broker-dealer. Similarly, without transaction data, beneficial owners would be hampered in their ability to determine whether the terms for loans secured by their lending agents were consistent with market conditions for loans with similar characteristics, rendering it more difficult for beneficial owners to evaluate the performance of their lending agents. A lack of publicly disseminated transaction data may also hinder broker-dealers from determining if the terms being offered by a lending agent for a loan are consistent with market conditions for similar loans.

These effects would reduce the benefits of final rule for improved competition.

The diminished transparency of this alternative relative to the final rule may also lead to less improvement in the efficiency of the securities lending market, leading to fewer benefits for traders in the form of increased trading profits.¹⁰⁶⁴ This alternative would also hamper research into the securities lending market by some market participants and academics, relative to the final rule, by preventing researchers from performing analysis using individual transactions.

The Commission also considered several alternatives related to the applicability of the rule to market for Customer loans, including an alternative in which Customers loan are excluded from reporting requirements, and an alternative in which Customer loans are reported, but not disseminated to the public. One commenter stated that "the Commission should limit the Proposal to the 'wholesale' market," because including Customer market loans in a securities lending reporting regime would be akin to a "transaction-by-transaction short sale public reporting regime."¹⁰⁶⁵

The Commission believes that limiting the applicability of the rule for Customer loans would significantly limit the benefits of the rule for increasing transparency in the securities lending market. In particular, end borrowers would not benefit from a reduction in their information disadvantage vis-à-vis their broker-dealers in the securities lending market.¹⁰⁶⁶ As a result, the effects of the rule on competition between broker-dealers, which would be expected to lower borrowing costs for hard-to-borrow stocks and thus reduce costs for short sellers, would not materialize.¹⁰⁶⁷ Market participants would also not be able to use Rule 10c-1a data to compare trends in both the Wholesale and

¹⁰⁶⁴ See *supra* Part IX.C.1 for a discussion of how improvement in securities lending information could lead to increased profits for some investors by increasing their certainty regarding investment strategies that require borrowing securities.

¹⁰⁶⁵ See Citadel Letter, at 11. The commenter refers to Short Sale Linked Activity, by which the commenter stated that they are referring to what the Proposing Release calls the "retail market" (see Citadel Letter, at 1). The Economic Analysis uses the terms Wholesale market and Customer market to make clear the implications of the final rule for the different segments of the market. See also MFA Letter 3, at 4 (stating that "it is critical that the Proposed Securities Lending Rules be revised to capture only wholesale securities lending activity").

¹⁰⁶⁶ See *supra* Part IX.C.1 for a discussion of the expected effects of the final rule on reducing information asymmetry.

¹⁰⁶⁷ See *supra* Part IX.C.1 for a discussion of the expected effects of the final rule on short sellers.

¹⁰⁵⁸ The final rule requires an RNSA to disseminate transaction-level information (apart from loan size) as soon as practicable, but no later than the morning of the business day after the covered securities loan is affected. See final Rule 10c-1a(g). For a discussion of an alternative in which loan size information is released without a delay, see *supra* Part IX.E.1.

¹⁰⁵⁹ See *supra* Part IX.C.1.

¹⁰⁶⁰ See *supra* Part IX.C.1 for further discussion of the potential negative consequences of revealing short sellers' information.

¹⁰⁶¹ This was suggested by some commenters. See, e.g., RMA Letter, at 4; SIFMA Letter 1, at 3-4; MFA Letter 3, at 4-5.

¹⁰⁶² See final Rule 10c-1a(g)(5).

¹⁰⁶³ See *supra* Part IX.C.1 for further discussion of the potential negative consequences of revealing short sellers' information.

Customer markets simultaneously.¹⁰⁶⁸ Furthermore, while the Commission acknowledges that information about Customers loans can correspond closely to information about short positions,¹⁰⁶⁹ the Commission believes that concerns about whether the dissemination of Customer loan information will harm short sellers are largely addressed by requiring that an RNSA delay public disclosure of the loan amount by 20 business days. This modification should significantly reduce the novelty of the information disseminated under the final rule regarding short sellers' positions, such that it is less timely than pre-existing sources of short selling transparency, such as FINRA's bimonthly short interest data.¹⁰⁷⁰

Second, excluding Customer loans from reporting requirements altogether would not only reduce the benefits of the rule from increased transparency as described above, but would also reduce the regulatory benefits of the rule, as the Commission and FINRA would no longer benefit from an improved ability to use Rule 10c–1a data for surveillance and enforcement, market reconstruction, and market research in Customer segment of the lending market.¹⁰⁷¹ Furthermore, it is unclear whether the costs of the rule for short sellers would be significantly reduced by the exclusion of Customer loans from reporting requirements compared to excluding them from dissemination, as the commenter's concerns related to the inclusion of Customer loans stem primarily from the public dissemination of this information.

4. Require Reporting of Shares Available to Lend and Shares on Loan

The Commission also considered an alternative requiring market participants to report shares available to lend and shares on loan to an RNSA. An RNSA would then produce aggregate statistics by security regarding shares available to loan and shares on loan. This alternative would increase the amount of information available to market participants regarding conditions in the securities lending market, which would increase the benefits of the rule from

increased transparency.¹⁰⁷² It could also benefit consumers of Rule 10c–1a data by lowering barriers to entry for firms to start providing securities lending analytics services, as they could incorporate shares available into their analysis without purchasing data from the current commercial data vendors. This could lead to benefits in the form of increased competition for securities lending analytics.¹⁰⁷³

However, commenters opposed the inclusion of shares available on the grounds that any measure of shares available would be inherently noisy.¹⁰⁷⁴ The Commission does not believe that requiring reporting entities to report shares available would result in a measure that is inherently noisier than the current estimates provided by commercial data vendors, which research shows can be informative.¹⁰⁷⁵ As such a measure would be more comprehensive than existing estimates, it would likely be more informative than existing data estimates. However, the Commission acknowledges that any estimate of shares available to lend would be noisy for numerous reasons, including the reasons mentioned by commenters,¹⁰⁷⁶ and that this noise limits the benefits of requiring the reporting of information about shares available to lend.

This alternative would also increase the costs to the commercial data vendors that currently offer utilization rate and shares available information because it would provide market participants with alternate access to such information. This effect could

lower demand for the data currently provided by commercial data vendors, leading to a loss of business for these data vendors.¹⁰⁷⁷

Regarding shares on loan information, the Commission believes that the benefit of requiring covered person to report aggregate information about shares on loan would also be limited, as this information is rendered somewhat redundant by the requirement that an RNSA disseminate aggregated transaction activity information for each security.¹⁰⁷⁸ At the same time, requiring covered persons to report aggregate information about both shares on loan and shares available would increase the compliance costs relative to the final rule by requiring an additional report (*i.e.*, a report on aggregated securities lending activities) to be reported to an RNSA in addition to the transaction-by-transaction securities lending data.

5. Restrict Covered Persons to Broker-Dealers

The Commission also considered an alternative requiring only broker-dealers, rather than any person that qualifies as a "covered person" under the definition in the rule,¹⁰⁷⁹ to report securities lending transactions to an RNSA. The Commission believes that this alternative would be less costly overall than final Rule 10c–1a. Specifically, covered persons that are not broker-dealers would not incur any of the costs of reporting. As a result, fewer entities would incur costs. Further, most broker-dealers already have connections to FINRA, the only RNSA, so the overall implementation costs associated with connecting to an RNSA for the purposes of reporting would be lower.

In addition, because most broker-dealers currently have relationships with FINRA, the Commission preliminarily believes that this alternative could be implemented sooner, allowing the market and market participants to benefit from an increase securities lending transparency sooner.¹⁰⁸⁰

However, under this alternative, Rule 10c–1a data would not provide a comprehensive view into the securities lending market. Even though broker-dealer activity makes up a significant

¹⁰⁶⁸ See *supra* Part IX.C.1 for a discussion of this benefit.

¹⁰⁶⁹ See *supra* Part IX.B.6 for further discussion of why the market for Customer loans is tightly linked to short selling positions.

¹⁰⁷⁰ See *supra* Part IX.B.6 for a discussion of the FINRA bimonthly short interest data which are made available for publication on the seventh business day after the reporting settlement dates, which occur bimonthly.

¹⁰⁷¹ See *supra* Part IX.C.2 for a discussion of the expected regulatory benefits associated with final Rule 10c–1a.

¹⁰⁷² See *supra* Part IX.C.1 for further discussion of the expected effects of the final rule on increase transparency in the securities lending market.

¹⁰⁷³ See *supra* Part IX.D.2 for further discussion of the final rule's expected effects on competition between securities lending data analytics firms.

¹⁰⁷⁴ See, *e.g.*, AIMA Letter 1, at 2; SIFMA AMG Letter, at 8, 11; CASLA Letter, at 2; MFA Letter 3, at 6–7.

¹⁰⁷⁵ See, *e.g.*, Dixon, et al. (2021) *supra* note 746.

¹⁰⁷⁶ See, *e.g.*, SBAI Letter, at 2 (stating that "funds managed under 1940 Act regulations have restrictions on their approach to securities lending (*e.g.*, limit on lending: A fund may not have on loan at any time securities representing more than one-third of the fund's total value), thereby not allowing an accurate calculation of 'securities available to lend' on an individual security basis"); MFA Letter 1, at 10 (stating that "while a lender's portfolio holdings may be eligible securities for lending, they are unlikely to be 'available to lend' at all times."); See also SIFMA Letter 1, at 15 (stating that "the number of securities in accounts of customers who have agreed to participate in a fully paid lending program and margin customer accounts will lead to a gross over-inflation of the number of securities available to lend. Customer margin inventory can be impacted due to volatility of customers (*e.g.*, market makers and hedge funds) who often move positions in and out quickly. Customer balances often change and can also swing between debits/credits, resulting in positions being locked/released.").

¹⁰⁷⁷ See *supra* Part IX.C.4 for further discussion of the final rule's expected effects on securities lending data vendors' revenues.

¹⁰⁷⁸ See final Rule 10c–1a(g)(5).

¹⁰⁷⁹ See final Rule 10c–1a(j)(1) for a definition of "covered person."

¹⁰⁸⁰ See *supra* Part IX.C.1 for further discussion of the expected benefits from the final rule stemming from increased transparency in the securities lending market.

percentage of securities lending transactions in the Customer market, the alternative would exclude market participants such as lending programs that are significant players in the securities lending market, particularly in the Wholesale market.¹⁰⁸¹ Thus, the alternative would obscure a large swath of the Wholesale market, making it more difficult for lending institutions, for example, to benefit from securities lending transparency because the included data would provide a less relevant benchmark.

Requiring only broker-dealers to report data could also create a competitive advantage for non-broker-dealer entities that engage in securities lending. Such entities would not be required to report their transactions and thus would have lower costs. They would also be in a position to attract business from borrowers or beneficial owners seeking to keep their transactions out of the public view, further tilting the competitive landscape in their favor. This could create an uneven playing field for entities engaged in the securities lending market, diminishing the benefits of the rule for competition and transparency.

6. Expand Reporting Agents Beyond Broker-Dealers and Clearing Agencies

The Commission also considered an alternative expanding who can act as a reporting agent to entities other than broker-dealers and clearing agencies.¹⁰⁸² Commenters expressed concern that restricting reporting agents to only broker-dealers would result in conflicts of interest between broker-dealers acting as reporting agents on the one hand, and beneficial owners and lenders who transact with these broker-dealers in the primary market on the other.¹⁰⁸³ Since information about an entities' lending activities is likely to correspond closely to that entities' inventory levels, it is possible that such a risk of information leakage may be a significant cost for some lenders and lending agents who are "highly concerned about visibility into inventory levels."¹⁰⁸⁴

Furthermore, expanding reporting agents to entities other than broker-dealers and clearing agencies would serve to increase the number of entities that would compete to provide lenders

and lending agents with reporting services. Thus, expanding the eligibility of reporting agents would serve to promote more competition in this market,¹⁰⁸⁵ potentially leading to lower fees for lenders and lending agents that would rely on these reporting agents for these services.

However, the Commissions believes that expanding reporting agent eligibility beyond broker-dealers and clearing agencies would increase the costs associated with the rule. The Commission's oversight over reporting agents that are neither broker-dealers nor clearing agencies could be limited, which could shift the costs of monitoring reporting agents for accuracy and compliance onto the lenders and lending agents that would hire them. This would serve to increase covered persons' ongoing costs.

In addition, to the extent that covered persons are concerned about contracting with broker-dealers as reporting agents because of potential conflicts of interest, to the extent that there are clearing agencies that would act as reporting agents, these covered persons could contract with these entities.

Furthermore, covered persons are not restricted from contracting privately to use third-party vendors to assist in reporting.¹⁰⁸⁶ Therefore, those market participants that are concerned about revealing sensitive inventory information to broker-dealers but would still benefit from reporting assistance could privately contract with third-party vendors. Since covered persons could not rely on third-party vendors to fulfill their regulatory obligations,¹⁰⁸⁷ contracting with a third-party vendor for assistance in reporting may require covered persons to incur some amount of monitoring costs; however, this option should provide covered persons with additional flexibility and a way to potentially mitigate reporting costs.¹⁰⁸⁸

7. Publicly Releasing the Information in 10c-1a(e)

The Commission also considered an alternative requiring public disclosure of the information in Rule 10c-1a(e), namely available identifiers for each

party to the transaction, whether the security is loaned from a broker's or dealer's securities inventory to a customer of such broker or dealer, and if known whether the loan is being used to close out a fail to deliver.

Information on who the parties to the transaction are and whether a broker or dealer is lending to its own customer could refine the context around the other data elements in Rule 10c-1a that are public. Such refinement would be likely to alter trading strategies, which could have both positive and negative effects on market quality. For example, this information could allow the market to identify the positions of large short sellers. Empirical studies support the idea that short sellers are informed, suggesting that additional information about short selling could help investors better value securities.¹⁰⁸⁹ Professional traders might seek to profit by developing trading strategies based on signals from the identities of those borrowing securities, particularly those borrowing a high volume. In addition, the information could be used to reduce the search costs in the securities lending market.

However, the information on whether the security loan is being used to close out a fail to deliver may be of little use to anyone other than regulators. At this time, the Commission is unaware of potential non-regulatory uses of such information that would be beneficial to the market.

The alternative would result in higher costs to an RNA, to those who access the data, and to participants in the securities lending market. An RNA would incur higher costs to release the greater volume of data and those who access the data would incur higher costs to import and process the data. Trading strategies incorporating the identities of borrowers and lenders could negatively impact those borrowers and lenders in ways that could ultimately degrade price efficiency. In particular, identifying large short sellers could facilitate "copycat strategies" that seek to profit by copying the activity of others believed to have better information or by trading ahead of them.¹⁰⁹⁰ If it facilitates such trading

¹⁰⁸¹ See, e.g., Table 3 in the OFR Pilot Survey, which estimates that loans from broker-dealers only account for around 1.57% of shares on loan and around 1.33% of shares available to loan in the Wholesale market.

¹⁰⁸² See final Rule 10c-1a(j)(4) for a definition of "reporting agent."

¹⁰⁸³ See, e.g., IHS Markit Letter, at 2, 10-11; S3 Partners Letter, at 12.

¹⁰⁸⁴ See IHS Markit Letter, at 2.

¹⁰⁸⁵ This was supported by commenters. See, e.g., HMA Letter, at 8 (stating that "having separate reporting agents who are not brokers may enable lenders to more freely shop amongst multiple, competing lending agents").

¹⁰⁸⁶ Note that, while covered persons can use third party vendors to help prepare their reports, such vendors would not be reporting agents under final Rule 10c-1a. See *supra* Part VII.B.2.

¹⁰⁸⁷ See *id.*

¹⁰⁸⁸ See *supra* Part IX.C.3 for a further discussion about how contracting with third party vendors may allow covered persons to lower their compliance costs.

¹⁰⁸⁹ See, e.g., Joseph E. Engleberg, et al., *How are Shorts Informed?: Short Sellers, News, and Information Processing*, 105 J. Fin. Econ. 260 (2012); David E. Rapach, et al., *Short Interest and Aggregate Stock Returns*, 121 J. Fin. Econ. 46 (2016). However, one academic study finds that prices react to short sales even when short sales are not transparent to the market. See Michael J. Aitken, et al., *Short Sales Are Almost Instantaneously Bad News: Evidence from the Australian Stock Exchange*, 53 J. Fin. 2205 (1998).

¹⁰⁹⁰ See SEC Division of Economic Research and Analysis (DERA), *Short Sale Position and*

strategies, releasing the identities of short sellers could act as a constraint on fundamental short selling, reducing the incentives to conduct fundamental research.¹⁰⁹¹ Less fundamental research could potentially result in over- or underpricing, because prices would not incorporate information short sellers would have otherwise collected and traded on. Revealing the identities of participants and when they are borrowing to close failures to deliver in the securities lending market could also result in pressure on lenders to recall loans or negative campaigns against short sellers.¹⁰⁹²

8. Additional Information in the Reported or Disseminated Information

The Commission also considered alternatives requiring additional data fields to be reported and requiring an RNSA to compute derived fields for public dissemination.

For example, the Commission could require entities to report in their lending transactions whether a given loan was transacted on their own behalf, or on behalf of a customer, *i.e.*, whether the loan was transacted on a principal or agent basis. This alternative would allow FINRA and the Commission to oversee compliance with various regulations. These data could allow for the review of transactions that occur by an entity on a principal and agent basis to look for systematically different terms between the two different types of transactions by the same broker-dealer. Such differences may flag to regulators that broker-dealers are not fulfilling their obligations and may be in violation of existing rules. Requiring such data would add complexity and additional cost to the rule. However, these costs may be minimal for broker-dealers, who are FINRA members, as the Commission understands that FINRA members already collect much of this information.¹⁰⁹³ The Commission is unaware of any regulation or rule requiring non-FINRA members to collect this information, and this alternative may significantly increase costs for non-FINRA members who would be required to build out systems to collect and report such information.

As discussed in the Proposing Release,¹⁰⁹⁴ the Commission considered including in Rule 10c–1a(e) information on whether, if the lender is a broker or dealer, the securities are borrowed from customers who have agreed to participate in fully paid lending programs or from securities owned in its margin customers' accounts. Such information could help protect investors by improving the efficiency of surveillance of, for example, compliance with Rule 15c3–3(b)(3) related to providing the lender collateral to secure the loans of securities when broker-dealers lend shares from fully paid or excess margin securities from customers. However, the Commission has since come to understand that it may not be feasible for broker-dealers to identify which customers' shares are being loaned.¹⁰⁹⁵

9. Only Allow an RNSA To Charge Fees to Data Reporters

The Commission also considered an alternative that would allow an RNSA to charge fees to reporters of Rule 10c–1a information, but not to subscribers to access the securities lending data. The effect on costs of this alternative would be that any fees levied by an RNSA to help pay for costs to collect and disseminate the data would shift onto covered persons providing data to an RNSA. The Commission believes that many of the market participants providing data to an RNSA under the final rule will also be consumers of the data. If all 361 entities providing data were the only entities to subscribe to the data, for these market participants it is unclear how much difference this shift in fees would make. However, to the extent that more market participants subscribe to the data, prohibiting an RNSA from this additional source of revenue would likely result in higher reporting fees than under the final rule.

This alternative would potentially increase the benefits of the final rule for increased transparency, in that providing access to Rule 10c–1a data for free may increase the number of market participants who access it.¹⁰⁹⁶ However, TRACE has been successful in mitigating inefficiencies in the corporate bond market despite the fact that it is

only available for fee.¹⁰⁹⁷ Furthermore, the Commission expects that most of the entities likely in a position to affect the securities lending market or to use information from the securities lending market to affect other markets would subscribe to the data regardless of whether there was a cost to subscribing. Therefore, the Commission does not believe that disallowing an RNSA from charging fees to data subscribers would result in significant additional benefits to the securities lending market relative to the final rule.

10. Longer Holding Period Requirement

The Commission also considered an alternative requiring an RNSA to retain and make publicly available the data for a period longer than the 5 years specified (*e.g.*, 10 or 20 years). This alternative would ensure that the data are available to regulators and market participants at longer horizons. For instance, if regulators or market participants wanted to evaluate how the lending market reacts to different market events, such as across the business cycle, then five years of data may not be sufficient. The average business cycle is 3–5 years, and so to study the dynamics of the lending market across the business cycle would require at least 10 years, if not more, of data. Additionally, because there is likely persistence in conditions in the securities lending market, a five-year time horizon may not be sufficient for certain statistical analyses.¹⁰⁹⁸ Improved understanding of the dynamics of the securities lending market across various market conditions may benefit both regulators and investors by providing more precise information with which to make regulatory and investment decisions—enhancing many of the benefits described above.¹⁰⁹⁹ For example, longer term data may enable superior statistical analysis by market participants of the dynamics of the securities lending market in various environments, which in turn may lead to better investment decisions and thus improved market performance. Additionally, the Commission could use longer term data to provide more precise estimates of damages in, for example Reg SHO violations or violations of

Transaction Reporting (May 5, 2014), available at <https://www.sec.gov/files/short-sale-position-and-transaction-reporting%2C0.pdf>, at 52–53.

¹⁰⁹¹ See Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 Am. Econ. Rev. 393 (1980), available at <https://ssrn.com/abstract=228054> (retrieved from SSRN Elsevier database).

¹⁰⁹² See *supra* Part IX.C.1 for further discussion of the potential negative consequences of revealing short sellers' information.

¹⁰⁹³ See, *e.g.*, FINRA Rule 4314.

¹⁰⁹⁴ See Proposing Release, 86 FR 69846.

¹⁰⁹⁵ See, *e.g.*, James J. Angel Letter, at 3 (stating that shares available for lending from a brokerage firm's customers' margin accounts are in “fungible bulk” and that “the firm may not even have identified which customer's shares are being loaned out when it makes its delivery” to the DTC to settle its net delivery obligation).

¹⁰⁹⁶ See *supra* Part IX.C.1 for further discussion of the expected benefits from the final rule on increased transparency in the securities lending market.

¹⁰⁹⁷ See *supra* Part IX.C.1 for a discussion of empirical evidence that the introduction of TRACE improved efficiencies in the corporate bond market.

¹⁰⁹⁸ Persistence in conditions implies that observations are not independent. When this is the case even relatively large datasets may lack statistical power for some modeling applications, such as factor models. The solution in such cases is to significantly increase the sample size.

¹⁰⁹⁹ See *supra* Parts IX.C.1 and IX.C.2.

Exchange Act Rule 15c3–3 (Customer Protection Rule), to calculate disgorgement.

The Commission believes that the alternative would impose additional costs on an RNSA not required by the final rule in terms of storing and maintaining historical data. However, since the final rule already requires an RNSA to build systems to collect and disseminate five years of data, these costs would likely be relatively small because the Commission understands that the cost of storing data is relatively small compared to the cost of producing and maintaining the systems needed to collect, process, and disseminate the data.

While the final rule allows FINRA to destroy the data after five years, the Commission believes that it is unlikely that FINRA would do so. This is because the cost of retaining the data is likely relatively small and the data may have commercial value. For instance, an RNSA could levy additional fees for access to historical data. If this is the case, and an RNSA chooses to keep the historical data under the final rule, then the cost difference to an RNSA between the final rule and this alternative would likely be minimal given that this alternative would require an RNSA to comply with a requirement that they may already choose to do on their own.

11. Longer Implementation Period

The Commission considered alternatives that would allow for a longer implementation period. Several commenters requested implementation periods of 18 or 24 months,¹¹⁰⁰ which may be longer than the final rule's implementation period.¹¹⁰¹ Some commenters requested a phased-in approach to implementation, for example, by first only requiring information to be reported for certain types of securities, or initially delaying the public dissemination of data.¹¹⁰² The Commission recognizes that a longer implementation period would give reporting entities additional time and flexibility while building out the systems necessary to facilitating the reporting required under the final rule,

which may allow a more efficiency allocation and resources and thus reduce their implementation costs. Similarly, delaying the public dissemination of data would give an RNSA additional time and flexibility to build out systems related to dissemination, which may reduce their implementation costs.

However, the Commission also recognizes that any delay in the implementation period would also delay the realization of the benefits of final Rule 10c–1a, both those related to increased transparency in the securities lending market,¹¹⁰³ as well as the regulatory benefits.¹¹⁰⁴ Furthermore, while an initial delay in the public dissemination of the data would maintain the regulatory benefits of the rule, as regulators would still have access to the data, other market participants' access to the information would be delayed, which would delay the benefits of the Rule related to increased transparency. Thus, a choice of implementation period requires balancing the need to allow for sufficient time to build out reporting systems, on the one hand, and ensuring that market participants have timely access to Rule 10c–1a information on the other.

12. Report to the Commission Rather Than to an RNSA

The Commission also considered an alternative requiring that covered persons disclose Rule 10c–1a information directly to the Commission—for example, through EDGAR, rather than to an RNSA. Such an alternative could alter which entities incur costs and would likely increase overall costs relative to the final rule because, for example, many entities who possess reporting capabilities to an RNSA, *e.g.*, members of FINRA, would need to establish comparable reporting relationships with the Commission. In particular, many broker-dealers already have connectivity to FINRA systems that support the kind of submission process required for providing Rule 10c–1a information.¹¹⁰⁵ Establishing similar connectivity with EDGAR may require additional effort for covered persons compared to the proposal. Additionally, FINRA has expertise creating repositories similar to that called for in the final rule, suggesting

that the final rule will likely be more efficient than this alternative.

The Commission is uncertain of how some benefits of this alternative would compare to certain benefits of the final rule. Specifically, while this alternative would not alter the content of the data in the final rule, the accessibility and timeliness of the data under this alternative depend on how the Commission would develop the functionality for distributing the data. In particular, we cannot at this time assess whether the alternative would result in more or less timely or accessible data or if the differences would be meaningful. For example, data obtained from the Commission could be less accessible if the Commission could not develop functionality allowing market participants to access the data with the same ease an RNSA could provide, given an RNSA has more experience collecting and disseminating similar data (*e.g.*, TRACE). Thus, this alternative could result in significantly higher compliance costs than the final rule.

Additionally, the regulatory benefits of the alternative relative to the final rule will depend on whether the Commission chose to grant an RNSA direct access to the confidential data. If the Commission chose to do so, then the regulatory benefits of this alternative would be the same as the current proposal. If the Commission chose not to grant an RNSA access to the confidential data, then the regulatory benefits would decline significantly as many of the regulatory benefits, such as improved monitoring of broker-dealers for compliance with various legal requirements, require access to the confidential data.¹¹⁰⁶ Thus, the regulatory benefits of the rule could be severely diminished.

13. Report Through an NMS Plan

Because the nature of securities lending data is similar to the transaction data governed by the NMS data plans, such as the CT Plan,¹¹⁰⁷ the Commission considered proposing a new NMS Plan to set up a reporting and dissemination process that mirrors the CT Plan. Reporting entities could report the data to Transaction Reporting Facilities operated by competing

¹¹⁰⁰ See, *e.g.*, SIFMA Letter, at 4 (recommending “an 18-month build-out period following the RNSA’s finalization of the technical specifications for reporting”); Fidelity Letter, at 5 (recommending a two-year implementation period).

¹¹⁰¹ See final Rule 10c–1a(f) and *supra* Part VIII for additional discussion of the implementation timeline.

¹¹⁰² See, *e.g.*, Chamber of Commerce Letter, at 4 (recommending at “phased implementation by asset class”) and SIFMA Letter 1, at 4 (recommending “a staged reporting regime to allow regulators sufficient time to analyze collected data before public dissemination of any information”).

¹¹⁰³ See *supra* Part IX.C.1 for a discussion of the benefit of the final rule related to increased transparency in the securities lending market.

¹¹⁰⁴ See *supra* Part IV.C.2 for a discussion of the regulatory benefits of the final rule.

¹¹⁰⁵ For example, FINRA’s TRACE system.

¹¹⁰⁶ See *supra* Part IX.C.2 for further discussion of the expected regulatory benefits of the final rule.

¹¹⁰⁷ *Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data*, Release No. 34–92586, 86 FR.44142 (Aug. 11, 2021), available at <https://www.sec.gov/rules/sro/nms/2021/34-92586.pdf>, appeal filed, *Nasdaq Stock Market LLC v. SEC*, No. 21–1167 (D.C. Cir. Aug. 9, 2021).

consolidators,¹¹⁰⁸ who would consolidate and distribute the data for a fee. The NMS Plan would set the fee paid by (or rebate collected by) the reporting entities to (or from) the competing consolidators for the collection of the data.¹¹⁰⁹ We did not receive public comments addressing this alternative.

This alternative is more likely than the final rule to improve the competitiveness of the market for securities lending data. Under this alternative, current data vendors, who have experience collecting and disseminating securities lending information, could compete as competing consolidators for securities lending data and have the same access to the supply of consolidated data as any other competing consolidator, including an RNSA or SRO. Conversely, as final Rule 10c-1a gives RNSAs the authority to implement rules regarding the format and manner of collection and dissemination of Rule 10c-1a data,¹¹¹⁰ the final rule may be more likely to result in a situation in which a current vendor may need to compete with an RNSA that has exclusive access to the raw Rule 10c-1a data. However, since final Rule 10c-1a does not require the reporting of shares available to lend,¹¹¹¹ to the extent that commercial data vendors' superior access to information about shares available to lend and utilization rates provides them with a competitive advantage under the final rule,¹¹¹² it may not necessarily be the case that this alternative would result in significantly better outcomes for current data vendors than the final rule. This alternative would, however, reduce the barriers to entry in the market for securities lending data because all new

entrants would have access to the same data for consolidation and distribution.

This alternative could provide for the public dissemination of securities lending transaction information without the reliance on an RNSA alone. It could also leverage the processes of the NMS Plan, but would require compliance costs by one or more SROs that chose to set up and operate a Transaction Reporting Facility. Fees for reporting transactions could offset such compliance costs. While the Commission cannot be sure how these fees under this alternative would compare to the fees under the final rule, competition between competing consolidators could result in reporting facilities that are more efficient than that of an RNSA. However, as most SROs (including all of the national securities exchanges) do not necessarily have expertise that is specific to the dissemination of securities lending data, compliance costs may be higher than those proposed under the CT Plan, for which national securities exchanges do have relevant experience as they disseminate equity market data through their proprietary data feeds. A need to coordinate between multiple SROs in order to establish an NMS Plan may also imply higher coordination costs in this alternative as compared to the final rule.

X. Paperwork Reduction Act

Certain provisions of final Rule 10c-1a contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").¹¹¹³ The hours and costs associated with complying with the final rule's reporting requirements, RNSA rule implementation requirements, publication of data requirements, and data retention requirements, as applicable, constitute PRA burdens.

In accordance with the PRA, the Commission is submitting the final rule amendments to the Office of Management and Budget ("OMB") for review.¹¹¹⁴ The Commission published a notice requesting comment on these collections of information requirements in the Proposing Release and submitted these requirements to the OMB for review in accordance with the PRA. 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 title and control number

for these collections of information are OMB Control No. 3235-0788.

The Commission received limited comments on the PRA burden estimates included in the Proposing Release.¹¹¹⁵ One commenter stated that the Commission has covered most of the impacts of the proposed rule.¹¹¹⁶ Another commenter stated that the proposed rule's reporting regime would require considerable time to develop, test, launch, and monitor.¹¹¹⁷ Comments on specific parts of the Proposing Release's PRA burden estimates are discussed below, in this part, as they relate to the particular PRA burden estimates that are the subject of those comments. The Commission acknowledges the PRA burdens that will be assumed by covered persons, reporting agents, and RNSAs in complying with the final rule, and its estimates of the collection of information for the amendments, as adopted, have been updated from the estimates included in the Proposing Release, as appropriate, with the updated estimates based on the modifications in the final rule, comments received, and more recently available data.

The information collections are necessary to remediate certain issues present in the securities lending market. As discussed above, in Part I, the Commission is adopting amendments to close securities lending data gaps and increase market efficiency. Final Rule 10c-1a is designed to increase the transparency of information available to brokers, dealers, and investors with respect to the loan or borrowing of securities. Additionally, final Rule 10c-1a is designed to provide an RNSA with data that might be used for in-depth monitoring and surveillance. Further, the data elements are designed to provide regulators with information to understand whether broker-dealers are building up risk; what strategies broker-dealers use to source securities that are lent to their customers; and what loans broker-dealers provide to their customers with fail to deliver positions.

To achieve these objectives, the Commission is adopting the requirements discussed above, in Parts VII.A through M. Under final Rule 10c-1a, certain persons are required to report information about securities loans to an RNSA. The final rule also requires that an RNSA make certain information provided to an RNSA, along with daily information pertaining to the aggregate

¹¹⁰⁸ A competing consolidator is 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." 17 CFR 242.600(b)(16).

¹¹⁰⁹ The Proposing Release described this alternative slightly differently, with the data collected by an SRO rather than by competing consolidators. On further consideration we believe the scenario described here is more likely because it is similar to the Market Data Infrastructure rule, but both scenarios would result in economic competition on data price, and we considered both versions of this alternative.

¹¹¹⁰ See *supra* Part VII.I for further discussion.

¹¹¹¹ See *supra* Part IX.C.1 for further discussion related to the fact that Rule 10c-1a data will not specifically provide information on shares available.

¹¹¹² See *supra* Part IX.D.2 for further discussion of the impact of the final rule on competition in the market for securities lending data and analytics.

¹¹¹³ 44 U.S.C. 3501 through 3521. The burdens associated with the information collection requirements are referred to as "PRA burdens."

¹¹¹⁴ See 44 U.S.C. 3507(d); 5 CFR 1320.11.

¹¹¹⁵ See, e.g., CSFME Letter 1, at 3; IHS Markit Letter, at 13.

¹¹¹⁶ IHS Markit Letter, at 13.

¹¹¹⁷ See MFA Letter 3, at 8.

transaction activity and distribution of loan rates for each reportable security, publicly available. Further, the final rule requires certain confidential information to be reported to an RNSA to enhance RNSA oversight and enforcement functions.

A. Respondents

As a preliminary matter, the opacity of the securities lending market makes estimating the number of respondents difficult. Indeed, as discussed above, an objective of Rule 10c–1a is to close the data gaps in this market.¹¹¹⁸ Despite these data gaps, the Commission has estimated the number of respondents who are a covered person, reporting agent, or RNSA.

As described in detail below, in this part, the respondents under final Rule 10c–1a are: (1) covered persons and (2) reporting agents capturing the applicable Rule 10c–1a information and providing it to an RNSA, in the format and manner required by the applicable rule(s) of such RNSA, and within the time periods specified in paragraphs (c) through (e) of the final rule, as applicable to the covered securities loan;¹¹¹⁹ and (3) an RNSA complying with the final rule's requirements to implement rules regarding the format and manner of its collection of Rule 10c–1a information, publish the information specified in final Rule 10c–1a(g) in accordance with the time frames required for such publication, and retain and make available to the Commission, or any other persons designated by the Commission, certain specified information. Given the differences in the information collections applicable to these parties, as discussed below, in this part, the discussion of burdens applicable to covered persons and reporting agents are separated from the discussion of those applicable to an RNSA.

1. Covered Persons

As discussed above, in Part VII.A, under final Rule 10c–1a(j)(1), a covered person is any intermediary other than a clearing agency when providing only the functions of a central counterparty

pursuant to Rule 17Ad–22(a)(2) of the Exchange Act or a central securities depository pursuant to Rule 17Ad–22(a)(3) of the Exchange Act; any person that agrees to a covered securities loan as a lender when an intermediary is not used unless paragraph (j)(1)(iii) of the final rule applies; or a broker or dealer when borrowing fully paid or excess margin securities pursuant to Rule 15c3–3(b)(3) of the Exchange Act.

In the Proposing Release, the Commission estimated, based on a review of Forms N–CEN filed with the Commission that identify the lending agents used by investment companies, that there would be 37 lending agent intermediaries, 3 of which would provide information directly to an RNSA and 34 of which would provide information to a reporting agent.¹¹²⁰ Using updated figures based on a review of Forms N–CEN filed with the Commission, it is estimated that there are 35 intermediaries. Of the 35 intermediaries identified, four are broker-dealers. Broker-dealers have experience providing information directly to RNSAs. The Commission estimates that those four intermediaries would provide information directly to an RNSA. The other 31 intermediaries are not broker-dealers. Therefore, the Commission estimates that they would provide information to a reporting agent rather than establish connectivity directly to an RNSA.

In the Proposing Release, the Commission estimated, based on the number of funds within investment companies that do not employ a lending agent based on a review of Forms N–CEN filed with the Commission, that there would be 278 lenders that would not employ a lending agent, 139 of which would provide information to an RNSA and 139 of which would provide information to a reporting agent.¹¹²¹ One commenter stated that this was an underestimate that accounted for only those lenders that are registered with the Commission.¹¹²² The Commission agrees with the commenter and is updating the estimate regarding unregistered entities, which comprise approximately 67 percent of the securities available for lending.¹¹²³ The unregistered portion of the securities lending market, therefore, is estimated to be 1,389 entities.¹¹²⁴ However,

according to the OFR Pilot Survey, only about 15 percent of securities loans are not intermediated and go directly to end borrowers.¹¹²⁵ Therefore, it is estimated that the number of unregistered lenders that would not use an intermediary is 208 entities.¹¹²⁶ Accordingly, the Commission estimates that there are 434 persons that agree to a covered securities loan as the lender when an intermediary is not used, based on a review of Forms N–CEN filed with the Commission showing the number of investment companies that do not employ an intermediary.¹¹²⁷ Consistent with the estimated ratio included in the Proposing Release,¹¹²⁸ of these 434 persons, the Commission estimates that 217 persons will provide information to an RNSA (including by using a third-party vendor) and that 217 persons will provide information to a reporting agent.

As discussed above, in Part VII.A, paragraph (j)(1)(iii) was added to the proposed rule to specify that, if a broker or dealer is borrowing fully paid or excess margin securities in the covered securities loan, the broker or dealer is required to provide the Rule 10c–1a information to an RNSA. Based on a review of FOCUS Reports Part II, Item 4350, it is estimated that there are 34 brokers or dealers borrowing fully paid or excess margin securities pursuant to Rule 15c3–3(b)(3) of the Exchange Act. Consistent with the estimate for the number of intermediaries who are brokers or dealers and would provide information directly to an RNSA, the Commission estimates that the 34 brokers or dealers borrowing fully paid or excess margin securities would provide information directly to an RNSA.

Consistent with the estimate included in the Proposing Release,¹¹²⁹ the Commission is not estimating that persons who agree to a covered securities loan on behalf of themselves or another person and employ a lending agent assume any PRA burdens because those persons would not be responsible for providing information to an RNSA. Accordingly, the Commission estimates that 503 covered persons¹¹³⁰ will be

¹¹¹⁸ See *supra* Part I; see also *supra* Part IX.B.2.

¹¹¹⁹ The Proposing Release separated such persons into the following categories: lending agents, reporting agents, and lenders that would not employ a lending agent. The final rule differs from the proposed rule in that different categories of persons are used to describe those who have or may have a reporting requirement, as applicable, and as discussed above, in Parts VII.A and VII.B.

Therefore, the categories of persons included herein, as well as the estimates, vary from those included in the Proposing Release. For instance, this release uses the term “intermediaries,” which is comparable to the Proposing Release’s use of the term “lending agents.”

¹¹²⁰ Proposing Release, 86 FR 69822.

¹¹²¹ Proposing Release, 86 FR 69822–23.

¹¹²² See CSFME Letter 1, at 3.

¹¹²³ See OFR Pilot Survey, Table 2, at 7. (((\$2.519 trillion + \$1.563 trillion + \$663 billion + \$1.585 trillion)/\$9.443 trillion * 100% = 67%).

¹¹²⁴ (684 registered investment companies that agree to a covered securities loan as the lender × (0.67/0.33) = 1,389 unregistered entities.

¹¹²⁵ See OFR Pilot Survey, at 7–8.

¹¹²⁶ 1,389 unregistered entities × 0.15 = 208 unregistered entities.

¹¹²⁷ 226 registered investment companies that agree to a covered securities loan as the lender when an intermediary is not used + 208 unregistered entities = 434 persons that effect a covered securities loan as the lender when an intermediary is not used.

¹¹²⁸ Proposing Release, 86 FR 69823.

¹¹²⁹ See Proposing Release, 86 FR 69822.

¹¹³⁰ 35 intermediaries + 434 persons that agree to a covered securities loan as the lender when an intermediary is not used + 34 brokers or dealers

subject to PRA burdens under final Rule 10c–1a(a). As set forth in paragraph (a)(1) of the final rule, any covered person who agrees to a covered securities loan on behalf of itself or another person is required to provide Rule 10c–1a information directly to an RNSA;¹¹³¹ however, a covered person may enter into a written agreement with a reporting agent for the reporting agent to provide information to an RNSA.¹¹³² Of the 503 covered persons, the Commission estimates that 255 are providing covered persons¹¹³³ and that 248 are non-providing covered persons.¹¹³⁴

2. Reporting Agents

Under the proposed rule, the term “reporting agent” referred specifically to certain broker-dealers. In the Proposing Release, the Commission estimated, based on the number of broker-dealers that lent securities in 2020, that there would be 94 reporting agents.¹¹³⁵ Under final Rule 10c–1a(j)(4), a reporting agent means a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under final Rule 10c–1a(a)(2). Based on the number of broker-dealers that lent securities as of December 2022 (97),¹¹³⁶ as well as the number of registered clearing agencies in 2023 (9),¹¹³⁷ it is estimated that there are 106

borrowing fully paid or excess margin securities pursuant to Rule 15c3–3(b)(3) of the Exchange Act = 503 covered persons.

¹¹³¹ For the purposes of the PRA estimates included in this release, such covered person is referred to as a “providing covered person.”

¹¹³² For the purposes of the PRA estimates included in this release, such covered person is referred to as a “non-providing covered person.”

¹¹³³ 4 broker-dealer intermediaries + 217 persons that agree to a covered securities loan as the lender when an intermediary is not used and will provide information to an RNSA + 34 brokers or dealers borrowing fully paid or excess margin securities = 255 providing covered persons.

¹¹³⁴ 31 non-broker-dealer intermediaries + 217 persons that agree to a covered securities loan as the lender when an intermediary is not used and will provide information to a reporting agent = 248 non-providing covered persons.

¹¹³⁵ Proposing Release, 86 FR 69822.

¹¹³⁶ These persons likely have experience providing RNSAs with information through other trade-reporting requirements and have experience with securities lending. It is possible that some of these broker-dealers may choose not to be a reporting agent and that other persons may choose to be a reporting agent. Given uncertainty and a lack of granular data about the current market, however, the Commission continues to believe that an estimate based on the number of broker-dealers that lent securities in is reasonable with regard to the estimate of the number of reporting agents. See Proposing Release, 86 FR 69822.

¹¹³⁷ See *Cybersecurity Risk Management Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants, the Municipal Securities Rulemaking Board, National Securities Associations, National Securities Exchanges, Security-Based Swap Data Repositories, Security-*

reporting agents¹¹³⁸ that may be subject to PRA burdens under final Rule 10c–1a(b).

3. RNSA

Under final Rule 10c–1a(j)(5), an RNSA is an association of brokers and dealers that is registered as a national securities association pursuant to section 15A of the Exchange Act. Consistent with the estimate included in the Proposing Release,¹¹³⁹ it is estimated that there is one RNSA that will be subject to PRA burdens under paragraphs (f), (g), and (h) of the final rule.

B. Collection of Information Related to Covered Persons

Final Rule 10c–1a applies to any covered person who agrees to a covered securities loan on behalf of itself or another person. Under final Rule 10c–1a(a)(1), a covered person who agrees to a covered securities loan on behalf of itself or another person shall provide to an RNSA the Rule 10c–1a information, in the format and manner required by the applicable rule(s) of such RNSA, and within the time periods specified in paragraphs (c) through (e) of the final rule. As discussed above, in this part, this type of covered person is referred to as a providing covered person. However, a covered person may rely on a reporting agent to fulfill the covered person’s reporting obligations under final Rule 10c–1a(a) if the covered person: (1) enters into a written agreement with the reporting agent that agrees to provide the Rule 10c–1a information to an RNSA on behalf of such covered person, in accordance with the requirements set forth in Rule 10c–1a(b)(1), and (2), provides the reporting agent with timely access to the Rule 10c–1a information. As discussed above, in this part, this type of covered person is referred to as a non-providing covered person.

One commenter stated that the Commission should consider that not all “reporters” have licenses to multiple instrument identifiers required for reporting, meaning that smaller firms

Based Swap Dealers, and Transfer Agents, Release No. 34–97142 (Mar. 15, 2023), 88 FR 20212 (Apr. 5, 2023), 88 FR 20294. For purposes of this PRA burden estimate, all registered clearing agencies are included as respondents who are reporting agents. A registered clearing agency may elect not to be a reporting agent, in which case the PRA burden estimate may decrease due to the decrease in number of respondents.

¹¹³⁸ 97 broker-dealers that lent securities + 9 registered clearing agencies = 106 reporting agents. This estimate differs from that included in the Proposing Release because the final rule adds registered clearing agencies to the list of persons who are eligible to be reporting agents.

¹¹³⁹ See, e.g., Proposing Release, 86 FR 69829.

would need to purchase additional data licenses and thereby add to their cost structure.¹¹⁴⁰ As discussed above, in this part, unlike providing covered persons who are estimated to have experience in providing information directly to an RNSA, persons who do not have the necessary licenses and systems are estimated to use a reporting agent as non-providing covered persons for purposes of the PRA estimates. Therefore, as non-providing covered persons, they are not estimated to acquire any additional licenses for purposes of compliance with the final rule.

The below analysis is separated into categories of persons who may provide the Rule 10c–1a information to an RNSA.¹¹⁴¹ These categories are providing covered persons and non-providing covered persons.¹¹⁴² Both providing covered persons and non-providing covered persons assume PRA burdens in complying with final Rule 10c–1a(a)(1).

1. Providing Covered Persons

In the Proposing Release, the Commission estimated that lending agents who would be required to provide Rule 10c–1 information to an RNSA and lenders who run their own securities lending program rather than employ a lending agent and provide Rule 10c–1 information directly to an RNSA would assume certain burdens related to developing and reconfiguring their current systems to capture the required Rule 10c–1 information. The Proposing Release referred to such persons as “providing lending agents” and “self-providing lenders,” respectively. The PRA burden estimates for providing lending agents and self-providing lenders are summarized in PRA Table 1 of the Proposing Release.¹¹⁴³

a. Initial Burden

Providing covered persons assume PRA burdens related to developing and

¹¹⁴⁰ See IHS Markit Letter, at 13.

¹¹⁴¹ As more fully discussed below, there would be some variation between covered persons that are in the same category. The analysis provided herein is organized so that the discussion of covered persons who share commonalities allows for a logical presentation and discussion of burdens. This structure for the analysis is consistent with that provided in the PRA included in the Proposing Release. See Proposing Release, 86 FR 69822 n.130.

¹¹⁴² As an example of variability between covered persons in the same category, the parties within the intermediary category and a person that agrees to a covered securities loan as a lender when an intermediary is not used may choose to employ a reporting agent. As discussed below, this choice will result in information collection burdens being different for covered persons within the same category.

¹¹⁴³ Proposing Release, 86 FR 69827.

reconfiguring their current systems to capture the required Rule 10c–1a information.¹¹⁴⁴ Providing covered persons, in complying with the final rule, will also be required to establish connections that will allow them to provide the information to an RNSA, which involves establishing connections with an RNSA and the persons on whose behalf they are lending securities.

As stated in the Proposing Release,¹¹⁴⁵ the PRA burden for this requirement is similar to that of establishing the appropriate systems and processes required for collection and transmission of the required information in complying with the CAT.¹¹⁴⁶ Because of the general similarity between the systems established under that rule and the systems that would be required to be established under final Rule 10c–1a. One commenter argued that the Proposing Release’s operational PRA burden estimates were inappropriate because the CAT would not capture loan modifications.¹¹⁴⁷ However, the PRA burden estimates included in the Proposing Release accounted for loan modifications.¹¹⁴⁸ Further, the Commission continues to believe that the CAT-related burden estimates serve as an appropriate basis for the PRA burdens associated with compliance with the final rule, as both the CAT and final Rule 10c–1a require the provision of trade information to a third-party information repository.¹¹⁴⁹ The systems complying with final Rule 10c–1a will be significantly less complex than those required by the CAT because the systems required for compliance with final Rule 10c–1a will need to capture less information overall.¹¹⁵⁰

¹¹⁴⁴ While providing covered persons may already track the data elements as a part of the regular course of business, capturing this information would be a new regulatory requirement.

¹¹⁴⁵ See Proposing Release, 86 FR 69823.

¹¹⁴⁶ See *Joint Industry Plan, Order Approving the National Market System Plan Governing the Consolidated Audit Trail*, Release No. 34–79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (“CAT Approval Order”), 81 FR 84921.

¹¹⁴⁷ CSFME Letter 1, at 3.

¹¹⁴⁸ See, e.g., Proposing Release, 86 FR 69822.

¹¹⁴⁹ The burden estimates included in the CAT Approval Order are based on a study of cost estimate calculations. See CAT Approval Order, 81 FR 84857.

¹¹⁵⁰ 17 CFR 242.613 (“Rule 613(c)(1)”) of the Exchange Act requires the CAT NMS Plan to provide for an accurate, time-sequenced record of certain orders beginning with the receipt or origination of an order by a broker-dealer, and further documenting the life of the order through the process of routing, modification, cancellation, and execution (in whole or in part) of the order. Final Rule 10c–1a requires the reporting of loan modification data, as applicable, but does not

The PRA burden estimates for systems development and monitoring are based on the burdens applicable to non-Order Audit Trail System (“OATS”) reporters under the CAT.¹¹⁵¹ The Commission determined to use this estimate due to the factors it considered, as part of the CAT Approval Order, in categorizing firms and estimating burdens.¹¹⁵² Non-OATS reporters were estimated to assume the least amount of burdens under the CAT NMS Plan due to the limited scope of their reportable activity.¹¹⁵³ In addition, non-OATS reporters assumed new reporting burdens in complying with the CAT, similar to how providing covered persons will assume new PRA burdens in complying with the final rule’s reporting requirements. Based on the overall size of the securities lending market and the number of providing covered persons that may provide information directly to an RNSA, the Commission believes that the volume of securities lending transactions for providing covered persons will be, on average, of a similar scope to the volume of reports estimated by non-OATS reporters under the CAT Approval Order.

In the Proposing Release, the Commission, estimated that each providing lending agent and self-providing lender would assume 3,600 PRA burden hours in developing and reconfiguring their current systems to capture the required data elements, with a total industry-wide burden of 511,200 hours.¹¹⁵⁴ One commenter stated that most lenders will not be able to meet the proposed 15 minute reporting requirement without substantial technology development and cost.¹¹⁵⁵ As discussed above, in Part VII.G.1, the change from the proposed rule to impose an end-of-day reporting requirement should help to reduce the number and frequency of reports that would otherwise be required to be provided to an RNSA throughout the day. An intraday reporting system would have required a level of automation and data processing capacity that some providing covered persons would not currently have

require that order information be provided to an RNSA. Additionally, more trades that are reportable to the CAT are executed than securities lending transactions.

¹¹⁵¹ CAT Approval Order, 81 FR 84887.

¹¹⁵² See Proposing Release, 86 FR 69823.

¹¹⁵³ The CAT Approval Order estimated that non-OATS reporters would have fewer than 350,000 reportable events each month. CAT Approval Order, 81 FR 84928.

¹¹⁵⁴ 10,800 hours assumed by providing lending agents + 500,400 hours assumed by self-providing lenders = 511,200 total hours.

¹¹⁵⁵ IHS Markit Letter, at 13.

implemented. Implementing an end-of-day reporting requirement in place of the intraday reporting requirement removes the need for those providing covered persons to acquire this level of automation and processing capacity, thus lowering at least their initial burden associated with system design and configuration. Therefore, the Commission estimates that providing covered persons each will assume 3,000 PRA burden hours in developing and reconfiguring their current systems to capture the required data elements,¹¹⁵⁶ with a total industry-wide burden of 765,000 hours.¹¹⁵⁷

b. Ongoing Annual Burden

Once a providing covered person has established the appropriate systems and processes required for the collection and provision of the Rule 10c–1a information to an RNSA,¹¹⁵⁸ it is estimated that providing covered persons will assume ongoing annual PRA burdens associated with, among other things, providing the Rule 10c–1a information to an RNSA, monitoring systems, implementing systems changes, and troubleshooting errors. The Commission estimates that the ongoing annual PRA burden will be equivalent to the ongoing burden estimated for non-OATS reporters in the CAT Approval Order, as adjusted for the change from the proposed intraday reporting requirement to the end-of-day reporting requirement, for the same reasons discussed above with respect to automation and processing. In the Proposing Release, the Commission, estimated that each providing lending agent and self-providing lender would assume 1,350 PRA burden hours associated with monitoring systems,

¹¹⁵⁶ In the CAT Approval Order, the Commission estimated that, on average, the initial burden for non-OATS reporters would be two full-time-equivalent (“FTE”) employees working for one year (2 FTEs × 1,800 working hours per year = 3,600 hours). See CAT Approval Order, 81 FR 84938. Consistent with the estimate included in the Proposing Release, the estimate used in this release is based on the CAT Approval Order’s estimate for non-OATS reports due to the similarities between the requirements applicable to providing covered persons under final Rule 10c–1a and the requirements applicable to non-OATS reporters under the CAT Approval Order. However, in light of the change from the proposed intraday reporting requirement to an end-of-day reporting requirement, as discussed above, in this paragraph, it is appropriate to adjust the estimate to the following: 2 FTEs × 150 working hours per month × 10 months = 3,000 burden hours. The figure for 150 working hours was determined by dividing 1,800 working hours by 10 months.

¹¹⁵⁷ 3,000 hours × 255 providing covered persons = 765,000 hours.

¹¹⁵⁸ Such process of providing the applicable Rule 10c–1a information to an RNSA is estimated to be highly automated, so the Commission is including the burden for doing so in this estimate.

implementing systems changes, and troubleshooting errors, with a total industry-wide burden of 191,700 hours.¹¹⁵⁹ Consistent with the Proposing Release, it is estimated that each providing covered person will assume 1,350 PRA burden hours per year,¹¹⁶⁰ leading to a total industry-wide ongoing annual burden of 344,250 hours.¹¹⁶¹

2. Non-Providing Covered Persons

In the Proposing Release, the Commission estimated that lending agents who enter into a written agreement with a reporting agent to provide information to an RNSA (“non-providing lending agents”) and lenders that directly employ a reporting agent would assume certain burdens related to developing and reconfiguring their current systems to capture the required Rule 10c–1a information, as well as in entering into an agreement with a reporting agent. The PRA burden estimates for non-providing lending agents and lenders that directly employ a reporting agent are summarized in PRA Table 1 of the Proposing Release.¹¹⁶² As discussed above, in Part IX.A.1, in light of the rule text changes from the proposed rule, the PRA burdens included in the Proposing Release with regard to such persons are estimated in this release with regard to non-providing covered persons.

Non-providing covered persons will assume distinct PRA burdens from those applicable to providing covered persons. First, non-providing covered persons will assume fewer initial and ongoing PRA burdens related to systems development and monitoring because non-providing covered persons will not, for purposes of compliance with final Rule 10c–1a(a), need to establish connectivity to an RNSA and may have flexibility with regard to the format in which it provides the Rule 10c–1a information to the reporting agent. Second, non-providing covered persons will assume the initial burden of negotiating and executing a written agreement with the reporting agent, as

required by final Rule 10c–1a(a)(2) but are not estimated to assume an ongoing annual PRA burden associated with such written agreement.

a. Systems Development and Monitoring

i. Initial Burden

Non-providing covered persons will assume the initial burden of developing and reconfiguring their current systems to capture Rule 10c–1a information. Non-providing covered persons will assume fewer PRA burdens than providing covered persons will because non-providing covered persons may have the flexibility to collaborate with a reporting agent to determine the most efficient means of establishing systems that comply with the final rule’s reporting requirements. For example, if agreed to by both the non-providing covered person and the reporting agent, the non-providing covered person could have the flexibility to provide to the reporting agent the applicable Rule 10c–1a information that does not meet the specific format requirements of an RNSA if the reporting agent is able to reformat the information once received. Given these and other potential efficiencies, the Commission estimates that a non-providing covered person will assume half of the initial burden hours that a providing covered person will assume to develop and reconfigure their current systems to capture the Rule 10c–1a information. The Commission, therefore, estimates that each non-providing covered person will assume an initial PRA burden of 1,500 hours, leading to a total industry-wide initial PRA burden for this requirement of 372,000 hours.¹¹⁶³ This method of deriving the burden hours for non-covered persons is consistent with that used in the Proposing Release with regard to non-providing lending agents and lenders that directly employ a lending agent.¹¹⁶⁴ However, as discussed above, in Part IX.B.1, the estimated number of initial burden hours assumed has been lowered in light of the change from the proposed intraday reporting requirement to an end-of-day reporting requirement.

¹¹⁶³ 1,500 hours × 248 non-providing covered persons = 372,000 hours.

¹¹⁶⁴ See Proposing Release, 86 FR 69824, 69826. The estimated PRA burden included in the Proposing Release was 1,800 hours per providing lending agent or Lender that would directly employ a reporting agent, with an initial industry-wide PRA burden of 311,400 hours. 61,200 hours for non-providing lending agents + 250,200 hours for lenders that would directly employ a reporting agent = 311,400 total hours.

ii. Ongoing Annual Burden

Once a non-providing covered person has established the necessary systems and processes for the collection and provision of the Rule 10c–1a information to the reporting agent, such person will assume ongoing annual PRA burdens associated with, among other things, providing the data to the reporting agent, monitoring systems, implementing systems changes, and troubleshooting errors.¹¹⁶⁵ As with the initial PRA burden estimate for the systems development and monitoring requirement, the ongoing annual PRA burden estimate for non-providing covered persons is estimated to be less than that for providing covered persons because non-providing covered persons may have the flexibility to collaborate with a reporting agent to determine the most efficient means of establishing systems for purposes of compliance with the final rule. For example, the reporting agent could design programs that create direct links to a non-providing covered person’s systems to facilitate the gathering of information such that ongoing intervention would not be required by the non-providing covered person. In addition, non-providing covered persons and reporting agents could negotiate terms that may allow the non-providing covered person to avoid providing certain Rule 10c–1a information that can be gleaned from another data element, such as an issuer’s legal name if a security has a valid CUSIP.

Given these and other potential efficiencies, the Commission estimates that a non-providing covered person will assume half of the ongoing annual PRA burden that a providing covered person will assume with regard to the development and reconfiguration of current systems to capture the Rule 10c–1a information. The Commission, therefore, estimates that each non-providing covered person will assume an ongoing annual PRA burden of 675 hours,¹¹⁶⁶ leading to a total industry-wide ongoing annual PRA burden for this requirement of 167,400 hours.¹¹⁶⁷ This method of deriving the ongoing burden hours for non-providing covered persons is consistent with that used in the Proposing Release with regard to non-providing lending agents and

¹¹⁶⁵ See final Rule 10c–1a(a)(2)(ii) (requiring that the covered person provide the reporting agent with timely access to the Rule 10c–1a information).

¹¹⁶⁶ 1,350 hours (ongoing burden applicable to providing covered persons) × 50% = 675 hours.

¹¹⁶⁷ 675 hours × 248 non-providing covered persons = 167,400 hours.

¹¹⁵⁹ 4,050 hours assumed by providing lending agents + 187,650 hours assumed by self-providing lenders = 191,700 hours.

¹¹⁶⁰ In the CAT NMS Plan Release, the Commission estimated that, on average, the ongoing annual burden non-OATS reporters would be 0.75 FTE employees (0.75 FTEs × 1,800 working hours per year = 1,350 burden hours). See CAT Approval Order, 81 FR 84938. The Commission is using this estimate because of the similarities between the requirements applicable to providing covered persons under the final rule and the requirements applicable to non-OATS reporters under the CAT NMS Plan.

¹¹⁶¹ 1,350 hours × 255 providing covered persons = 344,250 hours.

¹¹⁶² Proposing Release, 86 FR 69827.

lenders that directly employ a reporting agent.¹¹⁶⁸

b. Entering Into Written Agreement With Reporting Agent

Final Rule 10c–1a(a)(2)(i) requires a covered person to enter into a written agreement with a reporting agent in order to rely on the reporting agent to fulfill the covered person's reporting obligations under paragraph (a)(1) of the final rule. In meeting this requirement, non-providing covered persons may assume initial PRA burdens associated with drafting, negotiating, and executing the agreements.

These agreements are estimated to be standardized across the industry because the data elements are consistent for all persons.¹¹⁶⁹ The Commission estimates that the only terms that may require negotiation are price and the format in which the information will be provided. To account for negotiation and any administrative tasks related to processing and executing agreements, the Commission is estimating that non-providing covered persons will spend 30 hours on this task.¹¹⁷⁰ Accordingly, the Commission estimates that the total industry-wide initial PRA burden attributed to this requirement is 7,440 hours.¹¹⁷¹ However, consistent with the Proposing Release, there should be no associated ongoing annual PRA burden once the agreement is signed, as the final rule does not separately impose a requirement to modify the written agreement or take additional action after the agreement is executed.

D. Collection of Information Related to Reporting Agents

Under final Rule 10c–1a(b), any reporting agent that assumes the reporting obligation on behalf of a

covered person pursuant to Rule 10c–1a(a)(2) shall do all of the following: (1) provide such Rule 10c–1a information to an RNSA, in the format and manner required by the applicable rule(s) of such RNSA, and within the time periods specified in paragraphs (c) through (e) of the final rule;¹¹⁷² (2) establish, maintain, and enforce written policies and procedures that are reasonably designed to provide the Rule 10c–1a information to an RNSA on behalf of the covered person in the format and manner required by the applicable rule(s) of an RNSA, and within the time periods specified in paragraphs (c) through (e) of the final rule;¹¹⁷³ (3) enter into a written agreement with an RNSA that permits the reporting agent to provide Rule 10c–1a information to an RNSA on behalf of the covered person;¹¹⁷⁴ (4) provide an RNSA with a list naming each covered person on whose behalf the reporting agent is providing Rule 10c–1a information to an RNSA and provide an RNSA with any updates to the list of such persons by the end of the day such list changes;¹¹⁷⁵ and (5) preserve for a period of not less than three years, the first two years in an easily accessible place, the Rule 10c–1a information obtained by the reporting agent from the covered person pursuant to Rule 10c–1a(a)(2), including the time of receipt, and the corresponding Rule 10c–1a information provided by the reporting agent to an RNSA, including the time of transmission to an RNSA, and the written agreements under paragraphs (a)(2) and (b)(3) of the final rule.¹¹⁷⁶

Reporting agents will assume PRA burdens associated with their compliance with three requirements in final Rule 10c–1a(b).¹¹⁷⁷ First, to

facilitate the provision of Rule 10c–1a information to an RNSA, reporting agents will assume burdens related to the development and monitoring of systems. This includes establishing, maintaining, and enforcing written policies and procedures that are reasonably designed to provide the Rule 10c–1a information to an RNSA on behalf of the covered person in the format and manner required by the applicable rule(s) of an RNSA, and within the time periods specified in paragraphs (c) through (e) of the final rule. It also includes the provision of an updated list of persons on whose behalf they are providing Rule 10c–1a information. Second, reporting agents will assume burdens in entering into written agreements with non-providing covered persons. Third, reporting agents will assume burdens in entering into agreements with an RNSA to provide Rule 10c–1a information on behalf of a non-providing covered person.

1. Systems Development and Monitoring

Reporting agents will provide Rule 10c–1a information to an RNSA on behalf of non-providing covered persons. In doing so, because reporting agents will need to change their internal systems to collect the Rule 10c–1a information, they will assume initial PRA burdens related to developing and reconfiguring their current systems to capture the required data elements. In addition, reporting agents will need to establish, maintain, and enforce written policies and procedures that are reasonably designed to provide Rule 10c–1a information to an RNSA on behalf of non-providing covered persons, in the format and manner required by the applicable rule(s) of an RNSA, and within certain time periods specified paragraphs (c) through (e) of the final rule.¹¹⁷⁸ Because reporting agents will provide to an RNSA the same type of Rule 10c–1a information that providing covered persons will provide,¹¹⁷⁹ the Commission estimates that the initial and ongoing annual PRA burdens related to the development and monitoring of systems that facilitate the provision of Rule 10c–1a information to an RNSA are the same. Therefore,

reporting agents and providing covered persons, as discussed above, because they both must provide Rule 10c–1a information to an RNSA in complying with final Rule 10c–1a. Accordingly, and consistent with the PRA burden estimates included in the Proposing Release, the PRA burden estimates for reporting agents are not being adjusted incrementally from the estimates for providing covered persons. See Proposing Release, 86 FR 69825 n.156.

¹¹⁷⁸ See final Rule 10c–1a(b)(2).

¹¹⁷⁹ See final Rules 10c–1a(a)(1) and (b)(1).

¹¹⁶⁸ See Proposing Release, 86 FR 69824, 69826. The estimated PRA burden included in the Proposing Release was 675 hours per providing lending agent or lender that would directly employ a reporting agent, with an ongoing industry-wide PRA burden of 116,775 hours. 22,950 hours for non-providing lending agents + 93,825 hours for lenders that would directly employ a reporting agent = 116,775 total hours.

¹¹⁶⁹ See final Rules 10c–1a(c) through (e).

¹¹⁷⁰ Each covered person is estimated to execute one such agreement because of the efficiencies gained from using only one reporting agent and the commoditized information that would be provided. Accordingly, the estimate of 30 hours would be the initial PRA burden required for one agreement. This estimate is consistent with that used in the Proposing Release. See Proposing Release, 86 FR 69824.

¹¹⁷¹ 30 hours × 248 non-providing covered persons = 7,440 hours. This method of deriving the initial burden hours for non-providing covered persons is consistent with that used in the Proposing Release with regard to non-providing lending agents and Lenders that directly employ a lending agent. See Proposing Release, 86 FR 69824, 69826–27.

¹¹⁷² See final Rule 10c–1a(b)(1).

¹¹⁷³ See final Rule 10c–1a(b)(2).

¹¹⁷⁴ See final Rule 10c–1a(b)(3).

¹¹⁷⁵ See final Rule 10c–1a(b)(4).

¹¹⁷⁶ See final Rules 10c–1a(b)(1) through (b)(5).

¹¹⁷⁷ The Rule 10c–1a information provided to an RNSA would be the same; however, certain aspects of the requirements applicable to reporting agents differ slightly from those applicable to providing covered persons. For example, reporting agents, unlike providing covered persons, will need to design systems to establish connectivity with the non-providing covered persons on whose behalf they are providing information to an RNSA. In addition, reporting agents, unlike providing covered persons, are required under final Rule 10c–1a(b)(4) to provide to an RNSA the identity of the person on whose behalf it is providing Rule 10c–1a information. Further, reporting agents, unlike either type of covered person—providing covered person or non-providing covered person—are required to establish, maintain, and enforce reasonably designed written policies and procedures to provide information to an RNSA. See final Rule 10c–1a(b)(2). Despite these differences, the estimates used in the CAT approval Order are an appropriate basis from which to estimate the burdens for

consistent with the Commission's estimate included above, in Part IX.B.1, the Commission estimates that each reporting agent will assume an initial PRA burden of 3,000 hours in developing and reconfiguring current systems to capture the required data elements. Accordingly, the industry-wide initial PRA burden is estimated to be 318,000 hours.¹¹⁸⁰

Once a reporting agent has established the appropriate systems and processes required for the collection and provision of the applicable Rule 10c-1a information, the reporting agent will assume ongoing annual PRA burdens associated with providing such information to an RNSA, in addition to an updated list of persons on whose behalf they are providing information, monitoring systems, implementing changes, and troubleshooting errors. As discussed above, in this part, because reporting agents provide to an RNSA the same information that providing covered persons provide, the Commission estimates that each reporting agent will assume an ongoing annual PRA burden of 1,350 hours related to this requirement. Accordingly, the total industry-wide ongoing annual PRA burden is estimated to be 143,100 hours.¹¹⁸¹

2. Entering Into Written Agreements With Non-Providing Covered Persons

To fulfill a covered person's reporting obligation under final Rule 10c-1a(a), any reporting agent must enter into a written agreement with the covered person on whose behalf they are providing Rule 10c-1a information to an RNSA.¹¹⁸² In meeting this requirement, reporting agents will assume initial PRA burdens related to drafting, negotiating, and executing such an agreement. Compliance with this requirement, however, should not create any ongoing annual burdens once the agreement is executed. This is because the final rule does not impose any requirement for reporting agents to modify the written agreement or take additional action after the agreement is executed.

¹¹⁸⁰ 3,000 hours × 106 reporting agents = 318,000 hours. The estimated initial burden per reporting agent is reduced from that included in the Proposing Release in light of the final rule's inclusion of an end-of-day reporting requirement as opposed to an intraday reporting requirement, as discussed above, in Part IX.B.1.

¹¹⁸¹ 1,350 hours × 106 reporting agents = 143,100 hours. This methodology is consistent with that used in the Proposing Release with respect to reporting agents. See Proposing Release, 86 FR 69825.

¹¹⁸² See final Rule 10c-1a(a)(2)(i).

These agreements are estimated to be standardized across the industry because the data elements are consistent for all persons.¹¹⁸³ The only terms (of an agreement between a non-providing covered person and a reporting agent) that may require negotiation are the price and the format in which the information would be provided. This process is estimated to be highly automated. Reporting agents are estimated to require the same amount of time to comply with this requirement as non-providing covered persons will require. Accordingly, the Commission estimates that each reporting agent will spend 30 hours on this task.¹¹⁸⁴ As a result, the total industry-wide initial PRA burden related to this requirement is estimated to be 3,180 hours.¹¹⁸⁵

3. Entering Into Written Agreements With an RNSA

Any reporting agent that assumes the reporting obligation on behalf of a covered person pursuant to final Rule 10c-1a(a)(2) must also enter into a written agreement with an RNSA that permits the reporting agent to provide Rule 10c-1a information to an RNSA on behalf of the covered person.¹¹⁸⁶ Because the Rule 10c-1a information is standardized for all reporting agents, there are no terms of these agreements that will need to be negotiated. Instead, an RNSA may create a form agreement for all reporting agents. Because these agreements are estimated to be standardized, the Commission estimates that reporting agents will assume a one-hour initial PRA burden to account for any administrative tasks related to processing and executing these agreements.¹¹⁸⁷ Reporting agents that enter into written agreements with an RNSA should not incur any ongoing annual burden to comply with this requirement once the agreement is executed, as the Rule 10c-1a information is standardized. Accordingly, the Commission estimates that the industry-wide initial PRA burden for this requirement is 106 hours.¹¹⁸⁸

¹¹⁸³ See *supra* note 1169 and accompanying text.

¹¹⁸⁴ See *supra* note 1170 and accompanying text.

¹¹⁸⁵ 30 hours × 106 reporting agents = 3,180 hours. This methodology is consistent with that used in the Proposing Release with respect to reporting agents. See Proposing Release, 86 FR 69825.

¹¹⁸⁶ See final Rule 10c-1a(b)(3).

¹¹⁸⁷ For example, a reporting agent may need to enter the written agreement into a contract management system or scan an executed paper agreement into an electronic format.

¹¹⁸⁸ 1 hour × 106 reporting agents = 106 hours. This methodology is consistent with that used in

4. Record Preservation Requirement

Any reporting agent that assumes the reporting obligation on behalf of a covered person pursuant to final Rule 10c-1a(a)(2) must also preserve for a period of not less than three years, the first two years in an easily accessible place, the Rule 10c-1a information it obtained from the covered person pursuant to paragraph (a)(2) of the final rule, including the time of receipt, and the corresponding Rule 10c-1a information provided by the reporting agent to an RNSA, including the time of transmission to an RNSA, and the written agreements that the reporting agent entered into with the covered person and with an RNSA.¹¹⁸⁹ The initial PRA burden associated with preserving the collected Rule 10c-1a information is related to the reporting agent's burden of developing and reconfiguring its current systems to capture the required data elements. Therefore, an initial burden associated with the preservation of information under final Rule 10c-1a(b)(5) is not separately estimated.

Compliance with this record preservation requirement is estimated to be highly automated. The Commission, therefore, estimates that reporting agents will spend one hour per week on upkeep and testing of records to ensure accuracy in complying with this requirement. Reporting agents each will assume an ongoing annual PRA burden of 52 hours per year.¹¹⁹⁰ Accordingly, the Commission estimates that the industry-wide ongoing annual PRA burden for this requirement is 5,512 hours.¹¹⁹¹

the Proposing Release with respect to reporting agents. See Proposing Release, 86 FR 69825.

¹¹⁸⁹ See final Rule 10c-1a(b)(5).

¹¹⁹⁰ This estimate is consistent with the ongoing annual burden estimate for national securities exchanges and RNSAs regarding the data collection and reporting for Rule 17a-1, which requires that every national securities exchange, national securities association, registered clearing agency, and the MSRB keep on file for a period of not less than five years, the first two years in an easily accessible place, at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records made or received by it in the course of its business as such and in the conduct of its self-regulatory activity. See Paperwork Reduction Act Extension Notice for Exchange Act Rule 17a-1, 84 FR 57920 (Oct. 29, 2019), 84 FR 57921.

¹¹⁹¹ 52 hours × 106 reporting agents = 5,512 hours. This methodology is consistent with that used in the Proposing Release with respect to reporting agents. See Proposing Release, 86 FR 69825-26.

PRA TABLE 1—SUMMARY OF ESTIMATED BURDENS FOR COVERED PERSONS AND REPORTING AGENTS

Type of respondent	Rule 10c–1a requirement	Type of PRA burden	Number of entities impacted	Total initial industry burden (hours)	Total annual industry burden (hours)
Providing Covered Persons ...	Systems Development and Monitoring.	Third-Party Disclosure	255	765,000	344,250
Non-providing Covered Persons.	Systems Development and Monitoring.	Third-Party Disclosure	248	372,000	167,400
Non-providing Covered Persons.	Entering into Agreement with Reporting Agent.	Third-Party Disclosure	248	7,440	0
Reporting Agents	Systems Development and Monitoring.	Third-Party Disclosure	106	318,000	143,100
Reporting Agents	Entering into Agreement with Non-providing Covered Person.	Third-Party Disclosure	106	3,180	0
Reporting Agents	Entering into Agreement with RNSA.	Third-Party Disclosure	106	106	0
Reporting Agents	Record Preservation Requirement.	Recordkeeping	106	0	5,512

E. Collection of Information Related to RNSAs

RNSAs will assume new PRA burdens in complying with final Rule 10c–1a(f) through (h). The PRA burdens associated with an RNSA's compliance with paragraphs (f) through (h) are discussed below. All estimates included in this Part X are consistent with the Commission's estimates included in the Proposing Release for an RNSA.¹¹⁹²

1. Burden Estimates Related to RNSA Rule Implementation

Under final Rule 10c–1a(f), an RNSA is required to implement rules regarding the format and manner of its collection of Rule 10c–1a information and make publicly available such information in accordance with rules promulgated pursuant to section 19(b) and Rule 19b–4 of the Exchange Act. The PRA burden associated with filing any proposed rule changes by an RNSA is already included under the collection of information requirements contained in Rule 19b–4 under the Exchange Act.¹¹⁹³ Therefore, a separate PRA burden estimate is not included for the purposes of the PRA included for this rulemaking.

2. Burden Estimates Related to the Publication of Data

As discussed above, in Part VII.J, an RNSA will be required, following the receipt of information pursuant to paragraph (c) or (d) of the final rule, to assign a unique identifier to the covered securities loan and make certain information publicly available (on its website or similar means of electronic

distribution, without use restrictions, for a period of at least five years)¹¹⁹⁴ within the time frames specified in paragraph (g) of the final rule. In complying with these requirements, an RNSA will need to create, implement, and maintain the infrastructure to enable providing covered persons and reporting agents to provide an RNSA with the Rule 10c–1a information. This includes establishing technical requirements and specifications for such infrastructure, creating a system that can generate unique identifiers, meeting with industry participants to gather feedback on the proposed infrastructure, drafting written policies and procedures to protect the confidentiality of certain information, and entering into written agreements with providing covered persons and reporting agents. In addition, the infrastructure employed will need to comply with paragraphs (h)(1) and (h)(2) of the final rule, which require an RNSA to retain the collected Rule 10c–1a information in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention, for a period of five years, and to make the information collected pursuant to paragraphs (b)(4) and (c) through (e) of the final rule available to the Commission, or other persons as the Commission may designate by order upon a demonstrated regulatory need, respectively.

The initial burden assumed by an RNSA in creating and implementing the infrastructure for providing covered persons and reporting agents to provide the applicable Rule 10c–1a information to an RNSA, and for an RNSA to make such information publicly available, is

similar to the initial burden assumed by national securities exchanges and RNSAs in complying with the requirement to establish the appropriate systems and processes for the collection and transmission of the required information under the CAT. However, the systems that are implemented to comply with Rule 10c–1a should be significantly less complex than those that are implemented to comply with the CAT. This is because the Rule 10c–1a systems will need to capture less information overall than what the CAT requires.¹¹⁹⁵ Further, as discussed above, in Part IX.A.3, there is only one RNSA that will need to create and implement the infrastructure for providing covered persons and reporting agents to provide Rule 10c–1a information, in contrast to the multiple national securities exchanges that create systems to comply with the CAT. In addition, an RNSA will have internal staff that can create and implement the infrastructure for providing covered persons and reporting agents to provide Rule 10c–1a information, unlike certain tasks required under the CAT that may require outsourcing. Accordingly, the PRA burden estimates for this collection of information are substantially reduced as compared to those for the CAT, as discussed below, in this part.

The Commission estimates that it would take an RNSA approximately 10,924 hours of internal legal, compliance, information technology, and business operations time to develop the infrastructure to enable providing covered persons and reporting agents to provide the Rule 10c–1a information to an RNSA, and for an RNSA to assign a unique identifier to the covered

¹¹⁹² See Proposing Release, 86 FR 69827–29.

¹¹⁹³ See Proposed Rule Changes of Self-Regulatory Organizations, Release No. 34–50486 (Oct. 5, 2004), 69 FR 60287 (Oct. 8, 2004), 69 FR 60293.

¹¹⁹⁴ See final Rule 10c–1a(h)(3).

¹¹⁹⁵ See *supra* note 1150 and accompanying text.

securities loan and make the specified information publicly available.¹¹⁹⁶ The RNSA is not estimated to assume external costs for the implementation of the infrastructure to enable providing covered persons and reporting agents to provide the Rule 10c–1a information, assign a unique identifier to the covered securities loan, and make the final rule's specified information publicly available. This is because the sole RNSA currently existing, FINRA, has experience in implementing systems to collect information from its member broker-dealers.¹¹⁹⁷ Therefore, the Commission estimates that the average one-time initial PRA burden related to developing the infrastructure to enable providing covered persons and reporting agents to provide the Rule 10c–1a information, assign a unique identifier to the covered securities loan, and make the final rule's

specified information publicly available is 10,924 hours.¹¹⁹⁸

Once an RNSA has developed the infrastructure to enable providing covered persons and reporting agents to provide the Rule 10c–1a information, assign a unique identifier to the covered securities loan, and make the final rule's specified information publicly available, the Commission estimates that an RNSA will assume ongoing annual PRA burdens of 7,739.5 hours related to ensuring that the infrastructure is up-to-date and remains in compliance with the final rule, for an estimated annual ongoing burden of 7,739.5 hours.¹¹⁹⁹

3. Burden Estimates Related to Data Retention and Availability

Under final Rule 10c–1a(h)(1), an RNSA must retain the collected Rule 10c–1a information in a convenient and

usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years. The initial burden associated with retaining the collected Rule 10c–1a information is assumed in an RNSA's burdens related to implementing and maintaining the infrastructure for providing covered persons and reporting agents to provide Rule 10c–1a information to an RNSA, as discussed above, in Part X.2. Therefore, the Commission is not separately assessing an initial burden associated with the retention of collected Rule 10c–1a information. The Commission, however, estimates that an RNSA will assume an ongoing annual PRA burden of 52 hours to retain the collected information,¹²⁰⁰ for an estimated annual industry-wide burden of 52 hours.

PRA TABLE 2—SUMMARY OF ESTIMATED BURDENS FOR RNSA

Rule 10c–1a requirement	Type of PRA burden	Number of entities impacted	Total initial industry burden hours	Total annual industry burden hours
Publication of Data	Reporting and Third-Party Disclosure	1	10,924	7,739.5
Data Retention and Availability	Recordkeeping	1	0	52

F. Collection of Information Is Mandatory

Each collection of information discussed above is a mandatory collection of information.

G. Confidentiality of Responses to Collection of Information

The Commission may receive confidential information as a result of this collection of information, such as the identity of covered persons. The final rule does not permit an RNSA to make such information publicly available.¹²⁰¹ Aside from this information, the collection of information is broadly expected to be publicly available information. To the

extent the Commission receives confidential information pursuant to this collection of information, through its examination and oversight program, through an investigation, or by some other means, such information will be kept confidential, subject to the provisions of applicable law.

H. Retention Period for Record Preservation Requirement

Pursuant to final Rule 10c–1a(h)(1), an RNSA is required to retain the collected Rule 10c–1a information in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of

five years. Pursuant to final Rule 10c–1a(b)(5), a reporting agent that assumes the reporting obligation on behalf of a covered person pursuant to paragraph (a)(2) of the final rule is required to preserve the Rule 10c–1a information obtained by the reporting agent from the covered person pursuant to final Rule 10c–1a(a)(2), including the time of receipt, and the corresponding Rule 10c–1a information provided by the reporting agent to an RNSA, including the time of transmission to an RNSA, as well as the written agreements under paragraphs (a)(2) and (b)(3) of the final rule, for a period of not less than three years, the first two years in an easily accessible place.

¹¹⁹⁶ This estimate is based on the Commission's initial burden estimate for national securities exchanges and RNSAs regarding the data collection and reporting for the consolidated audit trail which was approximately 43,696.80 burden hours in total. See CAT Approval Order, 81 FR 84921. Given the size of the overall equity market in comparison to the size of the securities lending market, the Commission believes equating the PRA burden hours (to develop the infrastructure for the provision of Rule 10c–1a information and for an RNSA to assign a unique identifier to the covered securities loan and make the specified information publicly available) with the CAT burden hours would overestimate the burden hours. The initial burden in complying with final Rule 10c–1a's requirements related to an RNSA's publication of data should be calculated based on the size of the securities lending market in comparison to the size of the equities market. Consistent with the

Commission's estimate in the Proposing Release, the Commission estimates that the average daily dollar value of securities lending transactions is approximately \$120 billion dollars compared to the average daily equity trading volume of \$475 billion. See Proposing Release, 86 FR 69828. Accordingly, the size of the securities lending market is approximately 25% of the U.S. equity market. Therefore, it is estimated that the initial PRA burden to develop and implement the needed systems changes to capture and publish the Rule 10c–1a information is 25% of the burden hours for the CAT, which is 10,924 burden hours.

¹¹⁹⁷ See, e.g., *supra* Part VII.H.

¹¹⁹⁸ 1 RNSA × 10,924 hours = 10,924 hours.

¹¹⁹⁹ The PRA burdens assumed in complying with this requirement are similar to the burdens assumed by national securities exchanges and RNSAs in complying with the data collection and reporting requirements for the CAT. This was

estimated to be approximately 30,958.20 total hours. See CAT Approval Order, 81 FR 84922. Consistent with the Commission's initial PRA burden estimates related to an RNSA's publication of data in accordance with the proposed rule, as such burden estimate relates to the Commission's estimates in the CAT Approval Order, the Commission estimates for purposes of compliance with the final rule that the annual ongoing burden related to the publication of the specified data is similarly 25% of the hours required for compliance with CAT. This is estimated to be 7,739.5 hours.

¹²⁰⁰ See *supra* note 1190. The resulting burden hours that are assumed in addition to those that already exist for Rule 17a–1, for purposes of this PRA estimate, are appropriate because an RNSA may be required to retain records related to Rule 10c–1a information provided by covered persons or reporting agents that are not RNSA members.

¹²⁰¹ See final Rule 10c–1a(g)(4).

XI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (“RFA”) ¹²⁰² requires Federal agencies, in promulgating rules, to consider the impact of those rules on “small entities,” ¹²⁰³ a term that includes “small businesses.” ¹²⁰⁴ Section 603(a) ¹²⁰⁵ of the Administrative Procedure Act, ¹²⁰⁶ as amended by section 604(a) of the RFA, requires the Commission to undertake a final regulatory flexibility analysis of rules it is adopting, unless the Commission certifies that the rules would not have a significant impact on a substantial number of small entities. ¹²⁰⁷

Small entities include broker-dealers 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)”), or, if not required to file such statements, a broker-dealer who had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the last day of the preceding fiscal year (or in the time it has been in business, if shorter), and is not affiliated with any person (other than a natural person) who is not a small business or small organization. ¹²⁰⁸ A small business or small organization, for purposes of “issuers” or “person” other than an investment company, is defined as a person who, on the last day of its most recent fiscal year, had total assets of \$5 million or less. ¹²⁰⁹ In the Proposing Release, the Commission certified, pursuant to section 605(b) of the RFA, that the proposed rule would not have a significant economic impact on a substantial number of small entities. ¹²¹⁰ The Commission requested but did not receive any comments on the

certification as it related to the entities impacted by the proposed rule.

Based on the Commission’s analysis of the existing information relating to persons who are subject to the final rule, it is unlikely that any broker-dealer, clearing agency, investment company, or bank categorized as a “small business” or “small organization” under Rule 0–10 would serve as a covered person, reporting agent, or RNSA, as they would almost certainly have insufficient capital to participate in lending activities involving a covered securities loan or would register with the Commission as a national securities association. Accordingly, the Commission believes it is unlikely that, in the future, a substantial number of small entities may become impacted by the final rule. This is because broker-dealers who have a reporting obligation or elect to serve as a reporting agent are likely to have at least \$500,000 in total capital; as described above, investment companies, together with other investment companies in the same group of related investment companies, who have a reporting obligation are likely to have net assets of over \$50 million as of the end of its most recent fiscal year; banks who have a reporting obligation are likely to have total assets of over \$5 million; ¹²¹¹ clearing agencies who elect to serve as reporting agents are likely to have compared, cleared, and settled at least \$500 million in securities transactions during the preceding fiscal year and have had a least \$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); ¹²¹² or such persons are likely to be affiliated with a person who is not a small business or small organization as defined under Rule 0–10.

For the foregoing reason, the Commission certifies, pursuant to section 605(b) of Title 5 of the U.S. Code, that final Rule 10c–1a will not have a significant economic impact on a substantial number of small entities.

XII. Other Matters

If any of the provisions of the final rule, or application thereof to any person or circumstances, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act, ¹²¹³ the Office of Information and Regulatory Affairs has designated these rules as a “major rule,” as defined by 5 U.S.C. 804(2).

Statutory Authority

The Commission is adopting final Rule 10c–1a pursuant to Sections 3, 10(b), 10(c), 15(c), 15(h), 15A, 17(a), 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78c, 78j(b), 78j(c), 78k–1, 78o(c), 78o(g), 78o–3, 78q(a), and 78w(a), and Public Law 111–203, 984(b), 124 Stat. 1376 (2010).

List of Subjects in 17 CFR Part 240

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

Text of Rule Amendments

For the reasons set out in the preamble, the Commission is amending title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78j–4, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, Sec. 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, Sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.10c–1a also issued under 15 U.S.C. 78j(c), and Pub. L. 111–203, 984(b), 124 Stat. 1376 (2010).

* * * * *

■ 2. Add § 240.10c–1a immediately following § 240.10b–21 to read as follows:

§ 240.10c–1a Securities lending transparency.

(a) *Reporting requirements for covered persons.* Any covered person who agrees to a covered securities loan on behalf of itself or another person shall:

(1) Provide to a registered national securities association (“RNSA”) the information in paragraphs (c) through (e) of this section (“Rule 10c–1a information”), in the format and manner required by the applicable rule(s) of such RNSA, and within the time periods

¹²⁰² 5 U.S.C. 601 *et seq.*

¹²⁰³ 5 U.S.C. 605(b).

¹²⁰⁴ Although section 601(b) of the RFA defines the term “small business,” the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term “small business” for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in 17 CFR 240.0–10 (“Rule 0–10”). Rule 0–10 also provides that the Commission may, if warranted by the circumstances, use a different definition for particular rulemakings. See 17 CFR 240.0–10.

¹²⁰⁵ 5 U.S.C. 603(a).

¹²⁰⁶ 5 U.S.C. 551 *et seq.*

¹²⁰⁷ 5 U.S.C. 605(b).

¹²⁰⁸ See 17 CFR 240.0–10(c).

¹²⁰⁹ 17 CFR 242.0–10(a).

¹²¹⁰ Proposing Release, 86 FR 69851.

¹²¹¹ 17 CFR 242.0–10(a).

¹²¹² See 17 CFR 240.0–10(d).

¹²¹³ 5 U.S.C. 801 *et seq.*

specified in paragraphs (c) through (e) of this section.

(2) Provided, however, a covered person may rely on a reporting agent to fulfill its reporting obligations under paragraph (a)(1) of this section if such covered person:

(i) Enters into a written agreement with a reporting agent that agrees to provide the Rule 10c–1a information to an RNA on behalf of such covered person in accordance with the requirements in paragraph (b) of this section; and,

(ii) Provides such reporting agent with timely access to the Rule 10c–1a information.

(b) *Reporting agent requirements.* Any reporting agent that assumes the reporting obligation on behalf of a covered person pursuant to paragraph (a)(2) of this section shall:

(1) Provide such Rule 10c–1a information to an RNA, in the format and manner required by the applicable rule(s) of such RNA, and within the time periods specified in paragraphs (c) through (e) of this section;

(2) Establish, maintain, and enforce written policies and procedures that are reasonably designed to provide Rule 10c–1a information to an RNA on behalf of a covered person in the format and manner required by the applicable rule(s) of an RNA, and within the time periods specified in paragraphs (c) through (e) of this section;

(3) Enter into a written agreement with an RNA that permits the reporting agent to provide Rule 10c–1a information to an RNA on behalf of a covered person;

(4) Provide an RNA with a list naming each covered person on whose behalf the reporting agent is providing Rule 10c–1a information to an RNA and provide an RNA with any updates to the list of such persons by the end of the day such list changes; and

(5) Preserve for a period of not less than three years, the first two years in an easily accessible place:

(i) The Rule 10c–1a information obtained by the reporting agent from the covered person pursuant to paragraph (a)(2) of this section, including the time of receipt, and the corresponding Rule 10c–1a information provided by the reporting agent to an RNA, including the time of transmission to an RNA; and

(ii) The written agreements under paragraphs (a)(2) and (b)(3) of this section.

(c) *Data elements.* A covered person shall provide the following information, if applicable, to an RNA, by the end of the day on which a covered securities loan is effected:

(1) The legal name of the security issuer, and the Legal Entity Identifier (“LEI”) of the issuer, if the issuer has a non-lapsed LEI;

(2) The ticker symbol, International Securities Identification Number (“ISIN”), Committee on Uniform Securities Identification Procedures (“CUSIP”), or Financial Instrument Global Identifier (“FIGI”) of the security, or other security identifier;

(3) The date the covered securities loan was effected;

(4) The time the covered securities loan was effected;

(5) The name of the platform or venue where the covered securities loan was effected;

(6) The amount, such as size, volume, or both, of the reportable securities loaned;

(7) The type of collateral used to secure the covered securities loan;

(8) For a covered securities loan collateralized by cash, the rebate rate or any other fee or charges;

(9) For a covered securities loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges;

(10) The percentage of collateral to value of reportable securities loaned required to secure such covered securities loan;

(11) The termination date of the covered securities loan; and

(12) Whether the borrower is a broker or dealer, a customer (if the person lending securities is a broker or dealer), a clearing agency, a bank, a custodian, or other person.

(d) *Loan modification data elements.* A covered person shall provide the following information to an RNA by the end of the day on which a covered securities loan is modified:

(1) If the modification occurs after the data elements under paragraph (c) of this section for such covered securities loan are provided to an RNA, and results in a change to information previously required to be provided to an RNA under paragraph (c) of this section:

(i) The date and time of the modification;

(ii) The specific modification and the specific data element in paragraph (c) of this section being modified; and

(iii) The unique identifier assigned to the original covered securities loan under paragraph (g)(1) or (g)(3) of this section;

(2) If the modification is to a covered securities loan for which reporting under paragraph (a) was not required on the date the loan was agreed to or last modified and results in a change to any of the data elements in paragraphs (c)(1) through (12) of this section:

(i) The data elements in paragraphs (c)(1) through (12) of this section as of the date of modification and the date and time of the modification.

(ii) [Reserved]

(e) *Confidential data elements.* A covered person shall provide the following information to an RNA, if applicable, by the end of the day on which a covered securities loan is effected:

(1) If known, the legal name of each party to the covered securities loan, other than the customer from whom a broker or dealer borrows fully paid or excess margin securities pursuant to § 240.15c3–3(b)(3) (“Rule 15c3–3(b)(3)”) of the Exchange Act, Central Registration Depository (“CRD”) or Investment Adviser Registration Depository (“IARD”) Number, market participant identification (“MPID”), and the LEI of each party to the covered securities loan, and whether such person is the lender, the borrower, or an intermediary between the lender and the borrower;

(2) If the person lending securities is a broker or dealer and the borrower is its customer, whether the security is loaned from a broker’s or dealer’s securities inventory to a customer of such broker or dealer; and

(3) If known, whether the covered securities loan is being used to close out a fail to deliver pursuant to § 242.204 of this chapter (“Rule 204 of Regulation SHO”) or to close out a fail to deliver outside of §§ 242.200 through 242.204 of this chapter (“Regulation SHO”).

(f) *RNA rules.* An RNA shall implement rules regarding the format and manner of its collection of information described in paragraphs (c) through (e) of this section and make publicly available such information in accordance with rules promulgated pursuant to 15 U.S.C. 78s(b) (“section 19(b)”) and § 240.19b–4 (“Rule 19b–4”) of the Exchange Act.

(g) *RNA publication of data.* An RNA shall:

(1) Following receipt of information pursuant to paragraph (c) of this section, as soon as practicable, and not later than the morning of the business day after the covered securities loan is effected, assign a unique identifier to the covered securities loan and make publicly available the following information:

(i) For each covered securities loan effected on the previous business day:

(A) The unique identifier assigned by an RNA;

(B) The information it receives under paragraphs (c)(1) through (5) and (7) through (12) of this section; and

(C) The security identifier(s) under paragraphs (c)(1) or (2) of this section

that an RNSA determines is appropriate to identify the relevant reportable security.

(2) Following receipt of information pursuant to paragraph (c) of this section, on the twentieth business day after the covered securities loan is effected, make publicly available the information specified in paragraph (c)(6) of this section along with the loan and security identifying information specified in paragraphs (g)(1)(i)(A) and (C) of this section.

(3) Following receipt of information pursuant to paragraph (d) of this section, assign a unique identifier to the covered securities loan if one was not assigned pursuant to paragraph (g)(1)(i)(A) of this section; and:

(i) As soon as practicable, and not later than the morning of the business day after the covered securities loan is modified, make publicly available information pertaining to any modification to the data specified in paragraphs (c)(1) through (5) and (7) through (12) of this section; provided however, for a covered securities loan for which paragraph (c) information is reported to an RNSA pursuant to paragraph (d)(2) of this section, make publicly available the data specified in paragraphs (c)(1) through (5) and (7) through (12); and

(ii) On the twentieth business day after the covered securities loan is modified, make publicly available the data specified in paragraph (c)(6) of this section along with the loan and security identifying information specified in paragraphs (g)(1)(i)(A) or (g)(3), as applicable, and (g)(1)(i)(C) of this section.

(4) Following receipt of information pursuant to paragraph (e) of this section, keep such information confidential, in accordance with the provisions of paragraph (h) of this section and applicable law.

(5) Following the receipt of information specified in paragraphs (c) and (d) of this section, as soon as practicable, and not later than the morning of the business day after covered securities loans are effected or modified, make publicly available, on a daily basis, information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security and the security

identifier(s) under paragraphs (c)(1) or (2) of this section for which an RNSA determines is appropriate to identify.

(h) *Data retention and availability.* An RNSA shall:

(1) Retain the information collected pursuant to paragraphs (c) through (e) of this section in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years;

(2) Make the information collected pursuant to paragraphs (b)(4) and (c) through (e) of this section available to the Commission; or other persons as the Commission may designate by order upon a demonstrated regulatory need;

(3) Make the information collected under paragraphs (c) and (d) of this section available to the public in the same manner such information is maintained pursuant to paragraph (h)(1) of this section on an RNSA's website or similar means of electronic distribution, without use restrictions, for a period of at least five years; and

(4) Establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of confidential information required by paragraph (e) of this section.

(i) *RNSA fees.* An RNSA may establish and collect reasonable fees, pursuant to rules that are promulgated pursuant to section 19(b) and Rule 19b-4 of the Exchange Act.

(j) *Definitions.* For purposes of this section:

(1) The term *covered person* means:

(i) Any person that agrees to a covered securities loan on behalf of a lender ("intermediary") other than a clearing agency when providing only the functions of a central counterparty pursuant to § 240.17Ad-22(a)(2) ("Rule 17Ad-22(a)(2)") of the Exchange Act or a central securities depository pursuant to § 240.17Ad-22(a)(3) ("Rule 17Ad-22(a)(3)") of the Exchange Act; or

(ii) Any person that agrees to a covered securities loan as a lender when an intermediary is not used unless paragraph (j)(1)(iii) of this section applies; or

(iii) A broker or dealer when borrowing fully paid or excess margin securities pursuant to Rule 15c3-3(b)(3) of the Exchange Act.

(2) The term *covered securities loan* means:

(i) A transaction in which any person on behalf of itself or one or more other persons, lends a reportable security to another person.

(ii) Notwithstanding paragraph (j)(2)(i) of this section, a position at a clearing agency that results from central counterparty services pursuant to Rule 17Ad-22(a)(2) of the Exchange Act or central securities depository services pursuant to Rule 17Ad-22(a)(3) of the Exchange Act will not be a covered securities loan for purposes of this rule.

(iii) Notwithstanding paragraph (j)(2)(i) of this section, the use of margin securities, as defined in § 240.15c3-3(a)(4) ("Rule 15c3-3(a)(4)") of the Exchange Act, by a broker or dealer will not be a covered securities loan for purposes of this rule.

(A) Provided, however, if a broker or dealer lends such margin securities to another person, the loan to the other person is a covered securities loan for purposes of this rule.

(B) [Reserved]

(3) The term *reportable security* means any security or class of an issuer's securities for which information is reported or required to be reported to the consolidated audit trail as required by § 242.613 ("Rule 613") of the Exchange Act and the CAT NMS Plan ("CAT"), the Financial Industry Regulatory Authority's Trade Reporting and Compliance Engine ("TRACE"), or the Municipal Securities Rulemaking Board's Real-Time Transaction Reporting System ("RTRS"), or any reporting system that replaces one of these systems.

(4) The term *reporting agent* means a broker, dealer, or registered clearing agency that enters into a written agreement with a covered person under paragraph (a)(2) of this section.

(5) The term *RNSA* means an association of brokers and dealers that is registered as a national securities association pursuant to 15 U.S.C. 78o-3 ("section 15A") of the Exchange Act.

By the Commission.

Dated: October 13, 2023.

J. Matthew DeLesDernier,
Deputy Secretary.

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[CMS-9897-P]

RIN 0938-AV15

**Federal Independent Dispute
Resolution Operations**

AGENCY: Office of Personnel Management; Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document sets forth proposed rules related to certain provisions of the No Surprises Act regarding the Federal independent dispute resolution (IDR) process, which was established as part of the Consolidated Appropriations Act, 2021 (CAA). These proposed rules would set forth new requirements relating to the disclosure of information that group health plans and health insurance issuers offering group or individual health insurance coverage must include along with the initial payment or notice of denial of payment for certain items and services subject to the surprise billing protections in the No Surprises Act. These proposed rules would also require plans and issuers to communicate information by using claim adjustment reason codes (CARCs)

and remittance advice remark codes (RARCs), as specified in guidance, when providing any paper or electronic remittance advice to an entity that does not have a contractual relationship with the plan or issuer. This document also proposes to amend certain requirements related to the open negotiation period preceding the Federal IDR process, the initiation of the Federal IDR process, the Federal IDR dispute eligibility review, and the payment and collection of administrative fees and certified IDR entity fees. This document also proposes to define bundled payment arrangements, amend requirements related to batched items and services, and amend the rules for extensions of timeframes due to extenuating circumstances. Additionally, this document proposes to require plans and issuers to register in the Federal IDR portal. In accordance with Federal law, a summary of these rules may be found at <https://www.regulations.gov/>.

DATES: To be assured consideration, comments must be received at one of the addresses provided below by January 2, 2024.

ADDRESSES: Written comments may be submitted to the addresses specified below. Any comment that is submitted will be shared among the Department of the Treasury, the Department of Labor, the Department of Health and Human Services (the Departments), and the Office of Personnel Management. Please do not submit duplicates.

Comments will be made available to the public. **Warning:** Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. Comments are posted on the internet exactly as received and can be retrieved by most internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

In commenting, refer to file code RIN 0938-AV15. Because of staff and resource limitations, the Departments cannot accept comments by facsimile (FAX) transmission.

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-9897-P, P.O. Box 8016, Baltimore, MD 21244-8016.

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-9897-P, 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: Padma Babubhai Shah, Office of Personnel Management, at 202-606-4056; Shira B. McKinlay, Internal Revenue Service, Department of the Treasury, at 202-317-5500; Elizabeth Schumacher or Shannon Hysjulien, Employee Benefits Security Administration, Department of Labor, at 202-693-8335; Zarah Ghiasuddin or Bryan Kirk, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at 301-492-4308.

Customer Service Information: Information from the Office of Personnel Management (OPM) on health benefits plans offered under the Federal Employees Health Benefits (FEHB) Program can be found on the OPM website (<http://www.opm.gov/healthcare-insurance/healthcare/>). Individuals interested in obtaining information from the Department of Labor (DOL) concerning employment-based health coverage laws may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the DOL's website (www.dol.gov/agencies/ebsa). In addition, information from the Department of Health and Human Services (HHS) on private health insurance coverage and coverage provided by non-Federal governmental group health plans can be found on the Centers for Medicare & Medicaid Services (CMS) website (<http://www.cms.gov/marketplace>), information on health care reform can be found at <http://www.healthcare.gov>, and information on surprise medical bills can be found at <http://www.cms.gov/nosurprises>.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: 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. The Departments post comments received before the close of the comment period on the following website as soon as possible after they have been received: <http://www.regulations.gov>. Follow the search instructions on that website to view public comments. The Departments 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 an individual. The Departments continue to encourage individuals not to submit duplicative comments. The Departments will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

I. Background

A. Preventing Surprise Medical Bills and Establishing the Federal IDR Process Under the Consolidated Appropriations Act, 2021

On December 27, 2020, the Consolidated Appropriations Act, 2021 (CAA) was enacted.¹ Title I, also known as the No Surprises Act, and title II (Transparency) of Division BB of the CAA amended chapter 100 of the Internal Revenue Code (Code), Part 7 of the Employee Retirement Income Security Act (ERISA), and title XXVII of the Public Health Service Act (PHS Act). The No Surprises Act provides Federal protections against surprise billing by limiting out-of-network cost sharing and prohibiting balance billing in many of the circumstances in which surprise bills most frequently arise. In particular, the No Surprises Act added new provisions applicable to group health plans and health insurance issuers offering group or individual health insurance coverage. Section 102 of the No Surprises Act added section 9816 of the Code, section 716 of ERISA, and section 2799A–1 of the PHS Act, which contain limitations on cost sharing and requirements regarding the timing of initial payments and notices of denial of payment by plans and issuers for emergency services furnished by nonparticipating providers and nonparticipating emergency facilities, and for non-emergency services furnished by nonparticipating providers with respect to patient visits to participating health care facilities, generally defined as hospitals, hospital outpatient departments, critical access

hospitals, and ambulatory surgical centers.²

Section 103 of the No Surprises Act established a Federal IDR process that plans and issuers and nonparticipating providers and facilities may utilize to resolve certain disputes regarding out-of-network rates under section 9816 of the Code, section 716 of ERISA, and section 2799A–1 of the PHS Act.

Section 105 of the No Surprises Act added section 9817 of the Code, section 717 of ERISA, and section 2799A–2 of the PHS Act. These sections contain limitations on cost sharing and requirements for the timing of initial payments and notices of denial of payment by plans and issuers for air ambulance services furnished by nonparticipating providers of air ambulance services and allow plans and issuers and nonparticipating providers of air ambulance services to utilize the Federal IDR process.

The No Surprises Act also added provisions to title XXVII of the PHS Act in a new part E that apply to health care providers, facilities, and providers of air ambulance services, such as prohibitions on balance billing for certain items and services and requirements related to disclosures about balance billing protections.

The Departments of the Treasury, Labor, and HHS (the Departments), along with the Office of Personnel Management (OPM), are issuing regulations in phases that implement provisions of the No Surprises Act and have issued multiple rulemakings since 2021 to implement various provisions. More specifically relevant to this proposed rulemaking, the Departments and OPM issued interim final rules (July 2021 interim final rules³ and October 2021 interim final rules),⁴ and the Departments issued final rules (August 2022 final rules)⁵ implementing provisions of sections 9816 and 9817 of the Code, sections 716 and 717 of ERISA, and sections 2799A–1 and 2799A–2 of the PHS Act. These rules implement provisions to protect consumers from surprise medical bills

for emergency services, non-emergency services furnished by nonparticipating providers with respect to patient visits to participating facilities⁶ in certain circumstances, and air ambulance services furnished by nonparticipating providers of air ambulance services. These rules also implement provisions to establish a Federal IDR process to determine payment amounts when there is a dispute between plans or issuers and providers, facilities, or providers of air ambulance services about the out-of-network rate for these services in cases where a specified State law or an applicable All-Payer Model Agreement does not provide a method for determining the total amount payable.

The July 2021 interim final rules and October 2021 interim final rules generally apply to plans and issuers (including grandfathered health plans) for plan years (in the individual market, policy years) beginning on or after January 1, 2022, and to health care providers, facilities, and providers of air ambulance services for items and services furnished during plan years (in the individual market, policy years) beginning on or after January 1, 2022.⁷ The August 2022 final rules became effective October 25, 2022, and are applicable for items and services provided or furnished on or after October 25, 2022, for plan years (in the individual market, policy years) beginning on or after January 1, 2022. As discussed in sections I.D and I.F of this preamble, certain provisions of these rules relating to the methodology for calculating the qualifying payment amount (QPA), the information that a certified IDR entity must consider in making a payment determination, the establishment of the administrative fee to use the IDR process, and certain restrictions on the qualified IDR items or services that may be considered jointly as part of a batched determination have been vacated⁸ by

⁶ References to a “participating facility” in this preamble mean a “participating health care facility,” as defined at 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.30.

⁷ The interim final rules also include interim final regulations under 5 U.S.C. 8902(p) issued by OPM that specify how certain provisions of the No Surprises Act apply to health benefit plans offered by carriers under the Federal Employees Health Benefits Act. These provisions apply to carriers in the FEHB Program with respect to contract years beginning on or after January 1, 2022. The disclosure requirements at 45 CFR 149.430 regarding patient protections against balance billing are applicable as of January 1, 2022.

⁸ See *Tex. Med. Ass’n, et al. v. U.S. Dep’t of Health and Human Servs.*, 587 F. Supp. 3d 528 (E.D. Tex. 2022) (TMA I), *Tex. Med. Ass’n, et al. v. U.S. Dep’t of Health and Human Servs.*, Case No. 6:22–cv–372 (E.D. Tex.) (Feb. 6, 2023) (TMA II), *Tex. Med. Ass’n, et al. v. U.S. Dep’t of Health and*

Continued

¹ Public Law 116–260 (Dec. 27, 2020).

² Section 102(d)(1) of the No Surprises Act amended the Federal Employees Health Benefits Act, 5 U.S.C. 8901 *et seq.*, by adding a new subsection (p) to 5 U.S.C. 8902. Under this new provision, each FEHB Program contract must require a carrier to comply with requirements described in sections 9816 and 9817 of the Code, sections 716 and 717 of ERISA, and sections 2799A–1 and 2799A–2 of the PHS Act (as applicable) in the same manner as these provisions apply with respect to a group health plan or health insurance issuer offering group or individual health insurance coverage.

³ 86 FR 36872 (July 13, 2021).

⁴ 86 FR 55980 (Oct. 7, 2021).

⁵ 87 FR 52618 (Aug. 26, 2022).

the United States District Court for the Eastern District of Texas (District Court). On September 26, 2023, the Departments published the Federal IDR Process Administrative Fee and Certified IDR Entity Fee Ranges Proposed Rules (IDR Process Fees proposed rules)⁹ to amend the administrative fee and certified IDR entity fee provisions in the October 2021 interim final rules to provide additional guidance and promote transparency in the administrative fee calculation and certified IDR fee ranges. If finalized, the rules would apply for disputes initiated on or after the later of the effective date or January 1, 2024.

B. July 2021 Interim Final Rules

The July 2021 interim final rules implement sections 9816(a)–(b) and 9817(a) of the Code, sections 716(a)–(b) and 717(a) of ERISA, and sections 2799A–1(a)–(b), 2799A–2(a), 2799A–7, 2799B–1, 2799B–2, 2799B–3, and 2799B–5 of the PHS Act.

The No Surprises Act directs the Departments to specify the information that a plan or issuer must share with a nonparticipating provider or nonparticipating emergency facility when determining the QPA. Therefore, 26 CFR 54.9816–6T(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d) require that plans and issuers make certain disclosures about the QPA with each initial payment or notice of denial of payment, and that plans and issuers provide certain additional information upon the request of the provider, facility, or provider of air ambulance services. This information must be provided in writing, either on paper or electronically, to a nonparticipating provider, facility, or provider of air ambulance services, as applicable, when the QPA serves as the recognized amount.

With an initial payment or notice of denial of payment, a plan or issuer must provide the QPA for each item or service involved, as well as a statement certifying that based on the determination of the plan or issuer: (1) the QPA applies for purposes of the recognized amount (or, in the case of air ambulance services, for calculating the participant's, beneficiary's, or enrollee's cost sharing), and (2) each QPA shared with the provider, facility, or provider of air ambulance services was determined in compliance with the

methodology outlined in the July 2021 interim final rules.¹⁰

A plan or issuer is also required to provide a statement that if the provider, facility, or provider of air ambulance services wishes to initiate a 30-day open negotiation period for purposes of determining the amount of total payment, the provider, facility, or provider of air ambulance services may contact the appropriate person or office to initiate open negotiation, and that if the 30-day open negotiation period does not result in an agreement on the payment amount, generally, the provider, facility, or provider of air ambulance services may initiate the Federal IDR process within 4 days after the end of the open negotiation period.¹¹ The plan or issuer must provide contact information, including a telephone number and email address, for the appropriate office or person for the provider, facility, or provider of air ambulance services to contact to initiate open negotiation for purposes of determining a payment amount (inclusive of cost sharing) for the item or service.¹²

In addition, upon request by the provider or facility,¹³ a plan or issuer must provide in a timely manner information about whether the QPA includes contracted rates that were not set on a fee-for-service basis for the specific items and services and whether the QPA for those items and services was determined using underlying fee schedule rates or a derived amount.¹⁴ If

¹⁰ 86 FR 36888; 26 CFR 54.9816–6T(d)(1)(iii), 29 CFR 2590.716–6(d)(1)(iii), and 45 CFR 149.140(d)(1)(iii). For guidance regarding the certification statement in light of the decision in *TMA III*, see U.S. Department of Health and Human Services, U.S. Department of Labor, U.S. Department of the Treasury, Office of Personnel Management, *FAQs about Consolidated Appropriations Act, 2021 Implementation Part 62* (Oct. 6, 2023), Q3, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-62.pdf> and <https://www.cms.gov/files/document/faqs-part-62.pdf>.

¹¹ 86 FR 36899; 26 CFR 54.9816–6T(d)(1)(iv), 29 CFR 2590.716–6(d)(1)(iv), and 45 CFR 149.140(d)(1)(iv).

¹² 86 FR 36899; 26 CFR 54.9816–6T(d)(1)(v), 29 CFR 2590.716–6(d)(1)(v), and 45 CFR 149.140(d)(1)(v).

¹³ As discussed further in section II.C. of this preamble, this proposed rule would add a reference to providers of air ambulance services in 26 CFR 54.9816–6T(d)(2), 29 CFR 2590.716–6(d)(2), and 45 CFR 149.140(d)(2).

¹⁴ 26 CFR 54.9816–6T(d)(2)(i), 29 CFR 2590.716–6(d)(2)(i), and 45 CFR 149.140(d)(2)(i). Under the July 2021 interim final rules, plans and issuers are required to calculate the QPA using underlying fee schedule rates or derived amounts when the plan or issuer has sufficient information to calculate the median of its contracted rates but the payments under the contractual agreements are not on a fee-for-service basis (such as bundled or capitation payments). 86 FR 36893; 26 CFR 54.9816–6T(b)(2)(iii), 29 CFR 2590.716–6(b)(2)(iii), 45 CFR

an eligible database was used to determine the QPA, upon request by the provider or facility, the plan or issuer must provide information to identify which database was used.¹⁵ Similarly, if a related service code was used to determine the QPA for an item or service billed under a new service code, upon request by the provider or facility the plan or issuer must provide information to identify which related service code was used.¹⁶

Finally, upon request by the provider or facility, the plan or issuer must provide a statement, if applicable, that the plan's or issuer's contracted rates include risk-sharing, bonus, penalty, or other incentive-based or retrospective payments or payment adjustments that were excluded for purposes of calculating the QPA for the items and services involved.¹⁷

C. October 2021 Interim Final Rules and Related Guidance

The October 2021 interim final rules implement the Federal IDR process under sections 9816(c) and 9817(b) of the Code, sections 716(c) and 717(b) of ERISA, and sections 2799A–1(c) and 2799A–2(b) of the PHS Act. The Federal IDR process may be used by group health plans and health insurance issuers offering group or individual health insurance coverage and nonparticipating providers, facilities, and providers of air ambulance services to determine the out-of-network rate for certain items and services. These are emergency services, non-emergency services furnished by nonparticipating providers for patient visits to certain participating facilities (unless an individual has been provided notice and waived the individual's balance billing protections, in accordance with 45 CFR 149.410 or 149.420, as applicable), and air ambulance services furnished by nonparticipating providers of air ambulance services, for situations in which neither an All-Payer Model Agreement under section 1115A of the Social Security Act nor a specified State law as defined in 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.30 applies.

To implement the Federal IDR process, the October 2021 interim final

149.140(b)(2)(iii). Plans and issuers are not otherwise permitted to use underlying fee schedule rates or derived amounts to calculate the QPA.

¹⁵ 86 FR 36899; 26 CFR 54.9816–6T(d)(2)(ii), 29 CFR 2590.716–6(d)(2)(ii), and 45 CFR 149.140(d)(2)(ii).

¹⁶ 86 FR 36899; 26 CFR 54.9816–6T(d)(2)(iii), 29 CFR 2590.716–6(d)(2)(iii), and 45 CFR 149.140(d)(2)(iii).

¹⁷ 86 FR 36899; 26 CFR 54.9816–6T(d)(2)(iv), 29 CFR 2590.716–6(d)(2)(iv), and 45 CFR 149.140(d)(2)(iv).

Human Servs., Case No. 6:22–cv–450–JDK (E.D. Tex. Aug. 24, 2023) (*TMA III*), and *Tex. Med. Ass'n, et al. v. U.S. Dep't of Health and Human Servs.*, Case No. 6:23–cv–00059–JDK, (E.D. Tex. Aug. 3, 2023) (*TMA IV*).

⁹ 88 FR 65888 (Sept. 26, 2023).

rules include requirements governing the 30-business-day open negotiation period; the initiation of the Federal IDR process; the Federal IDR process following initiation, including the selection of a certified IDR entity, submission of offers, payment determinations, and written decisions; costs of the Federal IDR process; certification of IDR entities, including the denial or revocation of certification of an IDR entity; and the collection of information related to the Federal IDR process from certified IDR entities to satisfy reporting requirements under the statute.

To be eligible for the Federal IDR process, the subject of the dispute must be a qualified IDR item or service as defined in 26 CFR 54.9816–8T(a)(2)(xi), 29 CFR 2590.716–8(a)(2)(xi), and 45 CFR 149.510(a)(2)(xi). The October 2021 interim final rules define “qualified IDR item or service” to mean an emergency service furnished by a nonparticipating provider or nonparticipating facility subject to the protections of 26 CFR 54.9816–4T, 29 CFR 2590.716–4, or 45 CFR 149.110, for which the exception under 45 CFR 149.410(b) (regarding receipt of notice and consent to waive surprise billing protections) does not apply. A qualified IDR item or service may also be an item or service furnished by a nonparticipating provider at a participating health care facility subject to the requirements of 26 CFR 54.9816–5T, 29 CFR 2590.716–5, and 45 CFR 149.120, for which the exception under 45 CFR 149.420(c)–(i) (regarding receipt of notice and consent to waive surprise billing protections) does not apply. For an item or service to be considered a qualified IDR item or service, the provider, facility, or provider of air ambulance services or plan or issuer, as applicable, must submit a valid notice of IDR initiation through the Federal IDR portal for the item or service. The notice of IDR initiation is not valid if the 30-business-day open negotiation period under 26 CFR 54.9816–8T(b)(1), 29 CFR 2590.716–8(b)(1), and 45 CFR 149.510(b)(1) has not elapsed or an agreement on the payment amount has been reached. The term “qualified IDR item or service” also includes air ambulance services furnished by nonparticipating providers of air ambulance services subject to the protections of 26 CFR 54.9817–1T, 29 CFR 2590.717–1, and 45 CFR 149.130, as these services are defined in 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.30, for which the open negotiation period under 26 CFR 54.9816–8T(b)(1), 29 CFR 2590.716–8(b)(1), and 45 CFR 149.510(b)(1) has

elapsed, no agreement on the payment amount has been reached, and a valid notice of IDR initiation has been submitted after the 30-business-day open negotiation period has been satisfied.

The term “qualified IDR item or service” does not include items and services for which the out-of-network rate is determined by an All-Payer Model Agreement under section 1115A of the Social Security Act or by reference to a specified State law. Additionally, this term does not include an item or service submitted by the initiating party that is subject to the 90-calendar-day suspension period (also referred to as the “cooling-off period”) under 26 CFR 54.9816–8T(c)(4)(vii)(B), 29 CFR 2590.716–8(c)(4)(vii)(B), and 45 CFR 149.510(c)(4)(vii)(B) except to the extent that it is submitted during the subsequent 30-business-day period, as allowed under the October 2021 interim final rules.¹⁸

The open negotiation period may be initiated by either party during the 30-business-day period beginning on the day the nonparticipating provider, facility, or nonparticipating provider of air ambulance services receives either an initial payment or a notice of denial of payment for an item or service.¹⁹ In order for a plan, issuer, provider, facility, or provider of air ambulance services to know when it is a party to an open negotiation and the item or service for which the payment is to be negotiated, the party initiating the open negotiation period must provide written notice to the other party of its intent to negotiate using a standardized form, referred to as an open negotiation notice. The open negotiation notice must include information sufficient to identify the item or service subject to negotiation, including the date the item or service was furnished, the service code, the initial payment amount or notice of denial of payment, as applicable, an offer for the out-of-network rate, and the contact information of the party sending the open negotiation notice. The open negotiation notice must be sent during

¹⁸ In the case of a determination made by a certified IDR entity, the party that submitted the initial notification initiating the Federal IDR process may not submit a subsequent notification involving the same other party with respect to a claim for the same or similar item or service that was the subject of the initial notification during the 90-calendar-day period following the determination (the “cooling off period”).

¹⁹ As clarified in the July 2021 interim final rules, the initial payment should be an amount that the plan or issuer reasonably intends to be payment in full based on the relevant facts and circumstances, prior to the beginning of any open negotiations or initiation of the Federal IDR process. See 86 FR 36900–36901.

the 30-business-day period beginning on the day the initial payment or notice of denial of payment from the plan or issuer regarding such item or service was received and must be provided in writing. The party sending the open negotiation notice may satisfy this requirement by providing the notice to the opposing party electronically (such as by email) if the following two conditions are satisfied: (1) the party sending the open negotiation notice has a good faith belief that the electronic method is readily accessible to the other party; and (2) the notice is provided in paper form free of charge upon request. The 30-business-day open negotiation period begins on the day on which the open negotiation notice is first sent by a party.

As stated in the preamble to the October 2021 interim final rules, parties should be able to provide effective notice because the parties have already made initial contact (that is, the provider, facility, or provider of air ambulance services has transmitted a bill to the plan or issuer, and the plan or issuer sent an initial payment or a notice of denial of payment to the provider, facility, or provider of air ambulance services).²⁰ The Departments encouraged the parties to take reasonable measures to ensure that actual notice is provided, such as by confirming that the email address is correct, and cautioned that if the open negotiation notice is not properly provided to the other party (and no reasonable measures have been taken to ensure actual notice has been provided), the Departments or a certified IDR entity may determine that the 30-business-day open negotiation period has not begun. In such a case, any subsequent payment determination from a certified IDR entity may be unenforceable due to the failure of the party sending the open negotiation notice to meet the open negotiation requirement of the October 2021 interim final rules. In guidance, the Departments clarified how a provider, facility, or provider of air ambulance services should proceed if the plan or issuer fails to disclose information necessary to initiate the open negotiation period when providing the initial payment or notice of denial of payment and whether providers, facilities, or providers of air ambulance services are required to use a plan’s or issuer’s online portal to submit an open negotiation notice.²¹

²⁰ 86 FR 55980, 55990.

²¹ See U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury *FAQs about Affordable*
Continued

The October 2021 interim final rules provide that if the parties have not negotiated an agreement on the out-of-network rate by the last day of the open negotiation period, either party may initiate the Federal IDR process during the 4-business-day period beginning on the 31st business day after the start of the open negotiation period.²² To initiate the Federal IDR process, the initiating party must submit the standard notice of IDR initiation to the other party and to the Departments. As stated in the preamble of the October 2021 interim final rules, this notice must be provided to the Departments and the other party on the same day.²³ The notice of IDR initiation must include: (1) information sufficient to identify the qualified IDR items and services (and whether the qualified IDR items or services are designated as batched items and services), including the furnishing date(s) and location(s) of the item or service, the type of qualified IDR item or service (such as emergency services, post-stabilization professional services, hospital-based services), corresponding service and place-of-service code(s), the amount of cost sharing allowed, and the amount of the initial payment made by the plan or issuer for the qualified IDR item or service, if applicable; (2) the names and contact information of the parties involved, including email addresses, phone numbers, and mailing addresses; (3) the State where the qualified IDR item or service was furnished; (4) the commencement date of the open negotiation period; (5) the initiating party's preferred certified IDR entity; (6) an attestation that the item or service is a qualified IDR item or service within the scope of the Federal IDR process; (7) the QPA; (8) information about the QPA as described in 26 CFR 54.9816-6T(d), 29 CFR 2590.716-6(d), and 45 CFR 149.140(d); and (9) general information describing the Federal IDR process as specified by the Departments.²⁴ The general information should include a description of the scope of the Federal IDR process and key deadlines in the Federal IDR process, including the dates to initiate the Federal IDR process, how to select a certified IDR entity, and the

process for selecting an offer.²⁵ The Departments have developed a form that parties must use to satisfy this requirement to provide general information describing the Federal IDR process.

Under section 9816(c)(1)(B) of the Code, section 716(c)(1)(B) of ERISA, and section 2799A-1(c)(1)(B) of the PHS Act, the date of initiation of the Federal IDR process is the date of the submission of the notice of IDR initiation or another date specified by the Departments that is not later than the date of receipt of the notice of IDR initiation by both the other party to the dispute and the Departments. The October 2021 interim final rules establish that the initiation date of the Federal IDR process is the date of receipt of the notice of IDR initiation by the Departments.²⁶

Under the October 2021 interim final rules, the plan or issuer and the nonparticipating provider, nonparticipating emergency facility, or nonparticipating provider of air ambulance services (as applicable) may jointly select a certified IDR entity no later than 3 business days following the date of the IDR initiation.²⁷ As previously stated, the initiating party will select its preferred certified IDR entity in the notice of IDR initiation. The party in receipt of the notice of IDR initiation (non-initiating party) may agree or object to the preferred certified IDR entity identified by the initiating party in the notice of IDR initiation. If the non-initiating party does not object within 3 business days of the date of initiation of the Federal IDR process, the preferred certified IDR entity identified in the notice of IDR initiation will be the selected certified IDR entity, provided that the certified IDR entity does not have a conflict of interest. If the non-initiating party objects, that party must timely notify the initiating party of the objection and propose an alternative preferred certified IDR entity. The initiating party must then agree or object to the alternative preferred certified IDR entity. If the initiating party fails to object to the alternative preferred certified IDR entity within 3 business days of the date of initiation of the Federal IDR process, the alternative preferred certified IDR entity proposed by the non-initiating party will be the selected certified IDR entity, provided that the certified IDR entity does not have a conflict of interest. If both parties

agree on and select a certified IDR entity or fail to agree upon a certified IDR entity within the specified timeframe, the initiating party must notify the Departments by electronically submitting the notice of the certified IDR entity selection or failure to select (as applicable), no later than 1 business day after the end of the 3-business-day period (or in other words, 4 business days after the date of initiation of the Federal IDR process) through the Federal IDR portal. If the parties fail to jointly select a certified IDR entity, the Departments will then randomly select a certified IDR entity not later than 6 business days after the date of initiation of the Federal IDR process and will notify the parties of the selection. In addition, in instances in which the non-initiating party believes that an item or service is not eligible for the Federal IDR process, the non-initiating party must notify the Departments through the Federal IDR portal within the same timeframe that the notice of certified IDR entity selection or failure to select is required (or in other words, 4 business days after the date of initiation of the Federal IDR process) and provide information that demonstrates why an item or service is not eligible for the Federal IDR process.

After being notified of selection (either by the parties or the Departments), certified IDR entities are required within 3 business days of selection to attest that they do not have a conflict of interest as specified under 26 CFR 54.9816-8T(c)(1)(ii), 29 CFR 2590.716-8(c)(1)(ii), and 45 CFR 149.510(c)(1)(ii). Certified IDR entities are also required to review the information submitted in the notice of IDR initiation and any additional requested information to determine whether the dispute is for a qualified IDR item or service, as defined in 26 CFR 54.9816-8T(a)(2)(xi), 29 CFR 2590.716-8(a)(2)(xi), and 45 CFR 149.510(a)(2)(xi), that is eligible for the Federal IDR process, including whether an All-Payer Model Agreement or specified State law applies. If an item or service is not a qualified IDR item or service eligible for the Federal IDR process, certified IDR entities must notify the Departments and the parties within 3 business days of making this determination.

The October 2021 interim final rules provide that, not later than 30 business days after the selection of a certified IDR entity, the certified IDR entity must select one of the offers submitted by either party to the dispute to be the out-of-network rate for the qualified IDR

Care Act and Consolidated Appropriations Act, 2021 Implementation Part 55, Q20 and Q21 (Aug. 19, 2022), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-55.pdf> and <https://www.cms.gov/files/document/faqs-part-55.pdf>.

²² 86 FR 55991; 26 CFR 54.9816-8T(b)(2)(i), 29 CFR 2590.716-8(b)(2)(i), and 45 CFR 149.510(b)(2)(i).

²³ 86 FR 55991.

²⁴ 26 CFR 54.9816-8T(b)(2)(iii)(A), 29 CFR 2590.716-8(b)(2)(iii)(A), and 45 CFR 149.510(b)(2)(iii)(A).

²⁵ 86 FR 55991.

²⁶ *Id.*

²⁷ 86 FR 55991 through 55992, 26 CFR 54.9816-8T(c)(1)(i), 29 CFR 2590.716-8(c)(1)(i), and 45 CFR 149.510(c)(1)(i).

item or service.²⁸ For each qualified IDR item or service, the total plan or coverage payment is the amount by which this out-of-network rate exceeds the cost-sharing amount for the qualified IDR item or service (with any initial payment made by the plan or issuer counted toward the total plan or coverage payment).

The October 2021 interim final rules also provided that, after considering the QPA, the statutory factors under sections 9816(c)(5)(C)(ii) and 9817(b)(5)(C)(ii) of the Code, sections 716(c)(5)(C)(ii) and 717(b)(5)(C)(ii) of ERISA, and sections 2799A–1(c)(5)(C)(ii) and 2799A–2(b)(5)(C)(ii) of the PHS Act, additional information requested by the certified IDR entity from the parties, and all of the additional credible information submitted by the parties that was not prohibited information under 26 CFR 54.9816–8T(c)(4)(v), 29 CFR 2590.716–8(c)(4)(v), and 45 CFR 149.510(c)(4)(v), the certified IDR entity must select the offer closest to the QPA, unless the certified IDR entity determined that the credible information submitted by the parties clearly demonstrated that the QPA was materially different from the appropriate out-of-network rate, or the offers were equally distant from the QPA but in opposing directions.²⁹ In those situations, the October 2021 interim final rules required the certified IDR entity to select the offer that the certified IDR entity determined best represented the value of the item or service, which could be either party's offer.³⁰ However, as discussed in sections I.D. and I.F. of this preamble, the District Court vacated portions of these rules related to certified IDR entity determinations.³¹

The October 2021 interim final rules also provide that not later than 30 business days after the selection of the certified IDR entity, the certified IDR entity must notify parties to the dispute of the selection of the offer and provide a written decision,³² which must be submitted to the parties and the Departments through the Federal IDR portal.³³

Section 9816(c)(3)(A) of the Code, section 716(c)(3)(A) of ERISA, and

section 2799A–1(c)(3)(A) of the PHS Act direct the Departments to specify criteria under which multiple qualified IDR items and services are permitted to be considered jointly as part of a single determination (“batched determination” or “batched dispute”) by a certified IDR entity for purposes of encouraging the efficiency (including minimizing costs) of the Federal IDR process. These sections further require that items and services may be considered as part of a batched determination only if the items and services are furnished by the same provider or facility; payment for the items and services is required to be made by the same group health plan or health insurance issuer; such items and services are related to the treatment of a similar condition; and the items and services were furnished during the 30-day period following the date on which the first item or service included in the batched determination was furnished, or during an alternative period as determined by the Departments, for use in limited situations, such as by the consent of the parties or in the case of low-volume items and services, to encourage procedural efficiency and minimize health plan and provider administrative costs. The October 2021 interim final rules implemented these requirements for batched determinations at 26 CFR 54.9816–8T(c)(3)(i), 29 CFR 2590.716–8(c)(3)(i), and 45 CFR 149.510(c)(3)(i), which are subject to the certified IDR entity fee for batched determinations.³⁴

The October 2021 interim final rules also establish requirements related to the costs of the Federal IDR process. Under the October 2021 interim final rules, each party must pay a non-refundable administrative fee for participating in the Federal IDR process.³⁵ The certified IDR entity may invoice the parties for the administrative fee at the time the certified IDR entity is selected, and the parties must pay the administrative fee by the time of offer submission.³⁶ The administrative fee is paid by each party to the certified IDR entity and remitted to the Departments.³⁷ Under the October

2021 interim final rules, the administrative fee was to be established annually through guidance in a manner such that the total administrative fees collected for a year are estimated to be equal to the amount of expenditures estimated to be made by the Departments to carry out the Federal IDR process for that year.

Additionally, under the October 2021 interim final rules, each party must also pay a certified IDR entity fee to the certified IDR entity at the time that the party submits its offer.³⁸ However, the non-prevailing party is ultimately responsible for the full certified IDR entity fee, which is retained by the certified IDR entity for the services it performed.³⁹ The certified IDR entity fee that was paid by the prevailing party is returned to the prevailing party by the certified IDR entity within 30 business days following the date of the payment determination.⁴⁰ If the parties reach an agreement after initiating the Federal IDR process but before the certified IDR entity makes a payment determination, the certified IDR entity fee is split evenly between the parties, unless the parties agree on an alternative method for allocating the certified IDR entity fee.⁴¹ Similarly, if the initiating party withdraws a dispute after a certified IDR entity has been assigned but before the certified IDR entity makes a payment determination, responsibility for the certified IDR entity fee is split evenly between the parties.⁴² In the case of batched determinations, the certified IDR entity may make different payment determinations for each qualified IDR item or service under dispute. In these cases, the party with the fewest determinations in its favor is considered the non-prevailing party and is responsible for the full certified IDR entity fee. If each party prevails in an equal number of determinations, the certified IDR entity fee is split evenly between the parties. Under the October 2021 interim final rules, the

Surprises Act directed the Departments to jointly establish one Federal IDR process. To operationalize the Federal IDR process, HHS collects administrative fees for all disputes initiated under the Federal IDR process, including the administrative fees paid in connection with the Federal IDR process for health plans that are subject to the Code or ERISA.

²⁸ 26 CFR 54.9816–8T(d)(1)(ii), 29 CFR 2590.716–8(d)(1)(ii), and 45 CFR 149.510(d)(1)(ii).

²⁹ 26 CFR 54.9816–8T(d)(1)(i), 29 CFR 2590.716–8(d)(1)(i), and 45 CFR 149.510(d)(1)(i).

⁴⁰ 26 CFR 54.9816–8T(d)(1)(ii), 29 CFR 2590.716–8(d)(1)(ii), and 45 CFR 149.510(d)(1)(ii).

⁴¹ 26 CFR 54.9816–8T(c)(2)(ii), 29 CFR 2590.716–8(c)(2)(ii), and 45 CFR 149.510(c)(2)(ii).

⁴² See <https://www.cms.gov/cciiio/resources/regulations-and-guidance/downloads/patient-provider-dispute-resolution-administrative-fee-cy-2023.pdf>.

²⁸ 26 CFR 54.9816–8T(c)(4)(ii), 29 CFR 2590.716–8(c)(4)(ii), and 45 CFR 149.510(c)(4)(ii).

²⁹ 86 FR 55995.

³⁰ *Id.*

³¹ *TMA I* and *TMA II*.

³² 86 FR 55995, 26 CFR 54.9816–8T(c)(4)(ii), 29 CFR 2590.716–8(c)(4)(ii), and 45 CFR 149.510(c)(4)(ii).

³³ The Federal IDR portal is available at <https://www.nsa-idr.cms.gov> and must be used throughout the Federal IDR process to maximize efficiency and reduce burden.

³⁴ 86 FR 55994. See also the October 2021 interim final rules in which the Departments defined “batched items and services” as “multiple qualified IDR items or services that are considered jointly as part of one payment determination by a certified IDR entity for purposes of the Federal IDR process.” 86 FR 55987.

³⁵ 26 CFR 54.9816–8T(d)(2)(i), 29 CFR 2590.716–8(d)(2)(i), and 45 CFR 149.510(d)(2)(i).

³⁶ See Federal Independent Dispute Resolution (IDR) Process Guidance for Disputing Parties, available at: <https://www.cms.gov/files/document/rev-102822-idr-guidance-disputing-parties.pdf>.

³⁷ 26 CFR 54.9816–8T(e)(2)(ix), 29 CFR 2590.716–8(e)(2)(ix), and 45 CFR 149.510(e)(2)(ix). The No

Departments set certified IDR entity fee ranges annually through guidance.

D. Litigation Regarding the July 2021 and October 2021 Interim Final Rules and Related Guidance

On October 28, 2021, the Texas Medical Association, a trade association representing physicians, and a Texas physician filed a lawsuit against the Departments and OPM (*TMA I*),⁴³ stating that certain provisions of the October 2021 interim final rules relating to the certified IDR entities' consideration of the QPA, as well as additional factors related to items and services that are not air ambulance services, should be vacated. Plaintiffs argued that the October 2021 interim final rules ignored Congress's intent that certified IDR entities weigh the QPA and other factors without favoring any factor, and the plaintiffs stated that as a result, the rules would skew IDR results in favor of plans and issuers. On February 23, 2022, the District Court issued a memorandum opinion and order that vacated portions of the October 2021 interim final rules governing aspects of the Federal IDR process related to non-air ambulance qualified IDR items or services including: (1) the definition of "material difference"; (2) the requirement that a certified IDR entity must select the offer closest to the QPA unless the certified IDR entity determines that credible information submitted by either party under 26 CFR 54.9816–8T(c)(4)(i), 29 CFR 2590.716–8(c)(4)(i), and 45 CFR 149.510(c)(4)(i) clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate for non-air ambulance qualified IDR items or services, or if the offers are equally distant from the QPA but in opposing directions; (3) the requirement that the certified IDR entity may only consider the additional information submitted by either party to the extent that the credible information related to the circumstances under 26 CFR 54.9816–8T(c)(4)(i), 29 CFR 2590.716–8(c)(4)(i), and 45 CFR 149.510(c)(4)(i) clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate for non-air ambulance qualified IDR items or services; (4) the dispute resolution examples; and (5) the requirement that, if the certified IDR entity does not choose the offer closest to the QPA, the certified IDR entity's written decision must include an explanation of the credible information that the certified IDR entity determined demonstrated that the QPA was

materially different from the appropriate out-of-network rate, based on the factors certified IDR entities are permitted to consider for the qualified IDR item or service.⁴⁴

On April 27, 2022, LifeNet, Inc., a provider of air ambulance services, filed a lawsuit against the Departments and OPM (*LifeNet*)⁴⁵ seeking the vacatur of additional provisions of the October 2021 interim final rules applicable to air ambulance services. In particular, LifeNet alleged that the requirement codified in the last sentence of 26 CFR 54.9817–2T(b)(2), 29 CFR 2590.717–2(b)(2), and 45 CFR 149.520(b)(2), which specifies the certified IDR entity may consider information submitted by a party only if the information "clearly demonstrate[s] that the qualifying payment amount is materially different from the appropriate out-of-network rate," should be vacated. On July 26, 2022, the District Court issued a memorandum opinion and order vacating this language.⁴⁶

On November 30, 2022, the Texas Medical Association, Tyler Regional Hospital, and a Texas physician filed a lawsuit (*TMA III*)⁴⁷ against the Departments and OPM, asserting that the July 2021 interim final rules, including the provisions of the regulations governing the methodology for calculating the QPA, and certain related guidance documents were in conflict with the statutory language. On August 24, 2023, the District Court issued a memorandum opinion and order⁴⁸ that vacated certain portions of the July 2021 interim final rules and associated regulatory provisions⁴⁹ and portions of guidance documents,⁵⁰ including portions related to the methodology for calculating the QPA and interpretations for certified IDR entities related to the processing of disputes for air ambulance services.

⁴⁴ *Id.*

⁴⁵ *LifeNet, Inc. v. U.S. Dep't of Health and Human Servs.*, 617 F.Supp.3d 547 (E.D. Tex. July 26, 2022).

⁴⁶ *Id.*

⁴⁷ *Tex. Med. Ass'n., et al. v. U.S. Dep't of Health and Human Servs.*, Case No. 6:22–cv–00450–JDK (E.D. Tex. November 30, 2022).

⁴⁸ See Memorandum Opinion and Order, *Tex. Med. Ass'n., et al. v. U.S. Dep't of Health and Human Servs.*, No. 6:22–cv–00450–JDK (E.D. Tex. August 24, 2023).

⁴⁹ Specifically, the District Court vacated certain provisions of 54.9816–6T and 54.9817–1T, 29 CFR 2590.716–6 and 2590.717–1, and 45 CFR 149.130 and 149.140. The District Court also vacated 5 CFR 890.114(a), insofar as it requires compliance with the vacated regulations and guidance.

⁵⁰ Specifically, the District Court vacated *FAQs about Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 55* (Aug. 19, 2022), Q14 and 15, as well as portions of *Technical Guidance for Certified IDR Entities at 2–3* (Aug. 18, 2022).

On January 30, 2023, the Texas Medical Association, Houston Radiology Associated, Texas Radiological Society, Tyler Regional Hospital, and a Texas physician filed a lawsuit (*TMA IV*)⁵¹ against the Departments and OPM, asserting that the December 2022 fee guidance⁵² and the October 2021 interim final rules were unlawfully issued without notice and comment rulemaking and were arbitrary and capricious.⁵³ On August 3, 2023, the District Court issued a memorandum opinion and order⁵⁴ that vacated the portion of the December 2022 fee guidance increasing the administrative fee for the Federal IDR process to \$350 per party for disputes initiated during the calendar year beginning January 1, 2023. The District Court also vacated certain provisions of the October 2021 interim final rules setting forth the batching criteria under which multiple IDR items or services are treated as related to the "treatment of a similar condition."⁵⁵ In light of the *TMA IV* order, on August 3, 2023, the Departments instructed certified IDR entities to pause all work in the Federal IDR portal until the Departments updated Federal IDR process guidance, systems, and related documents to make them consistent with the *TMA IV* order. Subsequently, on August 7, 2023, the Departments directed certified IDR entities to resume processing all single and bundled disputes for which the administrative fee had already been paid and all batched disputes for which the certified IDR entity had already determined the dispute eligible and

⁵¹ *Tex. Med. Ass'n., et al. v. U.S. Dep't of Health and Human Servs.*, Case No. 6:23–cv–00059–JDK, (E.D. Tex. Jan. 30, 2023).

⁵² Centers for Medicare & Medicaid Services (Dec. 23, 2022). *Amendment to the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act: Change in Administrative Fee*. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/amended-cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

⁵³ See Motion for Summary Judgment and Reply in Support of Summary Judgment, p. 1, *Tex. Med. Ass'n., et al. v. U.S. Dep't of Health and Human Servs.*, No. 6:23–cv–00059–JDK (E.D. Tex. March 27, 2023).

⁵⁴ See Memorandum Opinion and Order, *Tex. Med. Ass'n. v. U.S. Dep't of Health and Hum. Servs.*, No. 6:23–cv–00059–JDK (E.D. Tex. August 3, 2023).

⁵⁵ Specifically, the District Court vacated the requirement under 26 CFR 54.9816–8T(c)(3)(i)(C), 29 CFR 2590.716–8(c)(3)(i)(C), and 45 CFR 149.510(c)(3)(i)(C) that for a qualified IDR item and service to be considered the same or similar item and service, it must be billed under the same service code or a comparable code under a different procedural code system, such as the Current Procedural Terminology (CPT) codes with modifiers, if applicable, Healthcare Common Procedure Coding System (HCPCS) with modifiers, if applicable, or Diagnosis-Related Group (DRG) codes with modifiers, if applicable.

⁴³ *Tex. Med. Ass'n., et al. v. U.S. Dep't of Health and Human Servs.*, 587 F. Supp. 3d 528 (E.D. Tex. 2022).

administrative fees had been paid (or the deadline for collecting fees had expired) before August 3, 2023.⁵⁶ On August 8, 2023, the Departments directed certified IDR entities to resume processing single and bundled disputes initiated in 2022 for which the administrative fee had not been paid before August 3, 2023. On August 11, 2023, the Departments released guidance to reflect the *TMA IV* order related to the administrative fee and to clarify the administrative fee amount for 2023.⁵⁷ On the same date, the Departments directed certified IDR entities to resume processing single and bundled disputes initiated in 2023 for which the administrative fees had not been paid before August 3, 2023.

As a result of the *TMA III* order issued on August 24, 2023, the Departments again paused all IDR-related activities in order to evaluate the District Court's order and review current Federal IDR processes, templates, and system functions necessary to comply with the order. On September 5, 2023, the Departments directed certified IDR entities to resume making eligibility and conflict-of-interest determinations for all single and bundled disputes submitted on or before August 3, 2023, and encouraged disputing parties to continue engaging in open negotiations. On September 21, 2023, the Departments directed certified IDR entities to resume processing all single and bundled disputes submitted on or before August 3, 2023. On October 6, 2023, the Departments and OPM released "FAQs About Consolidated Appropriations Act, 2021 Implementation Part 62"⁵⁸ to provide

guidance in light of the *TMA III* order. On the same day, the Departments reopened the Federal IDR portal for the initiation of certain new single and bundled disputes. At the time of this proposed rulemaking and in accordance with the *TMA III* and *TMA IV* orders, the Departments plan to release guidance to clarify how certified IDR entities should determine whether a dispute is appropriately batched.

E. August 2022 Final Rules

The August 2022 final rules included amendments to remove from the regulations the language vacated by the District Court in *TMA I* and *LifeNet*,⁵⁹ as described in section I.D. of this preamble. In addition, the August 2022 final rules amended and finalized certain disclosure requirements related to information that plans and issuers must share about the QPA under the July 2021 interim final rules.⁶⁰ The August 2022 final rules also amended and finalized select provisions of the October 2021 interim final rules on the information to be considered by a certified IDR entity when it makes a payment determination under the Federal IDR process.⁶¹

Specifically, the Departments amended and finalized parts of the July 2021 and October 2021 interim final rules related to: (1) the information that must be disclosed about the QPA under 26 CFR 54.9816–6T(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d) to address downcoding; (2) the certified IDR entity's consideration of the statutory factors when making a payment determination under the Federal IDR process at 26 CFR 54.9816–8T(c)(4)(iii)–(iv) and 54.9817–2T(b)(2), 29 CFR 2590.716–8(c)(4)(iii)–(iv) and 2590.717–2(b)(2), and 45 CFR 149.510(c)(4)(iii)–(iv) and 149.520(b)(2); and (3) the certified IDR entity's written decision at 26 CFR 54.9816–8T(c)(4)(vi)(B), 29 CFR 2590.716–8(c)(4)(vi)(B), and 45 CFR 149.510(c)(4)(vi)(B).

For the information that must be disclosed with the QPA, the August 2022 final rules require that if a QPA is based on a downcoded service code or modifier, in addition to the information already required to be provided with an initial payment or notice of denial of payment, a plan or issuer must provide

a statement that the service code or modifier billed by the provider, facility, or provider of air ambulance services was downcoded; an explanation of why the claim was downcoded, including a description of which service codes were altered, if any, and which modifiers were altered, added, or removed, if any; and the amount that would have been the QPA had the service code or modifier not been downcoded. The August 2022 final rules define the term "downcode," as described in the preamble to the October 2021 interim final rules, to mean the alteration by a plan or issuer of a service code to another service code, or the alteration, addition, or removal by a plan or issuer of a modifier, if the changed code or modifier is associated with a lower QPA than the service code or modifier billed by the provider, facility, or provider of air ambulance services.⁶²

The August 2022 final rules also provided that in determining which offer to select during the Federal IDR process, the certified IDR entity must consider the QPA for the applicable year for the same or similar item or service and then must consider all additional information submitted by a party to determine which offer best reflects the appropriate out-of-network rate, provided that the information relates to the party's offer for the payment amount for the qualified IDR item or service that is the subject of the payment determination and does not include information that the certified IDR entity is prohibited from considering in making the payment determination under section 9816(c)(5)(D) of the Code, section 716(c)(5)(D) of ERISA, and section 2799A–1(c)(5)(D) of the PHS Act. For this purpose, the preamble to the August 2022 final rules stated that information requested by a certified IDR entity, or submitted by a party, would be information relating to a party's offer if it tends to show that the offer best represents the value of the item or service under dispute. The August 2022 final rules required the certified IDR entity to evaluate whether the information relates to the offer submitted by either party for the payment amount for the qualified IDR item or service that is the subject of the payment determination. The August 2022 final rules clarified that in considering this additional information, the certified IDR entity should evaluate whether the information that is offered is credible and should not give weight to information that is not credible. The appropriate out-of-network rate must be the offer that the certified IDR entity

⁵⁶ For the purposes of the Federal IDR process, the Departments in guidance interpreted a bundled payment arrangement to be an arrangement under which: (1) a provider, facility, or provider of air ambulance services bills for multiple items or services under a single service code; or (2) a plan or issuer makes an initial payment or denial of payment to a provider, facility, or provider of air ambulance services under a single service code that represents multiple items or services (e.g., a DRG). See U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of Treasury, Federal Independent Dispute Resolution (IDR) Process Technical Assistance for Certified IDR Entities, August 2022, available at <https://www.cms.gov/files/document/TA-certified-independent-dispute-resolution-entities-August-2022.pdf>. These rules, discussed in section II.A. of this preamble, propose to codify that definition in the regulations.

⁵⁷ Centers for Medicare & Medicaid Services (Aug. 11, 2023). *Federal Independent Dispute Resolution (IDR) Process Administrative Fee FAQs*. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/no-surprises-act-independent-dispute-resolution-administrative-fee-frequently-asked-questions.pdf>.

⁵⁸ See U.S. Department of Health and Human Services, U.S. Department of Labor, U.S. Department of the Treasury, Office of Personnel

Management, *FAQs about Consolidated Appropriations Act, 2021 Implementation Part 62* (Oct. 6, 2023), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/faqs/aca-part-62.pdf> and <https://www.cms.gov/files/document/faqs-part-62.pdf>.

⁵⁹ 87 FR 52622.

⁶⁰ 87 FR 52622–52623.

⁶¹ 87 FR 52628.

⁶² 87 FR 52626.

determines best represents the value of the qualified IDR item or service.

Additionally, the August 2022 final rules provided that when considering the additional information under 26 CFR 54.9816–8(c)(4)(iii), 29 CFR 2590.716–8(c)(4)(iii), and 45 CFR 149.510(c)(4)(iii), the certified IDR entity should evaluate the information and should not give weight to that information if it is already accounted for by any of the other information submitted by the parties, to avoid weighting the same information twice.

For the written decision, the August 2022 final rules require the certified IDR entity to include what information the certified IDR entity used to determine that the offer selected as the out-of-network rate is the offer that best represents the value of the qualified IDR item or service, including the weight given to the QPA and any additional credible information submitted in accordance with the rules. The August 2022 final rules required that if the certified IDR entity relied on additional information in selecting an offer, its written decision must include an explanation of why the certified IDR entity concluded that this information was not already reflected in the QPA.

F. Litigation Regarding the August 2022 Final Rules

On September 22, 2022, the Texas Medical Association, Tyler Regional Hospital, a Texas physician, LifeNet, Inc., Air Methods Corporation, Rocky Mountain Holdings, LLC, and East Texas Air One, LLC filed a lawsuit against the Departments (*TMA II*),⁶³ asserting that certain provisions of the August 2022 final rules relating to the certified IDR entities' consideration of the QPA, as well as additional factors, should be vacated. Plaintiffs argued that the August 2022 final rules unlawfully conflict with the No Surprises Act in the same manner as the vacated provisions of the October 2021 interim final rules—that is, such rules improperly restrict arbitrators' discretion and unlawfully tilt the arbitration process in favor of the QPA. On February 6, 2023, the District Court issued a memorandum opinion and order that vacated portions of the August 2022 final rules related to the certified IDR entity's consideration of the statutory factors when making a payment determination under the Federal IDR process at 26 CFR 54.9816–8(c)(4)(iii)–(iv) and 54.9817–2(b)(3), 29

CFR 2590.716–8(c)(4)(iii)–(iv) and 2590.717–2(b)(3), and 45 CFR 149.510(c)(4)(iii)–(iv) and 149.520(b)(3) and part of the provision related to the certified IDR entity's written decision at 26 CFR 54.9816–8(c)(4)(vi)(B), 29 CFR 2590.716–8(c)(4)(vi)(B), and 45 CFR 149.510(c)(4)(vi)(B). The vacated portions of the rules include: (1) the requirement that certified IDR entities consider the QPA and then the additional statutory factors under 26 CFR 54.9816–8(c)(4)(iii)(B)(1)–(5) and 54.9817–2(b)(3), 29 CFR 2590.716–8(c)(4)(iii)(B)(1)–(5) and 2590.717–2(b)(3), and 45 CFR 149.510(c)(4)(iii)(B)(1)–(5) and 149.520(b)(3); (2) the provision that a certified IDR entity should evaluate whether the information submitted under 26 CFR 54.9816–8(c)(4)(iii)(B)–(D) and 54.9817–2(b)(3), 29 CFR 2590.716–8(c)(4)(iii)(B)–(D) and 2590.717–2(b)(3), and 45 CFR 149.510(c)(4)(iii)(B)–(D) and 149.520(b)(3) is credible and relates to the offer submitted by either party for the payment amount for the qualified IDR item or service that is the subject of the payment determination, and the certified IDR entity should not give weight to information to the extent it is not credible, it does not relate to either party's offer for the payment amount for the qualified IDR item or service, or it is already accounted for by the QPA or another factor; (3) the dispute resolution examples; and (4) the requirement that, if the certified IDR entity relies on additional information in selecting an offer, its written decision must include an explanation of why the certified IDR entity concluded that this information was not already reflected in the QPA.

As a result of the *TMA II* order, on February 10, 2023, the Departments instructed certified IDR entities to hold all payment determinations until the Departments updated Federal IDR process guidance, systems, and related documents to make them consistent with the *TMA II* order.⁶⁴ Subsequently, the Departments directed certified IDR entities to resume making payment determinations on February 27, 2023, for disputes involving an item or service furnished before October 25, 2022 (the effective date of the August 2022 Final Rules).⁶⁵ On March 17, 2023, the

Departments released updated guidance⁶⁶ to reflect the *TMA II* order and directed certified IDR entities to resume making payment determinations in accordance with the guidance for disputes involving items or services furnished on or after October 25, 2022.

On April 6, 2023, the Departments filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit from the District Court's order granting summary judgement to the plaintiffs and denying summary judgment to the Departments.

G. Federal IDR Process Administrative Fee and Certified IDR Entity Fee Ranges 2023 Proposed Rules

In light of *TMA IV* and to promote transparency in the administrative fee calculation, the Departments published the IDR Process Fees proposed rules on September 26, 2023. The IDR Process Fees proposed rules propose to amend the October 2021 interim final rules to provide that the administrative fee would be set in notice and comment rulemaking rather than annual guidance, propose an administrative fee amount that, if finalized, would apply for disputes initiated on or after the later of the effective date of the IDR Process Fees proposed rules or January 1, 2024, and propose a methodology that the Departments would use to calculate the administrative fee in the future. Additionally, the IDR Process Fees proposed rules would propose to amend the October 2021 interim final rules to provide that the certified IDR entity fee ranges for single and batched determinations would be set in notice and comment rulemaking rather than annual guidance, propose the certified IDR entity fee ranges for single and batched determinations, including a fixed tiered fee for batched disputes, and propose the considerations that the Departments would use to calculate the certified IDR entity fee ranges in the future. If finalized, the proposed certified IDR entity fee ranges and fixed tiered fees would apply for disputes initiated on or after the later of the effective date of the IDR Process Fees proposed rules or January 1, 2024. If finalized, the proposed administrative fee and certified IDR entity fee ranges would remain in effect until changed by subsequent rulemaking.

⁶⁴ Centers for Medicare & Medicaid Services. (February 10, 2023). *Payment Disputes Between Providers and Health Plans, Notices*. <https://www.cms.gov/nosurprises/help-resolve-payment-disputes/payment-disputes-between-providers-and-health-plans>.

⁶⁵ Centers for Medicare & Medicaid Services. (February 27, 2023). *Payment Disputes Between Providers and Health Plans, Notices*. <https://www.cms.gov/nosurprises/help-resolve-payment-disputes/payment-disputes-between-providers-and-health-plans>.

⁶⁶ Centers for Medicare & Medicaid Services. (March 2023). *Federal Independent Dispute Resolution (IDR) Process for Certified IDR Entities (Revised)*. <https://www.cms.gov/files/document/federal-idr-guidance-idr-entities-march-2023.pdf> and *Federal Independent Dispute Resolution (IDR) Process for Disputing Parties (Revised)*. <https://www.cms.gov/files/document/federal-idr-guidance-disputing-parties-march-2023.pdf>.

⁶³ *Tex. Med. Ass'n, et al. v. U.S. Dep't of Health and Human Servs.*, Case No. 6:22-cv-372 (E.D. Tex. February 06, 2023) (*TMA II*). Air Methods Corporation, Rocky Mountain Holdings, LLC, and East Texas Air One, LLC are providers of air ambulance services.

H. The Federal IDR Process to Date

On April 15, 2022, the Departments launched the Federal IDR portal to accept disputes regarding the appropriate out-of-network rate for claims subject to the surprise billing protections of the No Surprises Act. From April 15, 2022 to July 1, 2023, disputing parties submitted over 489,000 disputes. In the first year of operations, disputing parties submitted 14 times the number of disputes that the Departments had expected to receive in an entire calendar year.⁶⁷ Due to this unexpectedly high volume, the limited number of certified IDR entities,⁶⁹ the complexity of determining disputes' eligibility for the Federal IDR process, and a large number of ineligible disputes submitted, it is taking certified IDR entities longer than the timeframes established under the No Surprises Act and the October 2021 interim final rules to process payment disputes. Further, the District Court's successive orders have resulted in multiple temporary closures of the Federal IDR portal, requiring the Departments to alter guidance, implement significant system updates, and communicate changes to disputing parties and certified IDR entities to comply with the orders. These interruptions to the Federal IDR process have exacerbated delays and required certified IDR entities and disputing parties to rapidly adjust to changing operations and guidance. Accordingly, a large number of disputes still await payment determinations.

Several factors are likely contributing to the high volume of initiated disputes. First, providers, facilities, and providers of air ambulance services⁷⁰ have alleged that plans' and issuers' QPA calculations are sometimes artificially low and are even at times lower than Medicare rates. Providers, facilities, and providers of air ambulance services further allege that plans and issuers are making initial payments based on these artificially low QPAs, which incentivizes providers, facilities, and

providers of air ambulance services to use the Federal IDR process for a larger number of items and services than they otherwise would.

A second factor contributing to the high volume of disputes is that the disputing parties are not yet able to predict how disputes will be resolved by certified IDR entities. As the Departments stated in the preamble to the October 2021 interim final rules, a Federal IDR process with predictable outcomes will reduce the use of the Federal IDR process over time because, if outcomes are predictable in advance, parties will generally prefer to reach an agreement in line with the predicted outcome outside of the Federal IDR process to avoid the administrative costs of utilizing the process.

Third, disputing parties are failing to engage in meaningful open negotiations. Parties representing providers, facilities, providers of air ambulance services, plans, and issuers have all asserted that they experience challenges in negotiating with other parties during the 30-business-day open negotiation period, resulting in low levels of engagement during open negotiation. This lack of engagement has resulted in relatively few disputes being settled outside of the Federal IDR process, contributing to a higher-than-expected volume of disputes being initiated in the Federal IDR process. As discussed later in this section, interested parties also shared that the lack of meaningful engagement in open negotiation contributes to inefficiencies within the Federal IDR process, because disputing parties that fail to engage in open negotiation may not exchange information that would facilitate the Federal IDR process, such as contact information and other required disclosures, or may exchange only incomplete information.

Fourth, the District Court's successive rulings have necessitated multiple temporary shutdowns of the Federal IDR process to comply with the District Court's orders. Each shutdown has halted parts, or all, of the Federal IDR process, interrupting the advancement of ongoing disputes through the process and preventing new disputes from being submitted. Reopening the Federal IDR portal each time has required the Departments to draft new guidance, engage in new rulemaking, implement significant system updates, and communicate changes to disputing parties and certified IDR entities. These interruptions to the Federal IDR process have exacerbated delays and required certified IDR entities and disputing parties to rapidly adjust to changing operations and guidance, which causes

confusion regarding the current state of the process while certified IDR entities and disputing parties adapt to new or different processes, such as those discussed in section I.D. of this preamble related to the *TMA III* order.

Finally, initiating parties are submitting a large number of disputes that are not eligible for the Federal IDR process, leading to both a high volume of dispute submissions and slow processing of disputes. Certified IDR entities have indicated to the Departments that determining the eligibility of disputes for the Federal IDR process is more time-consuming and burdensome than they expected. In fact, certified IDR entities report spending 50 to 80 percent of their time working on eligibility determinations. From April 15, 2022 to July 1, 2023, non-initiating parties challenged the eligibility of 190,465 disputes for the Federal IDR process, and certified IDR entities found 59,604 disputes ineligible. A dispute is not eligible for the Federal IDR process unless it concerns an item or service that meets the definition of a qualified IDR item or service.⁷¹ Ineligible disputes often involve an item or service that is not a qualified IDR item or service because it is covered by a health plan or coverage that is not subject to the surprise billing protections of the No Surprises Act, such as Medicare or Medicaid, or because the item or service is subject to a specified State law or an All-Payer Model Agreement. Additionally, many batched disputes were found ineligible due to the initiating party incorrectly batching items or services in a manner that did not comply with the regulations, such as batching claims paid by different plans or issuers.⁷² Certified IDR entities have similarly reported encountering incorrectly bundled disputes for which providers are attempting to submit, for example, an emergency room facility code as a bundled code with various item and service codes included as line items, rather than properly submitting a single service code (for example, a Diagnosis-Related Group (DRG) code under which a provider, facility, or provider of air ambulance services can bill for multiple items or services).⁷³ Disputes are also ineligible when the disputing parties have failed to satisfy the 30-business-day open negotiation period requirements specified under 26 CFR

⁶⁷ Federal Independent Dispute Resolution Process—Status update. Available at: <https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf>.

⁶⁸ In the regulatory impact analysis of the October 2021 interim final rules, the Departments estimated that 17,333 disputes involving non-air ambulance services and 4,899 disputes involving air ambulance services would be submitted to the Federal IDR process during the first year of implementation.

⁶⁹ <https://www.cms.gov/nosurprises/help-resolve-payment-disputes/certified-idre-list>.

⁷⁰ For purposes of these proposed rules, unless otherwise stated, whenever the Departments are referring to providers, facilities, and providers of air ambulance services, the Departments are referring to nonparticipating providers, facilities, and providers of air ambulance services.

⁷¹ 26 CFR 54.9816–8T(a)(2)(xi), 29 CFR 2590.716–8(a)(2)(xi), and 45 CFR 149.510 (a)(2)(xi).

⁷² 26 CFR 54.9816–8T(c)(3)(i)(B), 29 CFR 2590.716–8(c)(3)(i)(B), and 45 CFR 149.510(c)(3)(i)(B).

⁷³ 26 CFR 54.9816–8T(c)(3)(ii), 29 CFR 2590.716–8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii).

54.9816–8T(b)(1), 29 CFR 2590.716–8(b)(1), and 45 CFR 149.510(b)(1) or have failed to initiate the Federal IDR process within 4 business days after the end of the 30-business-day open negotiation period as specified under 26 CFR 54.9816–8T(b)(2)(i), 29 CFR 2590.716–8(b)(2)(i), and 45 CFR 149.510(b)(2)(i).

The Departments' review of the disputes submitted to date and feedback received from interested parties and certified IDR entities via letters, email communication and listening sessions shows a pattern of initiating parties submitting ineligible disputes to the Federal IDR process due to miscommunication or a lack of communication between the disputing parties. The Departments intended that sufficient information would be communicated through the disclosures that plans and issuers are required to provide with their initial payment or notice of denial of payment or would be subsequently communicated during the required 30-business-day open negotiation period to identify whether the item(s) or service(s) involved in the dispute is a qualified IDR item(s) or service(s). Plans and issuers assert that providers, facilities, and providers of air ambulance services submit overwhelming numbers of ineligible disputes that overload the plans' and issuers' ability to identify and respond to dispute initiations, while providers, facilities, and providers of air ambulance services assert that plans and issuers do not provide required contact information and disclosures in a clear and convenient manner and fail to respond to their notices initiating open negotiation.

Although plans and issuers are required to provide disclosures with the initial payment or notice of denial of payment containing information related to the QPA and contact information to initiate open negotiations, providers, facilities, and providers of air ambulance services have reported difficulty locating this information. The inability of providers, facilities, and providers of air ambulance services to locate required disclosures has led to confusion about how they should contact and engage in open negotiations with the plan or issuer and ultimately submit the dispute to the Federal IDR process. If disputing parties fail to share the required information, or if they provide inaccurate information, certified IDR entities will have incomplete or inaccurate information when making eligibility determinations. As a result, certified IDR entities must dedicate additional resources and conduct outreach to determine

eligibility. Many interested parties have stated that the exchange of key information in a more standardized fashion, such as through the inclusion of the information on electronic remittance advice (ERA) transactions, discussed in greater detail in section II.B. of this preamble, would ensure that disputing parties have timely access to complete and accurate information and therefore help reduce the number of ineligible disputes submitted to the Federal IDR process. This is primarily because disputing parties would have timely access to the information they need to determine whether (1) an item or service is a qualified IDR item or service and (2) it is in their interest to initiate the Federal IDR process regarding such item or service. The Departments are of the view that timely access to that type of information would help reduce the overall number of ineligible disputes, resulting in more manageable workloads for certified IDR entities and more efficient dispute processing overall.

Additionally, providers and facilities have raised concerns that the existing disclosure rules do not require plans and issuers to provide information necessary for determining whether the item or service is subject to a specified State law, an All-Payer Model Agreement, or the Federal IDR process for determining the out-of-network rate. In particular, providers, facilities, and providers of air ambulance services have identified significant challenges in determining whether a claim involves a plan that is a self-insured group health plan subject to ERISA (and, if the claim involves an item or service covered by the No Surprises Act, is therefore generally subject to the Federal IDR process) or a fully-insured plan to which a specified State law or All-Payer Model Agreement may apply.⁷⁴ The Departments also are aware that there are further challenges in identifying whether a plan subject to ERISA has opted into a specified State law and, separately, whether a specific item or

service, or specific provider, facility, or provider of air ambulance services, is subject to a given specified State law or All-Payer Model Agreement. Additionally, providers, facilities, and providers of air ambulance services have identified difficulties in determining the correct legal business name of the plan or issuer. As a result, when initiating the Federal IDR process, providers, facilities, and providers of air ambulance services may initiate their dispute against the wrong party or may incorrectly batch claims that were paid by different plans or issuers.

To address the high volume of disputes submitted to the Federal IDR process and the growing backlog of cases, the Departments have provided ongoing technical assistance to certified IDR entities and disputing parties by issuing guidance as well as performing research and outreach on dispute eligibility determinations.⁷⁵ In addition, the Departments have implemented Federal IDR portal system enhancements. These system enhancements, such as enabling non-initiating parties to submit supporting documentation to contest dispute eligibility within their response to the notice of IDR initiation, allow the Departments to collect information regarding dispute eligibility earlier in the process to identify whether the eligibility requirements are met. However, despite the efforts to date, the Departments and certified IDR entities continue to experience challenges related to determining eligibility for the Federal IDR process, such as delays due to necessary outreach by the certified IDR entities to the disputing parties to obtain or verify information regarding the eligibility of a dispute.

I. Scope and Purpose of Rulemaking

This proposed rulemaking is intended to address specific issues that are critical to ensuring the timely rendering of payment determinations and to address feedback from interested parties and certified IDR entities to improve the functioning of the Federal IDR process.

These proposed rules are intended to address some of the common communication issues between disputing parties, including those stemming from a lack of clarity as to whether items and services are qualified IDR items and services covered by the

⁷⁴ The July 2021 interim final rules allow self-insured group health plans, including self-insured non-Federal governmental plans, to voluntarily opt in to a State law that provides for a method for determining the total amount payable under such a plan, where a State has chosen to expand access to such plans, to satisfy their obligations under section 9816(a)–(d) of the Code, section 716(a)–(d) of ERISA, and section 2799A–1(a)–(d) of the PHS Act. A self-insured plan that has chosen to opt-in to a State law must prominently display in its plan materials describing the coverage of out-of-network services a statement that the plan has opted in to a specified State law, identify the relevant State (or States), and include a general description of the items and services provided by nonparticipating facilities, providers, and providers of air ambulance services that are covered by the specified State law.

⁷⁵ U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury, Federal Independent Dispute Resolution (IDR) Process Technical Assistance for Certified IDR Entities, August 2022, available at <https://www.cms.gov/files/document/TA-certified-independent-dispute-resolution-entities-August-2022.pdf>.

No Surprises Act. These proposed rules would impose requirements and create incentives for parties to engage with one another during the open negotiation period, which would help reduce the volume of ineligible disputes being submitted. Specifically, these proposed rules would make changes to the information that plans, issuers, providers, facilities, and providers of air ambulance services must share before initiating the Federal IDR process by including proposals at 26 CFR 54.9816–6A, 29 CFR 2590.716–6A, and 45 CFR 149.100 to require plans and issuers to provide claim adjustment reason codes (CARCs) and remittance advice remark codes (RARCs) when providing any paper or electronic remittance advice in response to a claim for payment for health care items or services furnished by an entity with which it does not have a direct or indirect contractual relationship. Additionally, the Departments propose amendments at 26 CFR 54.9816–6, 29 CFR 2590.716–6, and 45 CFR 149.140 to the information that must be disclosed about the QPA. These proposed rules would also establish new requirements at 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530, which would require plans and issuers to register with the Federal IDR portal to better enable a provider, facility, or provider of air ambulance services to identify the appropriate plan or issuer with which it has a dispute and determine whether its coverage of an item or service that is the subject of the dispute is subject to a specified State law, an All-Payer Model Agreement, or the Federal IDR process for determining the out-of-network rate.

To further facilitate communication and improve open negotiations, these proposed rules would amend the open negotiation process that precedes the Federal IDR process. Specifically, at 26 CFR 54.9816–8(b)(1), 29 CFR 2590.716–8(b)(1), and 45 CFR 149.510(b)(1), these proposed rules would amend the content requirements of the standard open negotiation notice, would establish requirements related to an open negotiation response notice, and would clarify the timing for when the open negotiation period begins. These proposed rules would also amend the process for initiating the Federal IDR process. Specifically, at 26 CFR 54.9816–8(b)(2), 29 CFR 2590.716–8(b)(2), and 45 CFR 149.510(b)(2), these proposed rules would amend the content of the notice of IDR initiation and establish new requirements for a

notice of IDR initiation response from the non-initiating party. At 26 CFR 54.9816–8T(b)(3), 29 CFR 2590.716–8(b)(3), and 45 CFR 149.510(b)(3) these proposed rules would also establish a new manner for providing notices to the other party and the Departments.

These proposed rules would also provide additional clarity regarding timeframes within the Federal IDR process. The No Surprises Act includes timeframes by which certain steps of the Federal IDR process must be completed. For example, the parties to a dispute must jointly select a certified IDR entity not later than the last day of the 3-business-day period following the date of the initiation of the Federal IDR process, and if the parties fail to jointly select a certified IDR entity, the Departments must select a certified IDR entity not later than 6 business days after the date of IDR initiation.⁷⁶ While the No Surprises Act also provides detailed timeframes for certain other steps in the process, the steps that must be conducted before a payment determination can be issued are not as clearly defined, such as when a certified IDR entity must conduct a conflict-of-interest review and must determine whether an item or service is a qualified IDR item or service, as defined in 26 CFR 54.9816–8T(a)(2)(xi), 29 CFR 2590.716–8(a)(2)(xi), and 45 CFR 149.510(a)(2)(xi), and eligible for the Federal IDR process. Therefore, the provisions in these proposed rules would adjust certain steps and establish associated timeframes (see Table 1). This includes proposed provisions related to establishing a process for the preliminary selection of the certified IDR entity and the final selection of the certified IDR entity as set out in 26 CFR 54.9816–8(c)(1), 29 CFR 2590.716–8(c)(1), and 45 CFR 149.510(c)(1), in order to account for the time it takes certified IDR entities to confirm that they do not have a conflict of interest with either party. To allow more time for certified IDR entities to conduct eligibility reviews, these proposed rules would include proposed amendments to the Federal IDR process eligibility review proposed in 26 CFR 54.9816–8T(c)(2), 29 CFR 2590.716–8(c)(2), and 45 CFR 149.510(c)(2). As discussed in section I.H. of this preamble, eligibility reviews have proven to be complex and time consuming. In extenuating circumstances, such as when dispute volume is high, it may be more appropriate for the Departments, rather than certified IDR entities, to conduct

eligibility reviews to facilitate quicker dispute processing. Therefore, these proposed rules would establish a departmental eligibility review process in proposed paragraph 26 CFR 54.9816–8(c)(2)(ii), 29 CFR 2590.716–8(c)(2)(ii), and 45 CFR 149.510(c)(2)(ii). Further, to support eligibility determinations, conflict-of-interest reviews, or payment determinations, the Departments propose requirements for the submission of additional information from the disputing parties at 26 CFR 54.9816–8(c)(2)(iii), 29 CFR 2590.716–8(c)(2)(iii), and 45 CFR 149.510(c)(2)(iii). To clarify and establish a standard process for disputes to be withdrawn from the Federal IDR process, the Departments propose four conditions in which a dispute may be withdrawn at 26 CFR 54.9816–8(c)(3)(i), 29 CFR 2590.716–8(c)(3)(i), and 45 CFR 149.510(c)(3)(ii). To further adjust timeframes and processes associated with the Federal IDR process, these proposed rules would include proposed amendments related to submission of offers and payment determination and notification at 26 CFR 54.9816–8(c)(5), 29 CFR 2590.716–8(c)(5), and 45 CFR 149.510(c)(5); the collection of the certified IDR entity fee at 26 CFR 54.9816–8(d)(1), 29 CFR 2590.716–8(d)(1), and 45 CFR 149.510(d)(1); and the collection of the administrative fee, including a process for setting a reduced administrative fee for low-dollar amount disputes and for non-initiating parties in cases of ineligible disputes, at 26 CFR 54.9816–8(d)(2), 29 CFR 2590.716–8(d)(2), and 45 CFR 149.510(d)(2). These proposed rules also include provisions to expand upon situations in which Federal IDR process timeframes may be waived due to extenuating circumstances at 26 CFR 54.9816–8T(g), 29 CFR 2590.716–8(g), and 45 CFR 149.510(g).

Lastly, to address concerns regarding the vacated batching provision at 26 CFR 54.9816–8T(c)(3)(i)(C), 29 CFR 2590.716–8(c)(3)(i)(C), and 45 CFR 149.510(c)(3)(i)(C) and to create more efficiencies in the process, these proposed rules at 26 CFR 54.9816–8(c)(4), 29 CFR 2590.716–8(c)(4), and 45 CFR 149.510(c)(4) would include provisions that would allow for more flexibility in batching multiple items or services in a single dispute.

It is the Departments' intention that the implementation of the proposed provisions in these proposed rules, if finalized, would lead to a more efficient

⁷⁶ Section 9816(c)(4)(F) of the Code, section 716(c)(4)(F) of ERISA, and section 2799A–1(c)(4)(F) of the PHS Act.

Federal IDR process and more timely payment determinations.

BILLING CODE 6325-63-P; 4830-01-P; 4510-29-P; 4120-01-P

TABLE 1: The Federal IDR Process Under These Proposed Rules⁷⁷

Steps Preceding the Federal IDR Process	
Timeframe	Summary of Steps
Start	A furnished item or service results in a charge for emergency items or services from a nonparticipating provider or nonparticipating emergency facility, for non-emergency items or services from a nonparticipating provider at a participating health care facility, or for air ambulance services from a nonparticipating provider of air ambulance services.
Within 30 calendar days after the bill for the services is transmitted	Initial Payment or Notice of Denial of Payment The plan or issuer determines whether the services are covered, and if the services are covered, sends to the provider, facility, or provider of air ambulance services an initial payment or notice of denial of payment no later than 30 calendar days after a bill is transmitted.
30 business days after the provider, facility, or provider of air ambulance services receives an initial payment or notice of denial of payment	Initiation of Open Negotiation Period An open negotiation period must be initiated within 30 business days beginning on the day the provider, facility, or provider of air ambulance services receives either an initial payment or a notice of denial of payment for the item or service from the plan or issuer. To initiate the open negotiation period, a party must submit a written open negotiation notice and supporting documentation to the other party and to the Departments via the Federal IDR portal.
30 business days	Open Negotiation Period Parties must exhaust a 30-business-day open negotiation period before either party may initiate the Federal IDR process.
Within the first 15 business days of the open negotiation period	Open Negotiation Response Notice The party in receipt of the open negotiation notice must provide to the other party and to the Departments as soon as practicable, but no later than the 15 th business day of the 30-business-day open negotiation period, a written notice and supporting documentation in response to the open negotiation notice (open negotiation response notice).
Federal IDR Process Overview	
Timeframe	Summary of Steps
4 business days after the close of the open negotiation period	Initiation of Federal IDR Process Either party can initiate the Federal IDR process by submitting a notice of IDR initiation to the non-initiating party and to the Departments within the 4-business-day period beginning on the 1 st business day after the close of the open negotiation period. The notice must include the initiating party's preferred certified IDR entity.
3 business days after IDR initiation	Notice of IDR Initiation Response Within 3 business days of receipt of the notice of IDR initiation, the non-initiating party must submit the notice of IDR initiation response form, attesting to whether the Federal IDR process applies to the item(s) or service(s) included in the notice of IDR initiation. The non-

	initiating party must agree or object to the preferred certified IDR entity identified in the notice of IDR initiation by indicating its agreement or objection in the notice of IDR initiation response. If the non-initiating party objects to the preferred certified IDR entity identified in the notice of IDR initiation, the non-initiating party must designate an alternative preferred certified IDR entity.
3-6 business days after IDR initiation	Preliminary Selection of the Certified IDR Entity The date of the preliminary selection of the certified IDR entity will be 3 business days after the date of IDR initiation if the parties are considered to have jointly selected a certified IDR entity. The date of preliminary selection of the certified IDR entity will be 6 business days after the date of IDR initiation if the parties are considered to have failed to jointly select a certified IDR entity.
2 business days after preliminary selection of the certified IDR entity	Administrative Fee Collection from the Initiating Party The initiating party must pay the administrative fee directly to the Departments within 2 business days of the date of preliminary selection of the certified IDR entity. If the initiating party fails to pay its administrative fee, the dispute will be closed.
3 business days after preliminary selection of the certified IDR entity	Certified IDR Entity Conflict-of-Interest Review and Attestation Once preliminarily selected, the certified IDR entity has 3 business days to submit an attestation that it does not have a conflict of interest. If a preliminarily selected certified IDR entity notifies the Departments that it does not meet the conflict-of-interest requirements or does not respond within 3 business days of being preliminarily selected, the Departments will randomly preliminarily select another certified IDR entity. Random selection will occur no later than the first business day after notification from the certified IDR entity or if the preliminary selection of the certified IDR entity fails to respond, no later than one business day after the end of the 3-business-day period.
1 business day after conflict-of-interest attestation	Final Selection of the Certified IDR Entity The date of final selection of the certified IDR entity is the date that the Departments provide notice to the parties that the preliminarily selected certified IDR entity does not have a conflict of interest. This date will be no later than 1 business day after the conflict-of-interest attestation.
5 business days after final selection of the certified IDR entity	Eligibility Review The certified IDR entity that was finally selected must review the information in the notice of IDR initiation, notice of IDR initiation response, and any additional information and determine whether the item or service is a qualified IDR item or service that is eligible for the Federal IDR process. The certified IDR entity must notify the Departments and both parties of its determination within 5 business days after the date of final selection of the certified IDR entity.

2 business days after eligibility determination	Administrative Fee Collection from the Non-Initiating Party The non-initiating party must pay the administrative fee directly to the Departments within 2 business days of an eligibility determination.
10 business days after final selection of the certified IDR entity	Submission of Offers and Payment of Certified IDR Entity Fee Parties must submit their offers to the certified IDR entity not later than 10 business days after the date of final selection of the certified IDR entity. Each party must pay the certified IDR entity fee (which the certified IDR entity will hold in a trust or an escrow account) no later than the date a disputing party submits its offer. If a party fails to pay the certified IDR entity fee, the party's offer will not be considered received.
30 business days after final selection of the certified IDR entity	Selection of Offer A certified IDR entity has 30 business days from the date of final selection of the certified IDR entity to determine the payment amount and notify the parties and the Departments of its decision. The certified IDR entity must select one of the offers submitted.
30 calendar days after payment determination	Payments Between Parties of Payment Determination Amount Any amount due from one party to the other party must be paid not later than 30 calendar days after the payment determination by the certified IDR entity.
30 business days after the payment determination	Refunding the Certified IDR Entity Fee to the Prevailing Party The certified IDR entity must refund the prevailing party's certified IDR entity fee within 30 business days after the payment determination.

BILLING CODE 6325–63–C; 4830–01–C; 4510–29–C; 4120–01–C

II. Overview of the Proposed Rules—Departments of the Treasury, Labor, and HHS

A. Definition of Bundled Payment Arrangement

Section 9816(c)(3)(B) of the Code, section 716(c)(3)(B) of ERISA, and section 2799A–1(c)(3)(B) of the PHS Act state that the Departments shall provide that, in the case of items and services which are included by a provider or facility as part of a bundled payment, such items and services included in such bundled payment may be part of a single determination. The October 2021 interim final rules specify that in the case of qualified IDR items and services billed by a provider, facility, or provider of air ambulance services as part of a bundled payment arrangement, or if a plan or issuer makes or denies an initial payment as a bundled payment, the qualified IDR items and services may be submitted as part of one payment determination and are subject to the rules for batched determinations and the certified IDR entity fee for single

determinations.⁷⁸ The preamble to the October 2021 interim final rules describes a bundled payment arrangement as an instance in which a group health plan or health insurance issuer pays a provider, facility, or provider of air ambulance services a single payment for multiple items or services furnished during an episode of care to a single patient.⁷⁹ To clarify how certified IDR entities can identify a dispute that includes a bundled payment arrangement, the Departments provided a definition for a bundled payment arrangement in the *August 2022 Technical Assistance for Certified IDR Entities*.⁸⁰ In that guidance, the

⁷⁷ For a chart outlining the Federal IDR Process under the current regulations, see the Federal IDR Process Guidance for Disputing Parties at <https://www.cms.gov/files/document/federal-idr-guidance-disputing-parties-march-2023.pdf>.

⁷⁸ 86 FR 55994.

⁷⁹ Id.

⁸⁰ U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury. (August 2022). *Technical Assistance for Certified IDR Entities*. <https://www.cms.gov/files/document/TA-certified-independent-dispute-resolution-entities-August-2022.pdf>.

Departments clarified that a single payment to one provider, facility, or provider of air ambulance services for multiple items or services must be made at the service code level for the entire bundle in order to be considered a bundled payment and therefore be treated as a single payment determination for the multiple items and services under the Federal IDR process. The Departments defined a bundled payment arrangement at the service code level because service codes are the principal mechanism by which health care services and supplies are identified and reimbursed. These rules propose to codify the clarification set forth in the *August 2022 Technical Assistance for Certified IDR Entities*. Specifically, the Departments propose to amend 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.30 by defining the term “bundled payment arrangement” as an arrangement under which: (1) a provider, facility, or provider of air ambulance services bills for multiple items or services furnished to a single patient under a single service code that represents multiple items or services (for example, a DRG code); or

(2) a plan or issuer makes an initial payment or notice of denial of payment to a provider, facility, or provider of air ambulance services under a single service code that represents multiple items or services furnished to a single patient (for example, a DRG code).

For example, the *August 2022 Technical Assistance for Certified IDR Entities, the National Correct Coding Initiative (NCCI) Policy Manual*⁸¹ explains that if a physician performs bilateral mammography, the provider shall report (or for the purpose of the Federal IDR process, the provider shall bill) Current Procedural Terminology (CPT) code 77066 (*Diagnostic mammography . . . bilateral*). The provider should not submit CPT code 77065 (*Diagnostic mammography . . . unilateral*) with 2 UOS or CPT code 77065 LT (*unilateral left breast mammography*) plus CPT code 77065 RT (*unilateral right breast mammography*). Under this example, the provider performed multiple services, and therefore, if the services are billed or reimbursed under one service code (CPT code 77066), all services performed under that service code (CPT codes 77065 LT and 77065 RT) may be considered a bundled payment arrangement for purposes of the Federal IDR process.

Further, under current rules at 26 CFR 54.9816–8T(c)(3)(ii), 29 CFR 2590.716–8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii), bundled payment arrangements can be submitted as a single dispute and are subject to certified IDR entity fees for a single dispute rather than the higher fees for batched disputes (which may include multiple items or services from different claims between the same provider and plan but reflect the same service code or a similar code under a different procedural coding system).

To further clarify the process for resolving IDR disputes for bundled payment arrangements, the Departments propose an amendment that would remove the language in the October 2021 interim final rules stating that a bundled payment arrangement is subject to the rules for batched determinations. While a bundled payment arrangement by definition is billed by the same provider or group of providers, facility, or same provider of air ambulance services and paid by the same group

health plan or health insurance issuer, not all requirements for batched determinations⁸² apply to bundled payment arrangements.

The Departments solicit comment on the definition and treatment of bundled payment arrangements. The Departments also solicit comment on examples of service or procedural codes other than DRGs that would meet the proposed definition of a bundled payment arrangement.

B. Use of CARCs and RARCs

1. Existing Payment Communication Practice and Requirements

As described in section I.E. of this preamble, plans and issuers are currently required to disclose certain information to providers, facilities, and providers of air ambulance services when making an initial payment or notice of denial of payment when the recognized amount is the QPA.⁸³ The Health Insurance Portability and Accountability Act of 1996 (HIPAA) mandated the adoption of electronic standards for certain health care transactions, including health care payment and remittance advice. Under HIPAA and regulations implementing the electronic transaction standards, these disclosures, when transmitted from a plan or issuer to a provider, facility, or provider of air ambulance services,⁸⁴ meet the definition of a

health care remittance advice transaction.⁸⁵ Therefore, plans and issuers must comply with the Accredited Standards Committee (ASC) X12 implementation guide adopted at 45 CFR 162.1602 when electronically transmitting the QPA disclosures required under 26 CFR 54.9816–6T(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d) to a provider, facility, or provider of air ambulance services.⁸⁶ Further, plans and issuers are required to send remittance information electronically upon the request of a provider, facility, or provider of air ambulance services, regardless of whether the requesting individual or entity is in the plan's or issuer's network or otherwise affiliated with the plan or issuer.⁸⁷ When remittance advice is transmitted electronically, it is commonly referred to as an ERA.

An ERA explains how a plan or issuer has adjusted claim charges based on factors like contract agreements, secondary payers, benefits coverage, and expected cost sharing.⁸⁸ As noted earlier in this preamble section with reference to QPA disclosures, all ERAs must

plan" under 45 CFR 160.103 and are not subject to HIPAA requirements.

⁸⁵ 45 CFR 162.1601 ("The health care electronic funds transfers (EFT) and remittance advice transaction is the transmission of either of the following for health care: (a) The transmission of any of the following from a health plan to a health care provider: (1) Payment. (2) Information about the transfer of funds. (3) Payment processing information. (b) The transmission of either of the following from a health plan to a health care provider: (1) Explanation of benefits. (2) Remittance advice.").

⁸⁶ The ASC X12N 835 Version 5010 (835 transaction) is the current HIPAA standard that plans and issuers must use to electronically transmit explanation of benefits or remittance advice information to providers and facilities. As discussed later in this section II.B. of this preamble, the current ASC X12 standards predate, and therefore do not address, the No Surprises Act requirements.

⁸⁷ 45 CFR 162.925(a)(1). See also Gerhardt, C. (March 22, 2022). *Guidance on health plans' payment of health care claims using Virtual Credit Cards (VCCs) and adopted HIPAA standards for Health Care Electronic Funds Transfers (EFT) and Electronic Remittance Advice (ERA) transactions*. Centers for Medicare & Medicaid Services. <https://www.cms.gov/files/document/guidance-letter-vcc-eft-era.pdf>. HIPAA regulations require that a covered entity conduct a transaction as a standard transaction when using electronic media to transmit a transaction for which the Secretary has adopted a standard (see 45 CFR 162.923(a)). HIPAA regulations also require a health plan to conduct transactions as standard transactions when requested to do so (see 45 CFR 162.925(a)(1)). HIPAA does not, however, obligate a health plan to conduct a transaction(s) that it would not otherwise conduct.

⁸⁸ Centers for Medicare & Medicaid Services. (June 16, 2022). *Health Care Payment and Remittance Advice and Electronic Funds Transfer*. <https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/Transactions/HealthCarePaymentandRemittanceAdviceandElectronicFundsTransfer>.

⁸¹ The NCCI, developed by the Centers for Medicare & Medicaid Services, promotes correct national coding methodologies. Although created for the purpose of reducing improper Medicare Part B payments, the NCCI policy manual is also used by commercial payers. CMS. (Feb. 28, 2023). *Medicare National Correct Coding Initiative (NCCI) Edits*. <https://www.cms.gov/medicare-medicare-coordination/national-correct-coding-initiative-nci/nci-medicare-medicare-nci-policy-manual>.

⁸² 26 CFR 54.9816–8T(c)(3), 29 CFR 2590.716–8(c)(3), and 45 CFR 149.510(c)(3).

⁸³ 26 CFR 54.9816–6T(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d). As explained in section II.C. of this preamble, the Departments are proposing the following amendments to 26 CFR 54.9816–6T(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d) to reflect that the concept of the recognized amount is not applicable to providers of air ambulance services: (1) requiring plans and issuers to disclose the QPA and certain information about the QPA when cost sharing is calculated using the QPA for an air ambulance service; and (2) requiring plans and issuers to provide these disclosures when the recognized amount (or with respect to air ambulance services, the amount on which cost sharing is based) is the QPA or the amount billed by the provider, facility, or provider of air ambulance services.

⁸⁴ HIPAA requirements related to health care remittance advice transactions apply to "covered entities," including "health plans" (which generally include plans and issuers) and "health care providers" (which include providers, facilities, and providers of air ambulance services that transmit any health information in electronic form in connection with an electronic transaction for which a standard has been adopted under HIPAA). 45 CFR 160.102 and 45 CFR 160.103. For purposes of continuity with the rest of this preamble, this section uses the terms "plan" and "issuer" to refer to entities that are subject to HIPAA requirements that apply to "health plans" and the term "providers, facilities, and providers of air ambulance services" to refer to entities that are subject to HIPAA requirements that apply to "health care providers." However, self-administered group health plans with fewer than 50 participants are excluded from the term "health

comply with the ASC X12 835 transaction standard adopted by HHS under 45 CFR 162.1602. The X12 835 implementation guide mandates the use of CARCs and RARCs to communicate remittance information (as opposed to any other code systems, such as proprietary codes developed by individual plans and issuers).⁸⁹ The terms “CARC” and “RARC” are not defined in Federal statute but are described in the ASC X12 835 implementation guide and the Council for Affordable Quality Healthcare Committee on Operating Rule for Information Exchange (CAQH CORE) operating rule adopted at 45 CFR 162.1603(a)(4). CARCs explain why a claim or service line was paid differently than it was billed.⁹⁰ RARCs provide additional explanations for an adjustment already described by a CARC or convey information about remittance processing. RARCs are either “supplemental,” meaning that they provide additional explanation for an adjustment already described by a CARC, or “informational,” meaning they convey information about remittance processing and are never related to a specific adjustment or CARC.⁹¹ The lists of approved CARCs and RARCs are maintained by separate committees (the CARC Committee and the RARC Committee) designated by HHS to review requests to add, remove, or modify existing CARCs and RARCs. The HIPAA operating rule adopted at 45 CFR 162.1603(a)(4) requires plans and issuers to use a uniform set of CARCs and RARCs for defined business scenarios. Updated lists of approved CARCs and RARCs, along with an updated list of approved code combinations and business scenarios, are published three times each year.⁹²

The RARC Committee has approved a set of specific RARCs that convey information related to the No Surprises Act, including which of the No Surprises Act provisions apply to a claim, how cost sharing was calculated under the No Surprises Act, and whether a payment for a claim was an initial or final payment calculated in

accordance with the No Surprises Act.⁹³ These RARCs are currently available for use by plans and issuers, although the existing No Surprises Act-specific RARCs do not address all required QPA disclosures. The current standards and operating rules that govern ERA transactions under HIPAA were adopted prior to the enactment of the No Surprises Act and do not include specific requirements that dictate which combinations of CARCs and RARCs must be used to communicate claim adjudication information in business scenarios anticipated by the No Surprises Act.⁹⁴

Plans and issuers consequently convey the disclosures required under the No Surprises Act to providers, facilities, and providers of air ambulances through a variety of methods, including electronic and paper remittance advice. These disclosures, if more effectively communicated, would provide providers, facilities, and providers of air ambulance services with more accessible information to determine whether they may initiate open negotiation and the Federal IDR process. However, in part because plans and issuers are not able to transmit all of the required disclosures through standard transactions,⁹⁵ such as the ASC X12 835 transaction, providers, facilities, and providers of air ambulance services have reported to the Departments that they are not always aware of, or cannot understand, the disclosures even when the plan or issuer claims to have met the disclosure requirements.⁹⁶ Moreover, the

Departments’ ability to assess how often CARCs and RARCs are used to convey information related to the No Surprises Act is limited due to the minimal available data on uptake and the absence of guidance, standards, or operational rules specifying how these codes must be used. Informal feedback from providers, facilities, and providers of air ambulance services and plans and issuers suggests that some plans and issuers are using some of these codes, including when providing paper remittance advice, but there is not yet widespread usage.

2. Proposal To Require CARCs and RARCs To Improve Communication Between Plans and Issuers and Providers, Facilities, and Providers of Air Ambulance Services

Gaps in communication between plans and issuers and providers, facilities, and providers of air ambulance services contribute to inefficiencies in resolving disputes in the Federal IDR process. The Departments have identified the following areas of confusion, reported by plans, issuers, providers, facilities, providers of air ambulance services, and certified IDR entities, which are also consistent with the Departments’ experience administering the Federal IDR process: (1) whether the consumer protections against balance billing and out-of-network cost sharing under the No Surprises Act apply to an item or service; (2) how cost sharing and the out-of-network rates are determined (that is, through an All-Payer Model Agreement, specified State law, or the Federal rules); (3) how and with whom to initiate open negotiations; and (4) which items or services eligible for the Federal IDR process can be batched or bundled into one dispute.

To address communication challenges described in section II.B.1. of this preamble, the Departments propose new disclosure rules at 26 CFR 54.9816–6A, 29 CFR 2590.716–6A, and 45 CFR 149.100. These proposed provisions would require plans and issuers to use CARCs and RARCs, as specified in guidance issued by the Departments (and discussed elsewhere in this section II.B. of this preamble), or as required under any applicable adopted standards and operating rules under 45 CFR part 162, to communicate information related to whether a claim for an item or service furnished by an entity that does not have a direct or indirect

⁸⁹ CARCs and RARCs are required by the ASC X12 835 transaction standard and are not currently required to be used on paper remittance advice.

⁹⁰ X12. (Nov. 16, 2022). *Claim Adjustment Reason Codes*. <https://x12.org/codes/claim-adjustment-reason-codes>.

⁹¹ X12. (March 1, 2023). *Remittance Advice Remark Codes*. <https://x12.org/codes/remittance-advice-remark-codes>.

⁹² CAQH CORE. (n.d.). *Ongoing Maintenance of the CORE Code Combinations*. <https://www.caqh.org/core/ongoing-maintenance-core-code-combinations>.

⁹³ X12. (March 1, 2023). *Remittance Advice Remark Codes*. <https://x12.org/codes/remittance-advice-remark-codes> (complete list of approved RARC codes including No Surprises Act-specific codes); and Centers for Medicare & Medicaid Services. (March 1, 2022). *Remittance Advice Remark Codes Related to the No Surprises Act*. (unofficial reference list of No Surprises Act-specific RARC codes).

⁹⁴ The ASC X12 835 transaction standard requires health plans to convey information about the adjudication of a claim using CARCS and RARCS. The Phase III 360 CORE Uniform Use of CARCs and RARCs (835) Rule, adopted at 45 CFR 162.1603 requires plans to use specified combinations of CARCs and RARCs in certain business scenarios. CAQH CORE. (August 2022). *CAQH CORE Payment and Remittance (835) Uniform Use of CARCs and RARCs Rule, Version PR.1.1*. <https://www.caqh.org/sites/default/files/core/Payment-Remittance-CARCS-RARCS-Rule.pdf>.

⁹⁵ “Standard transaction” means a transaction that complies with an applicable standard and associated operating rules adopted under the HIPAA Administrative Simplification requirements at 45 CFR part 162. 45 CFR 162.103.

⁹⁶ For example, the Departments are aware of some cases where providers, facilities, and providers of air ambulance services used third parties to process remittances and did not realize the process for viewing the remittances through those third parties was filtering out information related to the No Surprises Act. Similarly, some

providers, facilities, and providers of air ambulance services may view electronic remittance advice without realizing plans and issuers provided the QPA and related information on paper remittance advice.

contractual relationship with the plan or issuer with respect to the furnishing of such item or service under the plan or coverage is subject to the provisions of 26 CFR 54.9816 and 54.9817; 29 CFR 2590.716 and 2590.717; or 45 CFR part 149, subparts B, E, or F. To improve the functioning of the Federal IDR process and ensure timely rendering of payment determinations, the Departments are of the view that providers, facilities, and providers of air ambulance services need information to understand not only when items and services are subject to the No Surprises Act, but also when they are not, to avoid submission of ineligible disputes to the Federal IDR process.

The Departments have the authority under section 9816(a)(2)(B)(ii) of the Code, section 716(a)(2)(B) of ERISA, and section 2799A–1(a)(2)(B)(ii) of the PHS Act to establish through rulemaking the information that a plan or issuer must share with a provider or facility when making a determination of the QPA, including the form and manner of such disclosures.⁹⁷ The Departments also have authority under section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act to issue such regulations as may be necessary and appropriate to carry out the provisions of chapter 100 of the Code, part 7 of ERISA, and title XXVII of the PHS Act, including the provisions directing the Departments to establish the Federal IDR process.

Under these authorities, the Departments propose to require plans and issuers to use CARCs and RARCs to convey specific information about the No Surprises Act when a plan or issuer provides a paper or electronic remittance advice to any entity with which it does not have a direct or indirect contractual relationship with respect to the furnishing of an item or service under the plan or coverage.

Specifically, under these proposed rules, a plan or issuer would be required to use CARCs and RARCs in accordance with guidance issued by the Departments when, with respect to an entity with which it does not have a direct or indirect contractual relationship, the plan or issuer provides a paper or electronic remittance advice to a provider, facility, or provider of air ambulance services for an initial payment, notice of denial of payment, or total plan or coverage payment required under the No Surprises Act.

These proposed requirements would also apply to plans and issuers when sending remittance advice to entities with which they do not have a direct or indirect contractual relationship with respect to items and services to which the No Surprises Act surprise billing requirements do not apply, in order to convey that the No Surprises Act does not apply.

Requiring plans and issuers to use approved CARCs and RARCs to convey information related to the No Surprises Act on both electronic and paper remittance advice would better facilitate the flow of information between plans and issuers and providers, facilities, and providers of air ambulance services and increase efficiencies in the processing of claims subject to the No Surprises Act's surprise billing protections. This requirement would also assist providers, facilities, and providers of air ambulance services in identifying items and services that are not eligible for the Federal IDR process as early as the initial payment or notice of denial of payment, thereby reducing the submission of ineligible payment disputes to the Federal IDR process. This would decrease the need for outreach by certified IDR entities and allow them to concentrate resources on making payment determinations for eligible disputes.

In addition, the Departments anticipate that the proposed requirement to use CARCs and RARCs would provide valuable information to certified IDR entities in determining whether disputing parties agree on the eligibility of a dispute for the Federal IDR process after it has been submitted. As described in section II.D.1. of this preamble, the Departments propose to require that the open negotiation notice include a copy of the initial payment or notice of denial of payment, which would, under the proposal described in this section of this preamble, include CARCs and RARCs related to the No Surprises Act. The Departments also propose, as described in section II.D.1. of this preamble, to require the open negotiation notice be submitted to the

Departments through the Federal IDR portal. This would help ensure that, even if a plan or issuer does not respond to a notice of IDR initiation, the certified IDR entity has access to certain information regarding whether the plan or issuer believes the dispute could be eligible for the Federal IDR process, thereby avoiding unnecessary or duplicative outreach to the parties when possible.

As discussed in section V.D. of this preamble, requiring the use of CARCs and RARCs as described in these proposed rules would result in an increase in burden for plans (or their third party administrators (TPAs)) and issuers, as they would need to implement and automate the use of new CARCs and RARCs. However, because all plans and issuers that provide ERA transactions subject to the HIPAA Administrative Simplification requirements already are required to use CARCs and RARCs, the Departments anticipate that most plans and issuers would generally have the capacity to provide No Surprises Act-specific CARCs and RARCs. The Departments seek comment on any circumstances in which it would not be possible for a plan or issuer to determine whether an item or service included on a remittance advice is, or is not, subject to the Federal IDR process at the time the remittance advice is issued to a provider, facility, or provider of air ambulance services. The Departments also seek comment on the technical and operational steps that would be necessary to initially implement new No Surprises Act-specific CARCs and RARCs, including for plans and issuers that do not currently use CARCs and RARCs, or that are currently able to accommodate only one CARC and RARC combination per line item.

The Departments propose that certain procedural aspects of this proposal would be implemented through guidance issued by the Departments.⁹⁸ Should the proposal described in this section of the preamble be finalized, the Departments would be authorized to require plans and issuers to use CARCs and RARCs to communicate information related to whether a claim for an out-of-network item or service is or is not subject to the surprise billing provisions of the No Surprises Act. The guidance issued under this authority would identify specific CARCs and RARCs and describe the specific circumstances in

⁹⁷ The No Surprises Act does not include the same language addressing disclosures to providers of air ambulance services. However, the July 2021 interim final rules implemented the statute's cost-sharing requirements for air ambulance services by requiring that plans and issuers base any coinsurance and deductible for air ambulance services furnished by a nonparticipating provider of air ambulance services on the lesser of the QPA or the billed amount for the services. 86 FR 36884. Therefore, the July 2021 interim final rules also applied the requirement to make disclosures regarding the QPA with respect to providers of air ambulance services. As stated in the preamble to the July 2021 interim final rules, the Departments recognize that providers of air ambulance services subject to the surprise billing rules (as well as providers and emergency facilities) need transparency regarding how the QPA was calculated in order to inform the open negotiation process and the decision whether to initiate the Federal IDR process and what offer to submit. 86 FR 36898.

⁹⁸ This proposal would not alter HHS' authority under HIPAA to implement future guidance with respect to electronic remittance advice or to adopt new or modified standards or operating rules in accordance with Title XI Part C—Administrative Simplification of the Social Security Act.

which the identified CARCs and RARCs must be used. As discussed in section II.B.1. of this preamble, this approach also mirrors the existing framework under HIPAA, in which required CARC and RARC code combinations are issued through guidance, as authorized by regulation. This would provide the Departments with the flexibility to specify the use of CARCs and RARCs, including new No Surprises Act-specific RARCs that may be developed in the future, while the Departments work to address communication challenges affecting the surprise billing provisions of the No Surprises Act. It would also provide flexibility for the Departments to discontinue the use of certain CARCs and RARCs should the information communicated using those CARCs and RARCs become readily available to providers, facilities, or providers of air ambulance services through a different mechanism or otherwise become unnecessary. As discussed in more detail in section II.H.1. of this preamble, the Departments propose that plans and issuers would have a period of time following the issuance of guidance to implement the use of CARCs and RARCs in accordance with the guidance.

HHS is not proposing changes to the HIPAA transaction standards (such as the X12 835 standard) or operating rules in these proposed rules. HHS continues to monitor the implementation of the No Surprises Act in order to determine whether future changes to the HIPAA transaction standards and operating rules, in accordance with the mandated HIPAA standards and operating rules development and adoption processes,⁹⁹ might provide a long-term mechanism for facilitating communication related to the No Surprises Act between plans and issuers and providers, facilities, and providers of air ambulance services.

The Departments are of the view that it would be beneficial to standardize No Surprises Act-related communications between plans and issuers and providers, facilities, and providers of air ambulance services, regardless of whether the information is transmitted using HIPAA standard transactions. Therefore, under this proposal, the Departments would issue guidance regarding the use of CARCs and RARCs in both electronic transactions as well as formats outside the purview of the HIPAA transaction standards, including paper remittance advice. While CARCs and RARCs have not been widely used to transmit information outside of ERA transactions, the Departments

understand that some plans and issuers routinely communicate with providers, facilities, and providers of air ambulance services using paper remittance advice and other formats outside the purview of the HIPAA transaction standards.

In addition to the RARCs related to the No Surprises Act described previously in this section of the preamble that have been approved for use, the Departments are assessing whether additional CARCs or RARCs could be helpful for improving communication between parties about how out-of-network claims are being processed in relation to the No Surprises Act. For example, the Departments are considering whether it would be beneficial to require the use of CARCs and RARCs when plans and issuers have insufficient information to determine coverage for a claim from a nonparticipating provider of air ambulance services.¹⁰⁰ The Departments are also considering whether it would be beneficial to require the use of RARCs that could be used to provide any of the information required to be disclosed about the QPA under 26 CFR 54.9816–6T(d), 26 CFR 54.9816–6(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d). It also may be helpful to have a RARC that specifies that the No Surprises Act surprise billing protections do not apply. In addition, a large proportion of the disputes determined ineligible for the Federal IDR process by certified IDR entities involve items or services that providers, facilities, or providers of air ambulance services batched improperly because they did not realize that a TPA was administering coverage for multiple self-insured plans rather than a single issuer or group health plan, and the items and services were thus ineligible to be batched.¹⁰¹ Certified IDR entities have determined that other disputes are ineligible for the Federal IDR process because the self-insured plan involved in the dispute had voluntarily opted in

to a specified State law.¹⁰² A RARC that could clearly identify a payer as a self-insured plan may reduce the number of disputes that are initiated and determined ineligible on the basis of a batching or jurisdictional error. The Departments solicit comment on whether and what information not conveyed in the existing RARCs would be helpful to convey through the creation of additional RARCs related to the No Surprises Act's surprise billing provisions.

The Departments are aware that some States require issuers to use CARCs and RARCs to communicate information about State surprise billing laws. The Departments seek comment regarding experience with these requirements, including whether such requirements have been effective, and any challenges related to implementing such requirements. Should these proposed rules be finalized, the Departments note that nothing in these proposed rules would prevent a State from requiring that issuers use specific CARCs or RARCs in addition to those specified in the No Surprises Act-specific Federal guidance that the Departments would be authorized to issue; nor would a State or other entity be prevented from engaging with the relevant committees to request the creation or use of a CARC or RARC in addition to those specified in such guidance.

Prior to the enactment of the No Surprises Act, out-of-network providers, facilities, and providers of air ambulance services commonly sought reimbursement directly from patients rather than from a plan or issuer, requiring a participant, beneficiary, or enrollee to then seek reimbursement for all or part of the cost of the out-of-network service directly from their plan or issuer. Because the No Surprises Act prohibits nonparticipating providers, facilities, and providers of air ambulance services from billing or holding liable a participant, beneficiary, or enrollee for an amount greater than the applicable in-network cost-sharing requirement for items and services subject to the No Surprises Act, direct billing of patients is now largely limited to items and services to which surprise billing protections in the No Surprises Act do not apply. The Departments understand that requiring the plan or issuer to convey CARC or RARC information related to eligibility for such processes to a participant,

¹⁰⁰ In *TMA III*, the District Court vacated the language in 26 CFR 54.9817–1T(b)(4)(i), 29 CFR 2590.717–1(b)(4)(i), and 45 CFR 149.130(b)(4)(i), that stated with respect to air ambulance services, “For purposes of this paragraph (b)(4)(i), the 30-calendar-day period begins on the date the plan or issuer receives the information necessary to decide a claim for payment for the services.” See Memorandum Opinion and Order, *Tex. Med. Ass’n, et al. v. U.S. Dep’t of Health and Hum. Servs.*, No. 6:22–cv–00450–JDK (E.D. Tex. August 24, 2023). Because a plan or issuer may not have the information necessary to decide a claim for payment within the 30-calendar-day period, the Departments are considering whether CARCs and RARCs may be useful in such circumstances.

¹⁰¹ 26 CFR 54.9816–8T(c)(3)(i)(B), 29 CFR 2590.716–8(c)(3)(i)(B), and 45 CFR 149.510(c)(3)(i)(B).

¹⁰² See discussion in section I.H. of this preamble related to the provisions of the July 2021 interim final rules that allow self-insured group health plans, including self-insured non-Federal governmental plans, to voluntarily opt into a specified State law.

⁹⁹ Sections 1172 and 1173 of the Social Security Act and 45 CFR 162.910.

beneficiary, or enrollee in this circumstance would represent an administrative burden on the plan or issuer without any clear benefit to the participant, beneficiary, or enrollee. In addition, such a requirement would not further the aims of these proposed rules to facilitate timely rendering of payment determinations and to improve the functioning of the Federal IDR process, in which a participant, beneficiary, or enrollee cannot participate as a party. Therefore, the requirement to use CARCs and RARCs under these proposed rules would not apply for out-of-network items and services for which the plan or issuer makes payment directly to the participant, beneficiary, or enrollee. The Departments seek comment on whether a plan or issuer should generate a remittance advice that can be obtained upon request by the provider, facility, or provider of air ambulance services when the plan or issuer makes a payment directly to a participant, beneficiary, or enrollee, and whether the requirement to use CARCs and RARCs to convey No Surprises Act-specific information as proposed in these rules should apply in these circumstances.

While the proposal refers to any paper or electronic remittance advice,¹⁰³ the Departments seek comment on whether a more general term, such as “any remittance advice,” would be helpful in characterizing the types of communications accompanying payments for items and services. The Departments also seek comment on this proposal generally.

C. Information To Be Shared About the QPA

As described in sections I.B. and I.E. of this preamble, the July 2021 interim final rules and August 2022 final rules provide that if the recognized amount with respect to an item or service is the QPA, plans and issuers must make certain disclosures about the QPA with each initial payment or notice of denial of payment and must also provide certain additional information upon request.¹⁰⁴ This information must be provided in writing, either on paper or electronically, to a provider, facility, or provider of air ambulance services, as applicable.¹⁰⁵

¹⁰³ The Departments are aware that different terms are sometimes used, such as paper remittance advice or explanation of payment, when referring to the paper communication that accompanies a payment or notice of denial of payment to a provider or facility for a claim and provides additional information about the adjudication of the claim for which payment is being made.

¹⁰⁴ 86 FR 36898; 87 FR 52633.

¹⁰⁵ 26 CFR 54.9816–6T(d) and 54.9816–6(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d).

While these requirements were intended to ensure the disclosure of information about the QPA in any instance in which an item or service would be eligible for the Federal IDR process, the text of the current regulation directs plans and issuers to make these disclosures only if the recognized amount with respect to an item or service furnished by a provider, facility, or provider of air ambulance services is the QPA. The Departments propose a change to reflect that the term “recognized amount” is not used in the statute or regulations for purposes of determining cost sharing with respect to air ambulance services furnished by nonparticipating providers of air ambulance services. Rather, under the July 2021 interim final rules, plans and issuers must calculate the cost-sharing amount for air ambulance services furnished by a nonparticipating provider of air ambulance services as if the total amount that would have been charged were equal to the lesser of the QPA or the billed amount for the services.¹⁰⁶ Therefore, the Departments propose to amend the regulations to specify that plans and issuers must, in the case of air ambulance services, disclose the QPA and certain information about the QPA when cost sharing is calculated using the QPA. In addition, the Departments propose to require plans and issuers to make the same disclosures when the recognized amount (or with respect to air ambulance services, the amount on which cost sharing is based) is the amount billed by the provider, facility, or provider of air ambulance services, and not only when the recognized amount (or with respect to air ambulance services, the amount on which cost sharing is based) is the QPA, as these items and services would also be eligible for the Federal IDR process (provided all other eligibility criteria are satisfied).

Under 26 CFR 54.9816–6T(d)(1)(iv), 29 CFR 2590.716–6(d)(1)(iv), and 45 CFR 149.140(d)(1)(iv), a plan or issuer making disclosures about the QPA must include a statement that if the provider or facility wishes to initiate a 30-day open negotiation period for purposes of determining the amount of total payment, the provider or facility may contact the appropriate person or office to initiate open negotiation, and if the 30-day open negotiation period does not result in a determination, generally the provider or facility may initiate the Federal IDR process 4 days after the end of the open negotiation period. Under 26 CFR 54.9816–6T(d)(2), 29 CFR

¹⁰⁶ 86 FR 36884.

2590.716–6(d)(2), and 45 CFR 149.140(d)(2), plans and issuers are required to disclose additional information in a timely manner upon the request of the provider or facility.

The Departments propose technical and conforming amendments to align these requirements with the October 2021 interim final rules¹⁰⁷ and current practice. First, the Departments acknowledge that 26 CFR 54.9816–6T(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d) do not consistently include references to providers of air ambulance services when referring to providers and facilities, and propose amendments to clarify that these disclosure requirements apply with respect to providers of air ambulance services (in addition to providers and facilities). Specifically, in 26 CFR 54.9816–6T, 29 CFR 2590.716–6, and 45 CFR 149.140, the Departments propose to amend the introductory language in paragraph (d), paragraph (d)(1)(iv), and the introductory language of paragraph (d)(2) to clarify the applicability with respect to disclosures to providers of air ambulance services.¹⁰⁸ Second, the Departments propose to align the timeframes described in the disclosure with the timeframes established in the October 2021 interim final rules,¹⁰⁹ by specifying that days are counted using business days (rather than calendar days), where applicable. The Departments also propose an amendment to align the language in 26 CFR 54.9816–6T(d)(1)(iv), 29 CFR 2590.716–6(d)(1)(iv), and 45 CFR 149.140(d)(1)(iv) with the same requirements established in the October 2021 interim final rules by replacing the phrase “amount of total payment” with the term “out-of-network rate,” as defined in 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.30, and by describing an unsuccessful open negotiation period as not resulting in an “agreement on the amount of payment” rather than a “determination.”

The Departments further propose to require that the statement also explain that the provider, facility, or provider of air ambulance services must notify the Departments as described under proposed 26 CFR 54.9816–8(b)(1)(i), 29 CFR 2590.716–8(b)(1)(i), and 45 CFR 149.510(b)(1)(i), as applicable, to initiate

¹⁰⁷ 86 FR 55980.

¹⁰⁸ The Departments anticipate finalizing additional corrections to address this issue when finalizing the remainder of the July 2021 interim final rules.

¹⁰⁹ 26 CFR 54.9816–8T(b)(1)(i), 29 CFR 2590.716–8(b)(1)(i), and 45 CFR 149.510(b)(1)(i).

open negotiation.¹¹⁰ The Departments propose that plans and issuers include this explanation as part of the disclosure once the open negotiation notice can be submitted through the Federal IDR portal.

As stated in the preamble to the July 2021 interim final rules¹¹¹ and the August 2022 final rules,¹¹² the Departments seek to ensure transparent and meaningful disclosure of information relating to the calculation of the QPA for providers, facilities, and providers of air ambulance services, while at the same time minimizing administrative burdens on plans and issuers and on the Federal IDR process. The Departments are now of the view that additional disclosure of information with the QPA is critical to ensuring that all parties have the information necessary to determine whether a payment dispute is eligible for the Federal IDR process. The Departments therefore propose to amend 26 CFR 54.9816–6T, 29 CFR 2590.716–6, and 45 CFR 149.140 by re-designating paragraph (d)(1)(v) as (d)(1)(vi) and adding a new paragraph (d)(1)(v) that would require plans and issuers to disclose the legal business name of the plan (if any) or issuer; the legal business name of the plan sponsor (if applicable); and the registration number assigned under proposed 26 CFR 54.9816–9, 29 CFR 2590.716–9, or 45 CFR 149.530, as applicable, if the plan or issuer is registered with the Federal IDR registry.¹¹³ The Departments seek comment on the specific technical and operational steps that would be necessary for plans and issuers to disclose this additional information when providing an initial payment or notice of denial of payment. Further, the Departments are seeking comment on the appropriate implementation period that would allow plans and issuers to complete these steps to comply with these proposed rules, if finalized. As noted in section II.B. of this preamble, the Departments are also seeking comment on whether any of the additional proposed disclosures should be required to be communicated using a CARC or RARC specified in guidance issued by the Departments.

¹¹⁰ For a discussion of the proposed requirement to notify the Departments when initiating open negotiation, see section II.D.1.c. of this preamble.

¹¹¹ 86 FR 36898.

¹¹² 87 FR 52625.

¹¹³ For a discussion of the proposal to establish a Federal IDR registry and assign a registration number to each plan and issuer, see section II.F. of this preamble.

D. Open Negotiation and Initiation of the Federal IDR Process

Section 9816(c)(1)(A) of the Code, section 716(c)(1)(A) of ERISA, section 2799A–1(c)(1)(A) of the PHS Act, and the October 2021 interim final rules establish that, when the out-of-network rate is not determined by reference to an All-Payer Model Agreement under section 1115A of the Social Security Act or specified State law as defined in 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.30, the plan or issuer or provider or facility may engage in open negotiations to determine the total out-of-network rate (inclusive of any cost sharing).¹¹⁴ If the parties fail to reach an agreement through open negotiation, they may initiate the Federal IDR process. Section 9817(b) of the Code, section 717(b) of ERISA, and section 2799A–2(b) of the PHS Act provide that out-of-network rates for air ambulance services may be determined through open negotiation or an IDR process that is largely identical to the process provided for in section 9816(c) of the Code, section 716(c) of ERISA, and section 2799A–1(c) of the PHS Act. Thus, the preamble and regulatory text describing open negotiations and the Federal IDR process generally apply to providers of air ambulance services, unless otherwise specified.

1. Open Negotiation

The Departments propose to amend the open negotiation provisions of 26 CFR 54.9816–8T(b)(1)(i) and (ii), 29 CFR 2590.716–8(b)(1)(i) and (ii), and 45 CFR 149.510(b)(1)(i) and (ii) to establish additional requirements for initiating open negotiation and to revise the open negotiation period start date. In addition, the Departments propose to add a new paragraph at 26 CFR 54.9816–8(b)(1)(iii), 29 CFR 2590.716–8(b)(1)(iii), and 45 CFR 149.510(b)(1)(iii) that would establish a requirement that in response to a party's written notice of its intent to negotiate (open negotiation notice), the party in receipt of the notice must provide a written open negotiation response notice. In these proposed rules, the Departments propose amendments to the content requirements for the open negotiation notice. The Departments also propose to require an open negotiation response notice from non-initiating parties, including specific content requirements.

Section 9816(c)(1)(A) of the Code, section 716(c)(1)(A) of ERISA, section 2799A–1(c)(1)(A) of the PHS Act, and the October 2021 interim final rules establish that the open negotiation

period may be initiated by either party during the 30-business-day period beginning on the day the provider, facility, or provider of air ambulance services receives either an initial payment or a notice of denial of payment for an item or service.¹¹⁵ The October 2021 interim final rules provide that in order for a plan, issuer, provider, facility, or provider of air ambulance services to know when it is a party to an open negotiation period and the item or service for which the payment is the subject of open negotiation, the party initiating open negotiation must provide to the other party a written open negotiation notice.¹¹⁶ Under 26 CFR 54.9816–8T(b)(1)(ii)(A), 29 CFR 2590.716–8(b)(1)(ii)(A), and 45 CFR 149.510(b)(1)(ii)(A), an open negotiation notice must include information sufficient to identify the item(s) and service(s) (including the date(s) the item(s) or service(s) were furnished, the service code, and the initial amount, if applicable, an offer of an out-of-network rate, and contact information for the party sending the open negotiation notice). The day on which the open negotiation notice is first sent by the party is the date that the 30-business-day open negotiation period begins. Consistent with the October 2021 interim final rules, negotiation during the open negotiation period occurs without the involvement of the Departments or a certified IDR entity.¹¹⁷ Furthermore, the requirement to complete a 30-business-day open negotiation period before initiating the Federal IDR process does not preclude the parties from reaching an agreement in fewer than 30 business days. However, in the event the parties do not reach an agreement, they still must exhaust the 30-business-day open negotiation period before either party may initiate the Federal IDR process. The Departments encourage disputing parties to negotiate in good faith during this time period to reach an agreement on the out-of-network rate. The Departments expect parties to make a genuine effort to exchange information with one another at reasonable times and intervals with the goal of reaching a solution satisfactory to both parties. To the extent parties reach an agreement during the open negotiation period, they can avoid the administrative fee and

¹¹⁵ As clarified in the July 2021 interim final rules, the initial payment should be an amount that the plan or issuer reasonably intends to be payment in full based on the relevant facts and circumstances, prior to the beginning of any open negotiations or initiation of the Federal IDR process. (86 FR 36900 through 36901).

¹¹⁶ 86 FR 55990.

¹¹⁷ See 86 FR 55991.

¹¹⁴ 86 FR 55990.

other costs associated with the Federal IDR process.

The preamble to the October 2021 interim final rules explained that, given that the parties already would have made initial contact (namely, the provider, facility, or provider of air ambulance services transmitted a bill to the plan or issuer, and the plan or issuer sent an initial payment or notice of denial of payment to the provider, facility, or provider of air ambulance services), the Departments expected the parties to provide effective notice and encouraged the parties to take reasonable measures to confirm the other party's contact information and confirm electronic receipt through approaches such as read receipts, especially if a party does not initially respond to an open negotiation notice.¹¹⁸ Further, the Departments contemplated that issues related to eligibility and jurisdiction would be resolved through the disclosures that plans and issuers are required to provide with their initial payment or notice of denial of payment or, through the required 30-business-day open negotiation period. However, disputing parties and certified IDR entities have reported that disputing parties are sometimes not actively negotiating with each other during the required period as expected by the Departments. In addition, non-initiating parties and certified IDR entities continue to express concern that initiating parties sometimes do not properly initiate or complete the open negotiation period before initiating the Federal IDR process. Plans and issuers also have expressed concern with the Departments and the certified IDR entities, that providers, facilities, and providers of air ambulance services overwhelm them with requests to negotiate items or services that are ineligible for the Federal IDR process. At the same time, providers, facilities, and providers of air ambulance services assert that plans and issuers rarely respond to their notices initiating open negotiation or provide inadequate information to determine whether the Federal IDR process applies during the open negotiation period.

a. Determination of Payment Amount Through Open Negotiation

To improve communication and information exchange between disputing parties and promote efficiencies in the Federal IDR process, the Departments propose to amend the open negotiation provisions of 26 CFR 54.9816-8(b), 29 CFR 2590.716-8(b),

and 45 CFR 149.510(b)(1) to impose new information exchange requirements and processes and to establish a process for tracking open negotiations through the Federal IDR portal in anticipation of initiation of a Federal IDR dispute.

First, the Departments propose to amend paragraph 26 CFR 9816-8(b)(1)(i), 29 CFR 2590.716-8(b)(1)(i), and 45 CFR 149.510(b)(1)(i) to establish a requirement that a party must provide a written open negotiation notice to the other party and to the Departments through the Federal IDR portal to initiate the open negotiation period.¹¹⁹ Requiring a party to submit the open negotiation notice to the Departments in addition to the other party would provide a record of whether and when the open negotiation period was properly initiated, which is essential in determining eligibility for the Federal IDR process, and would create greater transparency among parties engaged in open negotiation, the Departments, and certified IDR entities.

Second, the Departments propose to amend 26 CFR 54.9816-8(b)(1)(i), 29 CFR 2590.716-8(b)(1)(i), and 45 CFR 149.510(b)(1)(i) to specify that the 30-business-day open negotiation period begins on the day a party first submits the open negotiation notice and a copy of the initial payment, notice of denial of payment, or other remittance advice, as specified at proposed 26 CFR 54.9816-8(b)(1)(ii)(A)(12), 29 CFR 2590.716-8(b)(1)(ii)(A)(12), and 45 CFR 149.510(b)(1)(ii)(A)(12), to the other party and the Departments through the Federal IDR portal. This amendment would not change the timeframe for engaging in open negotiations but would provide greater clarity for parties engaged in open negotiation and improve the shared understanding of deadlines related to the open negotiation period. The Departments seek comment on these proposed amendments.

b. Open Negotiation Response Notice

To have a meaningful open negotiation, the Departments are of the view that both parties must be active and responsive participants. The Departments' experience and feedback from disputing parties and certified IDR entities indicate that the Federal IDR process is less efficient overall when disputing parties are not engaging with each other during the open negotiation period. Therefore, the Departments propose at 26 CFR 54.9816-8(b)(1)(iii), 29 CFR 2590.716-8(b)(1)(iii), and 45 CFR 149.510(b)(1)(iii) to require that the

party in receipt of the open negotiation notice provide a written notice and supporting documentation in response to the open negotiation notice (open negotiation response notice) to the other party and the Departments through the Federal IDR portal as soon as practicable, but no later than the 15th business day of the 30-business-day open negotiation period. Requiring the party in receipt of the open negotiation notice to submit an open negotiation response notice to both the other party and the Departments through the Federal IDR portal would help ensure that parties are responding to open negotiation notices and engaging with one another during the open negotiation period. To better inform the parties' negotiations, the Departments are proposing this 15-business-day timeframe to give the party in receipt of the open negotiation notice sufficient time to review and respond to the open negotiation notice. This would also allow the party that submitted the open negotiation notice to consider, at its discretion, the information included in the open negotiation response notice during (at a minimum) the remaining 15 business days in the 30-business-day open negotiation period.

These deadlines are intended to encourage meaningful participation in open negotiations and allow both parties time to consider offers and raise eligibility concerns prior to initiating the Federal IDR process. If a party were to fail to furnish an open negotiation response notice containing all required information to the other party and the Departments, the Departments would review and determine whether enforcement actions may be appropriate. However, failure to timely furnish an open negotiation response notice in any specific open negotiation would not extend the open negotiation period, delay the timeframe for initiation of the Federal IDR process, or affect either party's ability to initiate the Federal IDR process.

The Departments solicit comment on the proposed modifications to the requirements for submitting the open negotiation notice and the newly proposed open negotiation response notice. Specifically, the Departments seek comment on whether the party in receipt of the open negotiation notice should be required to furnish the open negotiation response notice to the other party and the Departments earlier than proposed to allow additional time for the party submitting the open negotiation notice to review the open negotiation response notice. The Departments also seek comment on imposing a deadline for the open

¹¹⁸ 86 FR 55990.

¹¹⁹ 26 CFR 9816-8T(b)(3), 29 CFR 2590.716-8(b)(3), and 45 CFR 149.510(b)(3).

negotiation response notice later than the proposed deadline, including by the 20th business day or up to the last day of the 30-business-day open negotiation period. A longer response timeframe may be necessary for a party in receipt of open negotiation notice to review and respond if the party receives a high number of open negotiation notices within a short time period. However, submission of the open negotiation response notice at the end of the open negotiation period would not provide the party that submitted the open negotiation notice sufficient time to review, consider, and engage with the party submitting the open negotiation response notice in a meaningful manner prior to the deadline for initiation of the Federal IDR process. Additionally, the Departments seek comment on allowing the certified IDR entities, as a means of incentivizing participation in the proposed exchange of notices, to take into consideration a party's compliance with the 15-business-day deadline for the open negotiation response notice when making their payment determinations.

c. Open Negotiation Notice Content

The Departments propose to amend 26 CFR 54.9816–8(b)(1)(ii)(A), 29 CFR 2590.716–8(b)(1)(ii)(A), and 45 CFR 149.510(b)(1)(ii)(A) and add 26 CFR 54.9816–8(b)(1)(ii)(A)(1) through (12), 29 CFR 2590.716–8(b)(1)(ii)(A)(1) through (12), and 45 CFR 149.510(b)(1)(ii)(A)(1) through (12) to require that the open negotiation notice include additional information regarding the item or service under dispute and the party sending the open negotiation notice. The proposed amendments would add new elements and expand the information required on the open negotiation notice.

Under these proposed rules, the content elements to identify the item or service on the open negotiation notice would align with those that the Departments propose to require in the notice of IDR initiation to identify an item or service under dispute as specified in 26 CFR 54.9816–8(b)(2)(iii)(A), 29 CFR 2590.716–8(b)(2)(iii)(A), and 45 CFR 149.510(b)(2)(iii)(A) and would encourage consistency between open negotiation and the Federal IDR process. The Departments are of the view that requiring the additional elements as part of the open negotiation notice would help parties identify the item or service, the reasons for the denial of payment or initial payment amount, and whether the Federal IDR process applies. Each proposed new or amended element on the open negotiation notice is described

in this section, and the Departments' reasoning for the proposed change is explained.

Under current rules, the open negotiation notice must include contact information for the party sending the notice. At proposed paragraphs 26 CFR 54.9816–8(b)(2)(iii)(A)(1) through (3), 29 CFR 2590.716–8(b)(2)(iii)(A)(1) through (3), and 45 CFR 149.510(b)(1)(ii)(A)(1) through (3), the Departments would require specific contact information sufficient to identify the provider, facility, or provider of air ambulance services, the plan or issuer, and any third party representing the parties in the open negotiation. This contact information would include legal business name, email address, phone number, and mailing address, as provided with the claim form submitted by the provider, facility, or air ambulance provider to the plan or issuer, which would encourage open negotiation initiation between the correct parties and effective communication of the required information.

In addition to the proposed standard contact information elements, parties would also be required to include the National Provider Identification (NPI) number to identify the provider, facility, or provider of air ambulance services and the IDR registration number, assigned under proposed 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530, to identify the plan or issuer (described further in section II.F. of this preamble).

Providers, facilities, and providers of air ambulance services would obtain the IDR registration number from the plan or issuer when the plan or issuer provides it with the initial payment or notice of denial of payment. The proposed registration number would help the provider, facility, or provider of air ambulance services to accurately identify the plan and issuer with which to initiate open negotiation, and the contact and plan information necessary to initiate open negotiation, particularly if the plan or issuer fails to clearly disclose such information. Including this element on the open negotiation notice would streamline the process of submitting the open negotiation notice by providing a validated source of plan and issuer business and contact information, which providers, facilities, and providers of air ambulance services often struggle to identify on documentation provided with the initial payment or the notice of denial of payment and would promote greater consistency and accuracy in initiating open negotiation with the correct plan or issuer.

The Departments acknowledge, as described in section II.F. of this preamble, that the plan or issuer may not be registered in the IDR registry at the time the provider, facility, or provider of air ambulance services initiates the open negotiation period. In these circumstances, the party submitting the open negotiation notice would attest that the party receiving the open negotiation notice was not registered prior to the date the party submitted its open negotiation notice and the registration number would not be required to be included in the notice. The submitting party would use the contact information currently required by the disclosure requirements established in sections 26 CFR 54.9816–6T(d)(1), 29 CFR 2590.716–6(d)(1), and 45 CFR 149.140(d)(1) with the initial payment or notice of denial of payment to complete the open negotiation notice. Finally, if the party submitting the open negotiation notice is a plan or issuer, the plan or issuer would be required to include the plan type. It is the Departments' view that the plan or issuer is best positioned to provide this information and that this information is necessary in assessing applicability of the Federal IDR process. If the plan or issuer is not the party initiating open negotiation, the plan or issuer would be required to include this information on the open negotiation response notice form, as discussed in section II.D.1.d. of this preamble.

Under the current regulations, the open negotiation notice must include information sufficient to identify the item(s) and service(s) furnished by the provider, facility, or provider of air ambulance services. These include the date(s) the item(s) or service(s) were furnished, the service code, and initial payment amount, if applicable, an offer of an out-of-network rate, and contact information for the party sending the open negotiation notice. If finalized, these proposed rules would add to this list of elements considered information sufficient to identify the item or service and, therefore, required to be included in the open negotiation notice at proposed paragraphs 26 CFR 54.9816–8(b)(1)(ii)(A)(4), 29 CFR 2590.716–8(b)(1)(ii)(A)(4), and 45 CFR 149.510(b)(1)(ii)(A)(4). The proposed additions include information to identify the location where the item or service was furnished (such as place of service code or bill type code¹²⁰), type of item or service, the State where the item or service was furnished, and the

¹²⁰ Bill type code is the code relevant for billing by facilities (as opposed to place of service code for providers).

claim number. The place of service code is a two-digit code on health care professional claims that indicates the setting in which a service was furnished.¹²¹ Place of service code information is often needed to determine the acceptability of direct billing of Medicare, Medicaid, and private insurance services furnished by a given provider.¹²² Further, these proposed rules would require the open negotiation notice to include the type of item or service, including whether the item or service is an emergency service or a non-emergency service; whether the item or service is an air ambulance service as defined in 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.510(b)(1)(ii)(A)(7); and whether any service is a professional service or a facility-based service. Parties engaged in open negotiations may use place of service code and information on the type of item or service to analyze the appropriateness of the payment for the item or service and the applicability of the Federal IDR process. The place of service code and type of item or service along with the proposed requirement to include the State where the item or service was furnished would help the parties assess whether a specified State law or an All-Payer Model Agreement might apply. In some States, a specified State law or All-Payer Model Agreement may apply only to certain items or services or with respect to services furnished by certain out-of-network providers or at certain locations (“bifurcated States”).¹²³

The combination of these requirements would help parties identify whether the Federal IDR process applies or whether an applicable specified State law or All-Payer Model Agreement governs the out-of-network payment amount. The Departments are of the view that requiring parties to provide this information on the open negotiation notice would improve communication between parties and help identify and resolve differences in their understanding of the items or services that are the subject of open negotiation.

Further, the Departments expect that as the Federal IDR portal continues to evolve, this information may also be helpful in providing automatic verifications upon a party’s initiation of the open negotiation period of eligibility for the Federal IDR process, which may result in a reduction in submission of ineligible items and services.¹²⁴

Plans and issuers have expressed concern that it is often difficult to identify the item or service subject to the dispute within their billing systems without the associated claim number provided by the provider, facility, or provider of air ambulance services. Therefore, the Departments amended the standard open negotiation notice to include the claim number, as it is necessary to identify the item or service that is subject of the dispute.¹²⁵ Under these proposed rules, the Departments are proposing to codify the requirement to include the associated claim number in the open negotiation notice.

At proposed paragraph 26 CFR 54.9816–8(b)(1)(ii)(A)(5), 29 CFR 2590.716–8(b)(1)(ii)(A)(5), and 45 CFR 149.510(b)(1)(ii)(A)(5), the Departments would specify that the open negotiation notice must include the initial payment amount (including \$0 if, for example, the payment is denied) of the item or service subject to the open negotiation. The initial payment amount is an existing requirement of the open negotiation notice, and this proposed amendment relocates it to 26 CFR 54.9816–8(b)(1)(ii)(A)(5), 29 CFR 2590.716–8(b)(1)(ii)(A)(5), and 45 CFR 149.510(b)(1)(ii)(A)(5) in the regulatory text and clarifies that the plan or issuer must specify \$0 if payment is denied.

The Departments propose to add paragraph 26 CFR 54.9816–8(b)(1)(ii)(A)(6), 29 CFR 2590.716–8(b)(1)(ii)(A)(6), and 45 CFR 149.510(b)(1)(ii)(A)(6) to require a party initiating open negotiations to provide the QPA for the item or service that is the subject of the negotiation if it has been provided on the initial payment or notice of denial of payment or if the party submitting the open negotiation notice is a plan or issuer. Similarly, by

requiring the QPA to be disclosed on the open negotiation notice, the Departments intend to facilitate better communication between parties in identifying whether there may be a mistake in the identified QPA, such as a typographical error or the incorrect use of the cost sharing amount rather than the QPA, so the information can be rectified before initiating the Federal IDR process, if applicable.

At proposed paragraph 26 CFR 54.9816–8(b)(1)(ii)(A)(7), 29 CFR 2590.716–8(b)(1)(ii)(A)(7), and 45 CFR 149.510(b)(1)(ii)(A)(7) the Departments would specify that the open negotiation notice must include an offer of an out-of-network rate for each item or service that is the subject of the open negotiation. The offer of an out-of-network-rate is an existing requirement of the open negotiation notice, and this proposed amendment relocates it to new paragraph (b)(1)(ii)(A)(7) in the regulatory text.

Under proposed 26 CFR 54.9816–8(b)(1)(ii)(A)(8), 29 CFR 2590.716–8(b)(1)(ii)(A)(8), and 45 CFR 149.510(b)(1)(ii)(A)(8) the Departments propose to require that if the party submitting the open negotiation notice is a plan or issuer, it must include the amount of cost sharing imposed for the item or service, if any. The Departments are of the view that the plan or issuer is in the best position to provide this information since non-participating providers, facilities, or providers of air ambulance services generally would not have access to this information. Because the amount of cost sharing for a qualified IDR item or service would be determined by the QPA amount, requiring the amount of cost sharing paid or owed by the participant, beneficiary, or enrollee could help parties better inform their offers while negotiating. The amount of cost sharing paid or owed by the participant, beneficiary, or enrollee would be used, along with the prevailing offer to calculate the final payment amount, should a party choose to initiate the Federal IDR process for the item or service in question. Having a shared understanding of this value and its impact on payment during open negotiations would support the parties’ ability to negotiate with one another in good faith.

A non-emergency item or service is ineligible for the Federal IDR process if the patient was properly provided notice and consented to waive their protections from balance billing under

¹²¹ See Centers for Medicare & Medicaid Services. (December 1, 2021). *Place of Service Codes*. <https://www.cms.gov/Medicare/Coding/place-of-service-codes#:~:text=Place%20of%20Service%20Codes%20are,throughout%20the%20health%20care%20industry.>

¹²² *Id.*

¹²³ There are currently 21 bifurcated States: California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Maine, Maryland, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Texas, Virginia, and Washington. See <https://www.cms.gov/files/document/applicability-federal-idr-bifurcated-states.pdf>.

¹²⁴ The Departments note that while this information may assist parties in preliminarily assessing eligibility based on the location of service, it would not eliminate the need for the certified IDR entity or the Departments to determine whether a specified State law applies to the specific item or service and provider at issue.

¹²⁵ U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of Treasury. (expiration Nov. 30, 2025). *Open Negotiation Notice*. (OMB Control No. 1210–0169). <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/no-surprises-act/surprise-billing-part-ii-information-collection-documents-attachment-2.pdf>.

the No Surprises Act.¹²⁶ To reduce the number of Federal IDR process disputes initiated for items or services that are ineligible for this reason, the Departments propose to require at new 26 CFR 54.9816–8(b)(1)(ii)(A)(9), 29 CFR 2590.716–8(b)(1)(ii)(A)(9), and 45 CFR 149.510(b)(1)(ii)(A)(9) that if the party submitting the open negotiation notice is a provider or facility, that party must provide a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 149.420(c) through (i), either because the items and services are subject to the prohibition on balance billing without exception or because the provider or facility did not provide notice and receive consent.

To further reduce the number of Federal IDR disputes initiated for ineligible items or services, the Departments propose at 26 CFR 54.9816–8(b)(1)(ii)(A)(10), 29 CFR 2590.716–8(b)(1)(ii)(A)(10), and 45 CFR 149.510(b)(1)(ii)(A)(10) to require that the party submitting the open negotiation notice provide a statement that the provider, facility, or provider of air ambulance services was a nonparticipating provider, facility, or provider of air ambulance services on the date the item or service was furnished. Identification of this eligibility factor at open negotiation may decrease the number of ineligible disputes initiated by drawing the attention of the parties to the statutory eligibility standards underlying the Federal IDR process.

Currently, the standard form¹²⁷ for the open negotiation notice provided by the Departments contains general information including a description of the open negotiation period, what happens at the end of the open

negotiation period, and the Federal IDR process. The Departments propose at 26 CFR 54.9816–8(b)(1)(ii)(A)(11), 29 CFR 2590.716–8(b)(1)(ii)(A)(11), and 45 CFR 149.510(b)(1)(ii)(A)(11) to align the general information requirements for the open negotiation notice with existing requirements under the October 2021 interim final rules regarding the notice of IDR initiation, which specify that the notice of IDR initiation must include a statement describing the Federal IDR process and general information to help ensure that the non-initiating party is informed about the process and is familiar with the next steps.¹²⁸

To support the identification of items or services ineligible for the Federal IDR process, the Departments propose to require the party submitting the open negotiation notice to provide a copy of the initial payment or notice of denial of payment or other remittance advice that is required to include the proposed CARC and RARC disclosures described in section II.B. of this preamble at proposed 26 CFR 54.9816–8(b)(1)(ii)(A)(12), 29 CFR 2590.716–8(b)(1)(ii)(A)(12), and 45 CFR 149.510(b)(1)(ii)(A)(12). The remittance advice containing the proposed CARC and RARC disclosures would provide information as to whether the plan or issuer believes the claim is eligible for the Federal IDR process and ensure that a provider initiating open negotiation understands the position of the plan or issuer regarding the eligibility of an item or service, even in situations in which a plan or issuer in receipt of an open negotiation notice is not otherwise responsive.

The Departments seek comment on the addition of these proposed required elements to the open negotiation notice. The Departments also solicit comment on whether the party submitting the open negotiation notice should be required to provide a statement describing why the party is initiating the open negotiation period, including any considerations that serve as the basis for the initiation of open negotiation for the item or service, such as any of the considerations currently described in 26 CFR 54.9816–8T(c)(4)(iii) and 54.9817–2T(b)(2), 29 CFR 2590.716–8(c)(4)(iii) and 2590.717–2(b)(2), and 45 CFR 149.510(c)(4)(iii) and 149.520(b)(2).

d. Open Negotiation Response Notice Content

The Departments propose to establish requirements for an open negotiation response notice at 26 CFR 54.9816–8(b)(1)(iii)(A), 29 CFR 2590.716–

8(b)(1)(iii)(A), and 45 CFR 149.510(b)(1)(iii)(A). Specifically, the Departments propose to require that the party receiving an open negotiation notice must provide a response to the open negotiation notice, which would include the same information specified in proposed 26 CFR 54.9816–8(b)(1)(ii)(A)(1) through (3), 29 CFR 2590.716–8(b)(1)(ii)(A)(1) through (3), and 45 CFR 149.510(b)(1)(ii)(A)(1) through (3) related to the requirements to provide contact information sufficient to identify the provider, facility, or provider of air ambulance services, the plan or issuer that are parties to the open negotiation, and any third party representing a party in the open negotiation. The Departments further propose that the open negotiation response notice would include the following additional information under proposed 26 CFR 54.9816–8(b)(1)(iii)(A)(4) through (11), 29 CFR 2590.716–8(b)(1)(iii)(A)(4) through (11), and 45 CFR 149.510(b)(1)(iii)(A)(4) through (11): (4) information sufficient to identify the item or service included in the open negotiation notice, including the date(s) the item or service was furnished, the claim number, and if the party in receipt of the open negotiation notice is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer; (5) if the party in receipt of the open negotiation notice is a plan or issuer, a statement as to whether it agrees that the initial payment amount (including \$0 if, for example, payment is denied) and the QPA reflected in the open negotiation notice accurately reflects the initial payment amount and QPA disclosed with the initial payment for the item or service, and if not, the initial payment amount (including \$0 if, for example, payment is denied) and/or the QPA it believes to be correct and documentation to support the statement (for example, the remittance advice confirming the QPA amount); (6) if the party in receipt of the open negotiation notice is a plan or issuer, the amount of cost sharing imposed for the item or service, if any; (7) a counteroffer of an out-of-network rate for each item or service or an acceptance of the other party's offer; (8) if the party in receipt of the open negotiation notice is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 149.420(c) through (i); (9) with respect to each item

¹²⁶ The notice and consent exception does not apply to ancillary services, which include items and services related to emergency medicine, anesthesiology, pathology, radiology, and neonatology, whether furnished by a physician or non-physician practitioner; items and services furnished by assistant surgeons, hospitalists, and intensivists; diagnostic services, including radiology and laboratory services; and items and services furnished by a nonparticipating provider, if there is no participating provider who can furnish such item or service at such facility. Additionally, as specified in PHS Act section 2799B–2(c), the notice and consent exception does not apply to items or services furnished as a result of unforeseen, urgent medical needs that arise at the time an item or service is furnished for which a nonparticipating provider satisfied the notice and consent criteria.

¹²⁷ See U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury. (expiration Nov. 30, 2025). *Open Negotiation Notice*. (OMB Control No. 1210–0169). <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/no-surprises-act/surprise-billing-part-ii-information-collection-documents-attachment-2.pdf>.

¹²⁸ 86 FR 55991.

or service, a statement and supporting documentation that explains why the item or service is ineligible for the Federal IDR process or a statement agreeing that the item or service is eligible for the Federal IDR process; (10) a statement as to whether any of the information provided in the open negotiation notice is inaccurate and the basis for the statement, as well as supporting documentation; and (11) a statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the party submitting the open negotiation notice is accurate, and if inaccurate, a copy of the accurate initial payment or notice of denial of payment or other remittance advice that is required to include the disclosures under 26 CFR 54.9816–6T(d)(1), 26 CFR 54.9816–6(d)(1), 29 CFR 2590.716–6(d)(1), and 45 CFR 149.140(d)(1), with respect to the item or service.

Based on feedback from the certified IDR entities, non-initiating parties often do not object to the applicability of the Federal IDR process or to the accuracy of the QPA until after the certified IDR entity has been selected, including at the time of offer submission. Also, at times, disputing parties disagree about the accuracy of information relevant to the claim under dispute. In these cases, the initiating party is unaware of the non-initiating party's statement because this information is sent to the certified IDR entity and not to the initiating party well after the open negotiation period has ended. This significantly slows down the processing of disputes, as the certified IDR entity then must contact both parties to determine the appropriate QPA or solicit information necessary to confirm the Federal IDR process applies. To implement an efficient Federal IDR process, both parties must be active participants in the process. For this reason, and to minimize communication challenges between parties, the Departments are of the view that the party in receipt of the open negotiation notice should provide the proposed content elements to the party sending the open negotiation notice and to the Departments. All of the proposed open negotiation response notice content requirements are also included in the proposed open negotiation notice content requirements, except for: (1) a statement that explains why the item or service is not subject to the Federal IDR process or a statement agreeing that the item or service is subject to the Federal IDR process; (2) a statement as to whether the QPA reflected in the open negotiation notice is accurate for the item or service, and

if not, a statement providing the QPA it believes to be correct and documentation to support the statement (for example, the remittance advice confirming the QPA amount); and (3) a statement confirming the accuracy of the initial payment, notice of denial of payment, or other remittance advice provided by the party submitting the open negotiation notice, and a copy of an accurate initial payment, notice of denial of payment or other remittance advice if inaccurate. By restating information on both the open negotiation notice and open negotiation response notice, parties would have an opportunity to confirm or update information necessary to negotiate and identify any information discrepancies which could impact eligibility and decisions to negotiate or participate in the Federal IDR process. With respect to the three proposed open negotiation response notice content requirements not included in the open negotiation notice, this proposal, if finalized, would make the party submitting the open negotiation notice aware of any objection that the party in receipt of the open negotiation notice has to the dispute's eligibility for the Federal IDR process or its objection to the QPA or remittance advice accuracy. Additionally, this proposal would require the party in receipt of the open negotiation notice to provide an explanation and documentation to support its statement(s).

The Departments are of the view that this proposed method of exchanging information would facilitate communication and understanding between the parties as to the eligibility of an item or service for the Federal IDR process. The Departments seek comment on the content elements of the open negotiation response notice. The Departments also seek comment on the requirement to submit a counteroffer for an out-of-network rate for the item or service or a statement accepting the other party's offer on the open negotiation response notice. Specifically, the Departments seek comment on whether it would hinder meaningful negotiation between the parties outside the Federal IDR portal, or whether it would promote negotiation among parties that might otherwise not negotiate.

e. Technical Amendments

The Departments propose several technical amendments to the open negotiation regulatory text. These proposed changes correct or remove regulatory text that is being updated by the open negotiation proposals in these proposed rules. First, the Departments

propose a technical correction for the cross reference at 26 CFR 54.9816–8T(b)(1)(i), 29 CFR 2590.716–8(b)(1)(i), and 45 CFR 149.510(b)(1)(i) which directs readers to the definition of a qualified IDR item or service at paragraph (a)(2)(xii)(A), but should instead reference paragraph (a)(2)(xi)(A) for the appropriate cross reference to the definition of a qualified IDR item or service.

Second, the Departments propose to remove the current regulatory text that describes the manner in which the open negotiation notice must be provided. The requirements for submitting the open negotiation notice described in paragraphs 26 CFR 54.9816–8T(b)(1)(ii)(B), 29 CFR 2590.716–8(b)(1)(ii)(B), and 45 CFR 149.510(b)(1)(ii)(B) would be removed because they would no longer apply under the proposed changes to the open negotiation notice, and the removal of this paragraph aligns with the proposal described at section II.D.3. of this preamble, which would establish uniform standards for submitting notices for both open negotiations and the IDR initiation through the Federal IDR portal.

f. Implementation of Open Negotiation Through the Federal IDR Portal

As discussed in section II.D.3. of this preamble, to implement the proposed modifications to the requirements for submitting the open negotiation notice and the newly proposed open negotiation response notice, the Departments would need to modify the Federal IDR portal to allow parties to send the open negotiation notice and open negotiation response notice to the other party and the Departments through the Federal IDR portal. While some plans or issuers have created their own proprietary portals to facilitate open negotiations, providers, facilities, and providers of air ambulance services are not required to use them. Accordingly, providers and facilities are not considered to have failed to provide an open negotiation notice or open negotiation response notice solely because they did not use a plan's or issuer's proprietary portal. The Departments are of the view that having one central location where plans, issuers, providers, facilities, and providers of air ambulance services could initiate open negotiations would increase efficiency. Plans, issuers, providers, facilities, providers of air ambulance services, and certified IDR entities have also requested that the Departments amend the rules to require parties to send the open negotiation notice through the Federal IDR portal to

streamline the process and create a centralized platform where parties can better track their open disputes. The Departments note that though these rules propose to require the open negotiation notice and the open negotiation response notice to be submitted through the Federal IDR portal, parties would not be required to conduct negotiations within the Federal IDR portal.

The Federal IDR portal would facilitate transmittal of the open negotiation notice to the appropriate party. Specifically, if the party receiving the open negotiation notice is a provider, facility, or provider of air ambulance services, the Federal IDR portal would transmit the notice to the party based on the contact information provided in the open negotiation notice. However, if the party in receipt of the open negotiation notice is a plan or issuer, the Federal IDR portal would transmit the notice to the party based on the contact information provided through the IDR registry. As discussed in sections II.D.1.c. and II.F. of these proposed rules, it is possible that a plan or issuer would not have submitted their information to the registry by the time a party submits an open negotiation notice to them. If, at the time the open negotiation notice is submitted there is not a registration number for the plan or issuer, the Federal IDR portal would transmit the notice to the party based on the contact information provided in the open negotiation notice.

The Departments seek comment on whether the disputing parties should be required to use the Federal IDR portal for further communication related to open negotiations beyond the initiation of open negotiation and the submission of the open negotiation response notice. The Departments seek comment on what modes of correspondence might be useful to the parties during the open negotiation period (for example, the submission of additional documentation to the other party, live chat, or message exchange, etc.) and if the content of those communications should be accessible to the certified IDR entities if a dispute is initiated on the relevant item or service. Lastly, the Departments solicit comment on whether there are any additional challenges preventing the parties from, or clarifications needed to assist the parties in, fully engaging in meaningful negotiations during the open negotiation period.

2. Changes to the Initiation of the Federal IDR Process

Section 9816(c)(1)(B) of the Code, section 716(c)(1)(B) of ERISA, section

2799A–1(c)(1)(B) of the PHS Act, and the October 2021 interim final rules establish that, with respect to items or services that are the subject of an open negotiation period, if the parties have not agreed upon an amount for the out-of-network rate by the last day of the open negotiation period, either party may initiate the Federal IDR process during the 4-business-day period beginning on the 31st business day after the start of the open negotiation period.¹²⁹

a. Notice of IDR Initiation

As discussed in section II.D.1. of this preamble, an efficient and transparent Federal IDR process requires both parties to be active participants. Therefore, the Departments propose to amend the IDR initiation provisions of 26 CFR 54.9816–8(b)(2), 29 CFR 2590.716–8(b)(2), and 45 CFR 149.510(b)(2) to improve communication between parties, accelerate dispute processing, and reduce the burden on certified IDR entities when determining whether a case is eligible for the Federal IDR process. Specifically, these proposed rules would require the initiating party to include additional information in the notice of IDR initiation and would require non-initiating parties to provide a response to the notice of IDR initiation (notice of IDR initiation response) to the Departments and to the initiating party through the Federal IDR portal within 3 business days of receipt of the notice of IDR initiation. Section II.D.3. of this preamble describes how the parties would provide both the notice of IDR initiation and notice of IDR initiation response to the other party and the Departments.

The Departments propose to amend the content of the notice of IDR initiation and redesignate proposed 26 CFR 54.9816–8(b)(2)(iii)(A), 29 CFR 2590.716–8(b)(2)(iii)(A), and 45 CFR 149.510(b)(2)(iii)(A) as 26 CFR 54.9816–8(b)(2)(ii)(A), 29 CFR 2590.716–8(b)(2)(ii)(A), and 45 CFR 149.510(b)(2)(ii)(A). As described in section II.D.1.c. of this preamble, under these proposed rules several of the content elements in the notice of IDR initiation would be required in the open negotiation notice and open negotiation response notice.¹³⁰ As discussed in

¹²⁹ 86 FR 55991.

¹³⁰ See proposed regulations for the open negotiation notice content at: 26 CFR 54.9816–8(b)(1)(ii)(A)(1)–(6) and (9)–(12); 29 CFR 2590.716–8(b)(1)(ii)(A)(1)–(6) and (9)–(12); and 45 CFR 149.510(b)(1)(ii)(A)(1)–(6) and (9)–(12). See proposed regulations for the open negotiation response content at: 26 CFR 54.9816–8(b)(1)(iii)(A)(1)–(4), (8), and (11); 29 CFR

section II.D.1.d. of this preamble, by restating information on the notices, parties would have an opportunity to confirm or update information necessary to continue negotiations and identify any information discrepancies that could impact eligibility for the Federal IDR process. Further, the open negotiation notice and notice of IDR initiation would often not be identical since disputing parties do not always decide to initiate the Federal IDR process for all items and services included in the open negotiation notice. The Departments anticipate that the Federal IDR portal would be able to prepopulate information included in the open negotiation notices and open negotiation response notices, which would mitigate additional burden on the disputing parties and would provide the certified IDR entity (or the Departments in the event the departmental eligibility review applies as described in section II.E.1.b.ii. of these proposed rules) sufficient information with respect to the item or service and dispute in a single document.

Under current rules, the notice of IDR initiation must include contact information for the parties to the dispute. The proposed rules under 26 CFR 54.9816–8(b)(2)(ii)(A)(1) through (3), 29 CFR 2590.716–8(b)(2)(ii)(A)(1) through (3), and 45 CFR 149.510(b)(2)(ii)(A)(1) through (3), would require specific contact information depending on whether the initiating party is a provider, facility, or provider of air ambulance services, or the plan or issuer, as well as any third party representing the initiating party in the dispute. This contact information would include the legal business name, email address, phone number, mailing address, and Tax Identification Number (TIN). The initiating party would also be required to include the NPI to identify the provider, facility, or provider of air ambulance services and the plan or issuer IDR registration number, assigned under proposed 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530 to identify the plan or issuer, if the plan or issuer is registered, or an attestation from the initiating party that the plan or issuer was not registered prior to the date of the notice (described further in section II.F. of this preamble). Further, if there is any third party representing the initiating party, the notice of IDR initiation would be required to include an attestation that the third party has the authority to act on behalf of the

2590.716–8(b)(1)(iii)(A)(1)–(4), (8), and (11); and 45 CFR 149.510(b)(1)(iii)(A)(1)–(4), (8) and (11).

party it represents in the Federal IDR process.¹³¹

Under current rules, the notice of IDR initiation must also include information sufficient to identify the items or services that are the subject of the dispute. These proposed rules would amend these requirements to include whether the dispute being initiated includes batched or bundled qualified IDR items or services¹³² (described in section II.E.2. of this preamble); the date(s) the qualified IDR item or service was furnished; if the initiating party is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer; the date the open negotiation period began; the type of item or service; the State where the item or service was furnished; the claim number; the service code; and information to identify the location the item or service was furnished (including the place of service code or bill type code).¹³³ The proposed rule requiring plans and issuers to provide the claim number in the notice of IDR initiation would codify existing content requirements in the notice of IDR initiation. The claim number is an element on the notice of IDR initiation that is currently approved for use by the initiating party, as it is information that is necessary to identify the item or service under dispute, as currently required by 26 CFR 54.9816–8T(b)(2)(iii)(A)(1), 29 CFR 2590.716–8(b)(2)(iii)(A)(1), and 45 CFR 149.510(b)(2)(iii)(A)(1). The Departments also propose requiring the initiating party to submit its TIN in the notice of IDR initiation in order to facilitate the Departments' ability to collect the administrative fees directly, as described in section II.E.3.d. of this preamble.¹³⁴ The TIN would also facilitate debt collection from parties that fail to pay their administrative fees and generally streamline the collection process by serving as a unique identifier for disputing parties.

Under current rules, the notice of IDR initiation requires the initiating party to provide the initial payment amount, the QPA, and if the initiating party is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 149.420(c) through (i). This information would still be required under these proposed rules at paragraphs 26 CFR 54.9816–8(b)(2)(ii)(A)(6) through (8), 29 CFR 2590.716–8(b)(2)(ii)(A)(6) through (8), and 45 CFR 149.510(b)(2)(ii)(A)(6) through (8), but would require the QPA only if provided with the initial payment of notice of denial or payment or if the initiating party is a plan or issuer. These proposed rules would also require that the initiating party provide the initial payment amount, including \$0, if the payment was denied.

Further, these proposed rules would require a statement that the provider, facility, or provider of air ambulance services was a nonparticipating provider, nonparticipating emergency facility, or nonparticipating provider of air ambulance services on the date the item or service was furnished.¹³⁵ As discussed in section II.D.1.c. of this preamble, identification of this eligibility factor at the time of initiating the Federal IDR process may decrease the number of ineligible disputes initiated by drawing the attention of the parties to the statutory eligibility standards underlying the Federal IDR process.

Under current rules, the notice of IDR initiation requires the initiating party to provide an attestation that the item or service under dispute is a qualified IDR item or service, and the basis for the attestation; general information listed in the standard notice of IDR initiation developed by the Departments describing the Federal IDR process (including a description of the purpose of the Federal IDR process and key deadlines in the Federal IDR process); and the preferred certified IDR entity. Each of these content requirements would still be required under these proposed rules.¹³⁶

To improve communications between the parties to a dispute, these proposed rules would also require the initiating party to include a copy of the initial payment or notice of denial of payment or other remittance advice that is required to include the disclosures

under 26 CFR 54.9816–6T(d)(1), 26 CFR 54.9816–6(d)(1), 29 CFR 2590.716–6(d)(1), and 45 CFR 149.140(d)(1), with respect to the item or service;¹³⁷ and a statement describing the key aspects of the claim discussed by the parties during open negotiation that relate to the payment for the disputed claim, whether the reasons for initiating the Federal IDR process are different from those aspects discussed during the open negotiation period, and an explanation of why the party is initiating the Federal IDR process, including any of the considerations currently described in 26 CFR 54.9816–8(c)(4)(iii) and 54.9817–2(b)(2), 29 CFR 2590.716–8(c)(4)(iii) and 2590.717–2(b)(2), and 45 CFR 149.510(c)(4)(iii) and 149.520(b)(2) that serve as the party's basis for initiating the Federal IDR process.¹³⁸ The Departments have received feedback that plans and issuers are often unaware of the reasons why the provider, facility, or provider of air ambulance services is initiating the Federal IDR process, despite engaging in the 30-business-day open negotiation period. Further, plans and issuers have stated that providers, facilities, and providers of air ambulance services often raise different reasons in the notice of offer submission than the reasons they presented during the open negotiation period. Plans and issuers have also stated that if they knew earlier of a provider's, facility's, or provider of air ambulance services' reasoning for initiating the Federal IDR process, they may have a more accurate basis for making an alternative out-of-network payment amount that may better align with the provider's, facility's, or provider of air ambulance services' requested total payment amount. Thus, the Departments are of the view that requiring this information would result in the non-initiating party providing a more informed offer or help the disputing parties reach a settlement before the certified IDR entity makes a payment determination.

Requiring the initiating party to attest that the item or service under dispute is a qualified IDR item or service and to identify the basis for the attestation may reduce the number of ineligible disputes submitted because it would require the initiating party to actively evaluate eligibility before initiating the Federal IDR process. This would help reduce the time certified IDR entities spend conducting outreach to confirm whether

¹³¹ Proposed 26 CFR 54.9816–8(b)(2)(ii)(A)(3), 29 CFR 2590.716–8(b)(2)(ii)(A)(3), and 45 CFR 149.510(b)(2)(ii)(A)(3).

¹³² Proposed 26 CFR 54.9816–8(b)(2)(ii)(A)(4), 29 CFR 2590.716–8(b)(2)(ii)(A)(4), and 45 CFR 149.510(b)(2)(ii)(A)(4).

¹³³ Proposed 26 CFR 54.9816–8(b)(2)(ii)(A)(5), 29 CFR 2590.716–8(b)(2)(ii)(A)(5), and 45 CFR 149.510(b)(2)(ii)(A)(5).

¹³⁴ Currently, the administrative fee is paid to the selected certified IDR entity and then remitted to the Departments. 26 CFR 54.9816–8T(d)(2)(i) and (e)(2)(ix), 29 CFR 2590.716–8(d)(2)(i) and (e)(2)(ix), and 45 CFR 149.510(d)(2)(i) and (e)(2)(ix).

¹³⁵ Proposed 26 CFR 54.9816–8(b)(2)(ii)(A)(9), 29 CFR 2590.716–8(b)(2)(ii)(A)(9), and 45 CFR 149.510(b)(2)(ii)(A)(9).

¹³⁶ Proposed 26 CFR 54.9816–8(b)(2)(ii)(A)(10) through (11) and (13), 29 CFR 2590.716–8(b)(2)(ii)(A)(10) through (11) and (13), and 45 CFR 149.510(b)(2)(ii)(A)(10) through (11) and (13).

¹³⁷ Proposed 26 CFR 54.9816–8(b)(2)(ii)(A)(12), 29 CFR 2590.716–8(b)(2)(ii)(A)(12), and 45 CFR 149.510(b)(2)(ii)(A)(12).

¹³⁸ Proposed 26 CFR 54.9816–8(b)(2)(ii)(A)(14), 29 CFR 2590.716–8(b)(2)(ii)(A)(14), and 45 CFR 149.510(b)(2)(ii)(A)(14).

the item or service is eligible for the Federal IDR process.

Lastly, the Departments propose to remove paragraphs 26 CFR 54.9816–8T(b)(2)(iii)(B) and (C), 29 CFR 2590.716–8(b)(2)(iii)(B) and (C), and 45 CFR 149.510(b)(2)(iii)(B) and (C), which specify the manner in which the notice of IDR initiation must be provided to the other party and the Departments. The Departments propose to establish paragraphs 26 CFR 54.9816–8(b)(3), 29 CFR 2590.716–8(b)(3), and 45 CFR 149.510(b)(3) to require use of the Federal IDR portal for transmission of notices of IDR initiation in the same manner as would be required for the transmission of notices related to open negotiation discussed in section II.D.3. of this preamble.

The Departments seek comment on these proposals. Specifically, the Departments seek comment on the new content elements for the notice of IDR initiation and whether additional elements should be required to facilitate the exchange of information necessary to initiate the Federal IDR process. Further, the Departments solicit comment on the proposed requirement for the initiating party to include in the notice of IDR initiation a statement describing any key aspects of the claim discussed by the parties during open negotiation, whether the considerations for initiating the Federal IDR process are different from the key aspects of the claim discussed during the open negotiation period, and an explanation of why the party is initiating the Federal IDR process, including any of the permissible considerations described at 26 CFR 54.9816–8(c)(4)(iii) and 54.9817–2(b)(2), 29 CFR 2590.716–8(c)(4)(iii) and 2590.717–2(b)(2), and 45 CFR 149.510(c)(4)(iii) and 149.520(b)(2).

b. Notice of IDR Initiation Response

The Departments propose to amend 26 CFR 54.9816–8(b)(2)(i), 29 CFR 2590.716–8(b)(2)(i), and 45 CFR 149.510(b)(2)(i) to require that the non-initiating party provide a written notice and supporting documentation in response to the notice of IDR initiation to the initiating party and the Departments within 3 business days after the date of IDR initiation. As described in section II.D.2.a. of this preamble, the initiating party must submit the notice of IDR initiation through the Federal IDR portal. Upon proper submission of the notice of IDR initiation by the initiating party, the Federal IDR portal would facilitate transmittal of the notice of IDR initiation to the non-initiating party. The non-initiating party would also

receive the notice of IDR initiation. The Departments are of the view that it is critical to require the non-initiating party to provide a response to the notice of IDR initiation (including any objections regarding preferred certified IDR entity selection and notice of any objection to Federal IDR process eligibility) in order to increase transparency and improve efficiencies in the Federal IDR process.

The Departments propose to add 26 CFR 54.9816–8(b)(2)(iii)(A), 29 CFR 2590.716–8(b)(2)(iii)(A), and 45 CFR 149.510(b)(2)(iii)(A), to provide that the notice of IDR initiation response must include information sufficient to identify the non-initiating party. Under the proposed rules, the notice of IDR initiation response must include the legal business name, email address, phone number, mailing address, the TIN, the NPI, and the plan's or issuer's registration number, as required under proposed 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530. These proposed rules would also require the notice to include the name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the non-initiating party, and an attestation that the third party has the authority to act on behalf of the party it represents in the Federal IDR process.

The Departments also propose that the notice must include information sufficient to identify each item or service included in the notice of IDR initiation (including the date(s) the item or service was furnished. If the non-initiating party is a provider, facility, or provider of air ambulance services, the notice must include the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer and the claim number). If the non-initiating party is a plan or issuer, the proposed rules would require a statement as to whether the non-initiating party agrees that the initial payment (including \$0 if, for example, payment is denied) and the QPA reflected in the notice of IDR initiation was the initial payment amount and/or the QPA disclosed with the initial payment or notice of denial of payment for the item or service that is the subject of the dispute, and if not, the initial payment amount (including \$0 if, for example, payment is denied) and/or QPA it believes to be correct, and documentation to support the statement

(for example, the remittance advice confirming the QPA). If the non-initiating party is a plan or issuer, the notice must include the amount of cost sharing imposed for the item or service, if any. If the non-initiating party is a provider or facility, the notice must include a statement that the items and services do not qualify for the notice and consent exception described at § 149.410(b) or § 149.420(c) through (i).

With respect to each item or service that is the subject of the dispute, the notice must also include an attestation that the item or service is a qualified IDR item or service, or for each item or service that the non-initiating party asserts is not a qualified IDR item or service, an explanation and documentation to support the statement; a statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the initiating party under paragraph (b)(2)(ii)(A)(12) is accurate, and if inaccurate, a copy of the accurate initial payment or notice of denial of payment or other remittance advice required to include the disclosures under 26 CFR 54.9816–6T(d)(1), 26 CFR 54.9816–6(d)(1), 29 CFR 2590.716–6(d)(1), and 45 CFR 149.140(d)(1), with respect to the item or service; a statement as to whether any of the information provided in the notice of IDR initiation is inaccurate, the basis for the statement, and any supporting documentation; and a statement as to whether the non-initiating party agrees or objects to the initiating party's preferred certified IDR entity. If the non-initiating party objects to the initiating party's preferred certified IDR entity, the notice of IDR initiation response must include the name of an alternative preferred certified IDR entity and, if applicable, an explanation of any conflict of interest with the initiating party's preferred certified IDR entity.

Most of the proposed notice of IDR initiation response content requirements are included in the proposed open negotiation notice, open negotiation response notice, and notice of IDR initiation content requirements.¹³⁹ As

¹³⁹ See proposed regulations for the open negotiation notice content at: 26 CFR 54.9816–8(b)(1)(ii)(A)(1)–(6), (8)–(9), and (12); 29 CFR 2590.716–8(b)(1)(ii)(A)(1)–(6), (8)–(9), and (12); and 45 CFR 149.510(b)(1)(ii)(A)(1)–(6), (8)–(9), and (12). See proposed regulations for the open negotiation response content at: 26 CFR 54.9816–8(b)(1)(iii)(A)(1)–(6), (8)–(9), and (11); 29 CFR 2590.716–8(b)(1)(iii)(A)(1)–(6), (8)–(9), and (11); and 45 CFR 149.510(b)(1)(iii)(A)(1)–(6), (8)–(9), and (11). See proposed regulations for the notice of IDR initiation content at: 26 CFR 54.9816–8(b)(2)(ii)(A)(1)–(3), (5)–(8), (10), and (12); 29 CFR 2590.716–8(b)(2)(ii)(A)(1)–(3), (5)–(8), (10), and (12); and 45 CFR 149.510(b)(2)(ii)(A)(1)–(3), (5)–(8), (10), and (12).

discussed in sections II.D.1.d. and II.D.2.a., by restating information on the notices, parties would have an opportunity to confirm or update information necessary to continue negotiations and identify any information discrepancies which could impact eligibility. Further, by requiring this information at IDR initiation, it would reduce the likelihood that additional outreach would be necessary to make eligibility determinations, improving IDR dispute processing. As discussed in section II.D.2.a. of this preamble, the Departments anticipate that the Federal IDR portal would be able to prepopulate information included in the open negotiation notice, open negotiation response notice, and the notice of IDR initiation notice, which would mitigate additional burden on the disputing parties.

The proposed rules also include additional content requirements for the notice of IDR initiation response that require a statement as to whether the non-initiating party agrees or objects to the initiating party's preferred certified IDR entity and, if the non-initiating party objects to the initiating party's preferred certified IDR entity, the name of an alternative preferred certified IDR entity. This proposed requirement is to meet the statutory requirement under Code section 9816(c)(4)(F), ERISA section 716(c)(4)(F), and PHS Act section 2799A–1(c)(4)(F) that the Departments must provide a method for the plan or issuer and the provider, facility, or provider of air ambulance services that are parties to a determination subject to the Federal IDR process to jointly select a certified IDR entity no later than 3 business days following the date of the IDR initiation. Section II.E.1.a. of this preamble further describes the selection of the certified IDR entity process and the proposed amendments to the certified IDR entity selection process.

The Departments anticipate updating the Federal IDR portal to create parameters to ensure information is submitted for each of the required fields for the notice of IDR initiation and notice of IDR initiation response. However, failure to timely furnish a notice of IDR initiation response would not delay the timeframe for initiation of the Federal IDR process (because the Federal IDR process has been initiated once a notice of IDR initiation has timely been submitted to the non-initiating party and the Departments) or delay any subsequent timeframes under the Federal IDR process. As discussed in section II.D.1.b. of this preamble, if a party were to fail to furnish a notice of IDR initiation response to the other

party and the Departments or fail to fill out all of the required information in good faith (for example, intentional omission of detail with the intent to advance the process without providing sufficient content), the Departments would review and determine whether enforcement actions may be warranted.

The Departments seek comment on these proposals, including any administrative burden associated with the additional disclosure requirements.

3. Manner of Notices

The October 2021 interim final rules generally require a party to initiate open negotiations and initiate the Federal IDR process by providing written notice to the other party.¹⁴⁰ The party initiating the Federal IDR process must also furnish the notice of IDR initiation to the Departments through the Federal IDR portal. In both cases, notice to the other party may be provided electronically if the following two conditions are satisfied: (1) the party sending the open negotiation notice has a good faith belief that the electronic method is readily accessible to the other party; and (2) the notice is provided in paper form free of charge upon request.¹⁴¹ As mentioned in section II.D.1. and II.D.2. of this preamble, the Departments are proposing to remove the regulatory text at 26 CFR 54.9816–8T(b)(1)(ii)(B), (b)(2)(iii)(B), and (b)(2)(iii)(C), 29 CFR 2590.716–8(b)(1)(ii)(B), (b)(2)(iii)(B), and (b)(2)(iii)(C), and 45 CFR 149.510(b)(1)(ii)(B), (b)(2)(iii)(B), and (b)(2)(iii)(C) and instead include new requirements related to the manner of submission of open negotiation notices and notices of IDR initiation to the Departments and the other party at 26 CFR 54.9816–8(b)(3), 29 CFR 2590.716–8(b)(3), and 45 CFR 149.510(b)(3). The Departments propose that these new requirements would also apply to the open negotiation response notice and the notice of IDR initiation response. Specifically, the Departments propose that a party must furnish to the other party and the Departments the notices and supporting documentation described in proposed paragraphs (b)(1)(ii) (open negotiation notice), (b)(1)(iii) (open negotiation response notice), (b)(2)(ii) (notice of IDR initiation), and (b)(2)(iii) (notice of IDR initiation response) through the Federal IDR portal, using the standard forms developed by the Departments.

¹⁴⁰ 86 FR 55990.

¹⁴¹ 26 CFR 54.9816–8T(b)(1)(ii)(B), (b)(2)(iii)(B), and (b)(2)(iii)(C), 29 CFR 2590.716–8(b)(1)(ii)(B), (b)(2)(iii)(B), and (b)(2)(iii)(C), and 45 CFR 149.510(b)(1)(ii)(B), (b)(2)(iii)(B) and (b)(2)(iii)(C).

Under the current regulations, the open negotiation notice between parties has taken place outside of the Federal IDR portal and has led to challenges for the Departments and certified IDR entities to confirm that all requirements related to the open negotiation notice and open negotiation period have been satisfied for each initiated dispute. Requiring a party to submit the open negotiation notice to the Departments and the other party through the Federal IDR portal would provide a record of whether and when the initiating party began open negotiations, which would help inform whether the item or service that is the subject of negotiation is eligible for the Federal IDR process. The Departments expect that this would decrease the amount of time and resources the Departments and certified IDR entities spend seeking information from the disputing parties to determine whether the open negotiation period was initiated and exhausted, which would ultimately provide certified IDR entities more time to review eligible disputes.

As specified in the October 2021 interim final rules and set forth in these proposed rules, the Departments are of the view that it is important for a party receiving a notice to be furnished the notice on the same day as it is submitted to the Departments, because many of the timeframes required in the October 2021 interim final rules and proposed in these proposed rules are triggered upon receipt of a notice.¹⁴² Currently, when an initiating party submits the notice of IDR initiation to the Federal IDR portal, the non-initiating party receives a notice from the Departments on the same day the Departments receive the notice of IDR initiation. This notice from the Departments to the non-initiating party provides information contained in the notice of IDR initiation. However, it does not include any of the supporting documentation that the initiating party may have provided with the notice of IDR initiation. While the initiating party is required to directly furnish the notice of IDR initiation to the other party, non-initiating parties report that, at times, the initiating party provides the notice after the period for IDR initiation has expired, although it submits the notice to the Departments within the applicable notice period.

If these proposed rules are finalized, the Departments would enhance the Federal IDR portal to allow the parties to transmit notices, including supporting documentation, through the Federal IDR portal so that the party sending the notice can notify the

¹⁴² 86 FR 55990 through 55991.

Departments and the other party at the same time. Further, as discussed in sections II.D.1.c. and II.D.2.a. of this preamble, the Departments are proposing to require similar content requirements in the open negotiation notice and notice of IDR initiation. By streamlining the submission of these notices, the Departments would be able to use information that was submitted for one notice to pre-populate subsequent notices, reducing the burden of providing duplicative information. For instance, if a party decides to initiate the Federal IDR process after submitting the open negotiation notice through the Federal IDR portal and completing the 30-business-day open negotiation period, the Departments intend that the Federal IDR portal would pre-populate the fields in the notice of IDR initiation and notice of IDR initiation response with the same information that was provided in the open negotiation notice and open negotiation response notice, as applicable. The Departments solicit comment on these proposals.

E. Federal IDR Process Following Initiation

1. Certified IDR Entity Selection and Eligibility Determinations

a. Certified IDR Entity Selection

Section 9816(c)(4)(F) of the Code, section 716(c)(4)(F) of ERISA, section 2799A–1(c)(4)(F) of the PHS Act, and the October 2021 interim final rules¹⁴³ provide parties to a dispute 3 business days after the initiation date of the Federal IDR process to jointly select a certified IDR entity. If parties to a dispute fail to jointly agree and select a certified IDR entity within the required timeframe, the Departments must select the certified IDR entity no later than 6 business days after the initiation date of the Federal IDR process. More specifically, under the current rules, the non-initiating party may agree or object to the preferred certified IDR entity that the initiating party identifies in its notice of IDR initiation. If the non-initiating party fails to object within 3 business days after the date of IDR initiation, the preferred certified IDR entity identified in the notice of IDR initiation will be selected and will be treated as jointly agreed to by the parties. In this case, the initiating party's preferred certified IDR entity becomes the certified IDR entity for the dispute, provided that the certified IDR entity does not have a conflict of interest. If the non-initiating party objects to the initiating party's preferred

certified IDR entity, it must notify the initiating party of the objection and propose an alternative preferred certified IDR entity within 3 business days after the date of IDR initiation. The initiating party must then agree or object to the alternative preferred certified IDR entity within 3 business days after the date of IDR initiation. If the initiating party fails to agree or object to the alternative preferred certified IDR entity within that timeframe, the alternative preferred certified IDR entity selected by the non-initiating party will be selected and will be treated as jointly agreed to by the parties. If the parties fail to jointly agree on a certified IDR entity within 3 business days after the date of IDR initiation, the Departments select a certified IDR entity through random selection.¹⁴⁴

Further, under the current rules, upon the joint selection of a certified IDR entity the initiating party must provide a notice of certified IDR entity selection to the Departments indicating whether the parties have jointly agreed or failed to agree on the selection of a certified IDR entity, as soon as practicable but no later than 1 business day after selection.¹⁴⁵ The notification must include an attestation by both parties, or by the initiating party if the non-initiating party fails to object to the selection of the certified IDR entity, that the selected certified IDR entity does not have a conflict of interest as specified in 26 CFR 54.9816–8(c)(1)(ii), 29 CFR 2590.716–8(c)(1)(iii), and 45 CFR 149.510(c)(1)(ii).¹⁴⁶ Under the current rules, after the selection of the certified IDR entity by the parties (including when the initiating party selects a certified IDR entity and the non-initiating party does not object), or by the Departments when the parties fail to select a certified IDR entity, the certified IDR entity must review the selection and attest that it meets these conflict-of-interest requirements.¹⁴⁷ If the certified IDR entity is unable to attest that it meets the conflict-of-interest requirements within 3 business days of selection, the parties, upon notification, must select another certified IDR entity. In such circumstances, the date of the notification sent by the certified IDR entity informing the parties that it cannot attest that it meets the conflict-

of-interest requirements is treated as the date of IDR initiation for the purposes of selecting a new certified IDR entity.

Since implementation of the Federal IDR process, the Departments have identified potential areas to improve upon and provide additional clarity with respect to the process for selecting a certified IDR entity. First, in the Departments' experience implementing these rules, when a non-initiating party waits until the third business day after the date of IDR initiation to select an alternative preferred certified IDR entity, the initiating party lacks sufficient time to agree or object to the alternative preferred certified IDR entity. As a result, the alternative preferred certified IDR entity will be "jointly" selected by default. The Departments are of the view that in order for a certified IDR entity to be "jointly" selected, the parties must agree on, or be given the opportunity to object to that certified IDR entity. Therefore, the Departments propose to amend the process for selecting a certified IDR entity when the parties fail to jointly agree on a certified IDR entity under section 9816(c)(4)(F)(i) of the Code, section 716(c)(4)(F)(i) of ERISA, and section 2799A–1(c)(4)(F)(i) of the PHS Act.

Second, as part of the current operations, the Federal IDR portal automates the process for selecting the certified IDR entity such that the initiating party and the non-initiating party communicate directly through the Federal IDR portal when selecting, agreeing to, or objecting to a certified IDR entity. Therefore, the Departments are notified automatically through the Federal IDR portal if both parties have jointly agreed on a certified IDR entity. Similarly, when the Departments select a certified IDR entity, the disputing parties are notified automatically, provided the selected certified IDR entity attests to having no conflicts of interest. As described in section II.D. of this preamble, if finalized, these proposed rules would collect information regarding the applicability of the Federal IDR process from both parties as part of the proposed notice of IDR initiation and notice of IDR initiation response requirements. Because this information is automated through the Federal IDR portal or would be collected at other points of the IDR initiation process, the Departments propose to amend the notice of certified IDR entity selection requirements of 26 CFR 54.9816–8(c)(1)(iii), 29 CFR 2590.716–8(c)(1)(iii), and 45 CFR 149.510(c)(1)(iii) and establish at 26 CFR 54.9816–8(c)(1)(i)(D), 29 CFR 2590.716–8(c)(1)(i)(D), and 45 CFR

¹⁴⁴ 26 CFR 54.9816–8T(c)(1)(iv), 29 CFR 2590.716–8(c)(1)(iv), and 45 CFR 149.510(c)(1)(iv).

¹⁴⁵ 26 CFR 54.9816–8T(c)(1)(iii)–(iv), 29 CFR 2590.716–8(c)(1)(iii)–(iv), and 45 CFR 149.510(c)(1)(iii)–(iv).

¹⁴⁶ 26 CFR 54.9816–8T(c)(1)(iii)(A)(3), 29 CFR 2590.716–8(c)(1)(iii)(A)(3), and 45 CFR 149.510(c)(1)(iii)(A)(3).

¹⁴⁷ 26 CFR 54.9816–8T(c)(1)(v), 29 CFR 2590.716–8(c)(1)(v), and 45 CFR 149.510(c)(1)(v).

¹⁴³ 87 FR 55991 through 55992.

149.510(c)(1)(i)(D) the mechanism for parties to agree or object and select another alternative preferred certified IDR entity after the non-initiating party submits the notice of IDR initiation response form and before the deadline for parties to jointly select a certified IDR entity, which is within 3 business days after the date of IDR initiation.

Lastly, to provide clarity on the Federal IDR process timeframes, in the *Federal IDR Process Guidance for Certified IDR Entities* and the *Federal IDR Process Guidance for Disputing Parties*, the Departments clarified that the certified IDR entity is “preliminarily” selected until it attests that it does not have a conflict of interest and determines whether the Federal IDR Process is applicable, thereby finalizing the selection.¹⁴⁸ The guidance further clarifies that the certified IDR entities must submit their conflict-of-interest attestation within 3 business days of being contingently selected, and that the parties must submit their offers for an out-of-network payment amount, as specified in 26 CFR 54.9816–8(c)(4)(i), 29 CFR 2590.716–8(c)(4)(i), and 45 CFR 149.510(c)(4)(i) no later than 10 business days after final selection of the certified IDR entity. To provide further clarity and to codify the process and timeframes for selecting a certified IDR entity, the certified IDR entity’s conflict-of-interest review, and the date the certified IDR entity selection is considered finally selected, the Departments propose to amend 26 CFR 54.9816–8(c)(1), 29 CFR 2590.716–8(c)(1), and 45 CFR 149.510(c)(1) to establish a process that includes both preliminary selection of the certified IDR entity and final selection of the certified IDR entity.

i. Preliminary Selection of the Certified IDR Entity

The Departments propose to amend 26 CFR 54.9816–8T(c)(1)(i), 29 CFR 2590.716–8(c)(1)(i), and 45 CFR 149.510(c)(1)(i) to establish the preliminary selection of the certified IDR entity in accordance with the statutory requirement at section 9816(c)(4)(F) of the Code, section 716(c)(4)(F) of ERISA, and section 2799A–1(c)(4)(F) of the PHS Act. Under the process for preliminary selection of the certified IDR entity proposed in these rules, the non-initiating party would be required to agree or object to the preferred certified IDR entity in the notice of IDR initiation response within

3 business days after the date of IDR initiation as discussed in section II.D.2.b of this preamble. Under these proposed rules, if the non-initiating party agrees, or fails to object, to the selection of the initiating party’s preferred certified IDR entity in the notice of IDR initiation response within the 3-business-day timeframe after the date of IDR initiation, the initiating party’s preferred certified IDR entity would be considered jointly selected by the parties on the third business day after the date of IDR initiation. If the non-initiating party objects to the selection of the initiating party’s preferred certified IDR entity by designating an alternative preferred certified IDR entity in the notice of IDR initiation response within the 3-business-day timeframe after the date of IDR initiation, the initiating party would be required to agree or object to the alternative preferred certified IDR entity using the notice of certified IDR entity selection. Under these proposed rules, if the initiating party agrees to the alternative preferred certified IDR entity within 3 business days after the date of IDR initiation, or if the non-initiating party submits the notice of IDR initiation response on or before the second business day after the date of IDR initiation and the initiating party fails to respond within 3 business days after the date of IDR initiation, the alternative preferred certified IDR entity would be considered jointly selected by the parties. If the non-initiating party submits the notice of IDR initiation response on the third business day after the date of IDR initiation and the initiating party does not agree on the same day, the parties would have failed to jointly select a certified IDR entity.

Additionally, these proposed rules would amend the process for the initiating and non-initiating parties to go back-and-forth in selecting and responding to a selection of an alternative preferred certified IDR entity after the non-initiating party submits a notice of IDR initiation response within the 3-business-day period after IDR initiation. Specifically, if a certified IDR entity is not jointly selected because the initiating party submits a notice of certified IDR entity selection objecting to the non-initiating party’s alternative preferred certified IDR entity reflected in the notice of IDR initiation response, the non-initiating party may agree to the alternative preferred certified IDR entity selected in the initiating party’s notice of certified IDR entity selection or select another alternative preferred certified IDR entity by submitting a notice of certified IDR entity selection to the initiating party and to the Departments.

This back-and-forth may continue until the earlier of the date that the parties agree on an alternative preferred certified IDR entity or the deadline for joint selection, which is 3 business days after the date of IDR initiation. However, if either the notice of IDR initiation response or the notice of certified IDR entity selection is submitted on the third business day after the date of IDR initiation, the party last in receipt of the applicable notice would not be allowed to select another alternative preferred certified IDR entity, as discussed later in this section of the preamble. Once a party submits a notice of certified IDR entity selection, it may not submit another notice of IDR entity selection until after it receives a responding notice of certified IDR entity selection from the other party.

If a party submits a notice of certified IDR entity selection to the other party on the first or second day after the date of IDR initiation and the party in receipt of the notice agrees or fails to object to the alternative preferred certified IDR entity by the third business day after the date of IDR initiation, the alternative preferred certified IDR entity would be considered jointly selected by the parties. If a party submits a notice of certified IDR entity selection to the other party on the third business day after the date of IDR initiation and the party last in receipt of the notice agrees to the alternative preferred certified IDR entity on the same day, the alternative preferred certified IDR entity will be considered jointly selected by the parties. If a party submits a notice of certified IDR entity selection to the other party on the third business day after the date of IDR initiation and the party last in receipt of the notice does not agree to the alternative preferred certified IDR entity on the same day, the parties would have failed to jointly select a certified IDR entity.

Under these proposed rules at 26 CFR 54.9816–8(c)(1)(i)(D), 29 CFR 2590.716–8(c)(1)(i)(D), and 45 CFR 149.510(c)(1)(i)(D), to notify the Departments and the other party of any subsequent agreement or objection to an alternative preferred certified IDR entity after the non-initiating party submits the notice of IDR initiation response, a party must submit a notice of certified IDR entity selection. The party must furnish the notice of certified IDR entity selection using the standard form developed by the Departments through the Federal IDR portal within 3 business days after the date of IDR initiation.

The Departments propose to amend the existing content of the notice of certified IDR entity selection and specify that the notice must include a

¹⁴⁸ See <https://www.cms.gov/files/document/federal-idr-guidance-idr-entities-march-2023.pdf> and <https://www.cms.gov/files/document/federal-idr-guidance-disputing-parties-march-2023.pdf>.

statement indicating the party's agreement with or objection to the other party's alternative preferred certified IDR entity and, if applicable, an explanation of any conflict of interest with the other party's alternative preferred certified IDR entity. If the party in receipt of a notice of certified IDR entity selection objects to the other party's alternative preferred certified IDR entity and the party submits a notice of certified IDR entity selection by the end of the third business day after the date of IDR initiation, that party's notice of certified IDR entity selection reflecting the objection must include the name of another alternative preferred certified IDR entity.

The Departments propose to amend 26 CFR 54.9816–8(c)(1)(iv), 29 CFR 2590.716–8(c)(1)(iv), and 45 CFR 149.510(c)(1)(iv), which describe the certified IDR entity selection process when the disputing parties fail to jointly select a certified IDR entity, and redesignate the paragraphs as amended 26 CFR 54.9816–8(c)(1)(ii), 29 CFR 2590.716–8(c)(1)(ii), and 45 CFR 149.510(c)(1)(ii). If the parties fail to jointly select a certified IDR entity within 3 business days after the date of IDR initiation, the Departments would select a certified IDR entity. The parties would have failed to jointly select a certified IDR entity if, by the end of the third business day after the date of IDR initiation, the party last in receipt of the notice of IDR initiation response or the notice of certified IDR entity selection has objected to the other party's alternative preferred certified IDR entity, or if the notice of IDR initiation response or the notice of certified IDR entity selection is submitted to the other party on the third business day after the date of IDR initiation and the party in receipt of the notice does not agree to the alternative preferred certified IDR entity within 3 business days after the date of IDR initiation.

As part of the Departments' process to select a certified IDR entity when the parties do not jointly select one,¹⁴⁹ under these proposed rules, the Departments would first confirm whether a party submitted the notice of IDR initiation response or notice of certified IDR entity selection with an alternative preferred certified IDR entity on the third business day after the date of IDR initiation without the other party's agreement to the selection. If either notice was provided on the third business day after the date of IDR initiation without the other party's

agreement to the alternative preferred certified IDR entity by the end of third business day after the date of IDR initiation, the Departments would provide the party last in receipt of the applicable notice 2 additional business days to either agree or object to the other party's alternative preferred certified IDR entity selection. In these circumstances, under these proposed rules, if a party last in receipt of the notice of IDR initiation response or the notice of certified IDR entity selection agrees with the other party's alternative preferred certified IDR entity and notifies the Departments of the agreement or fails to notify the Departments of its objection in the Federal IDR portal by the fifth business day after the date of IDR initiation, the Departments would select the final alternative preferred certified IDR entity selected in the applicable notice. In disputes where the applicable notice was submitted on the third business day after the date of IDR initiation, the party last in receipt of the notice would not be allowed to select another alternative preferred certified IDR entity. If the party last in receipt of the notice notifies the Departments of its objection to the alternative preferred certified IDR entity by the fifth business day after the date of IDR initiation, the Departments would proceed with the random selection of the certified IDR entity from among the certified IDR entities (other than the preferred certified IDR entity and any alternative preferred certified IDR entity previously selected in such dispute by a party, unless there is no other certified IDR entity available to select) that charge a fee within the allowed range of certified IDR entity fees on the sixth business day after the date of IDR initiation. If there are insufficient certified IDR entities that charge a fee within the allowed range of certified IDR entity fees available to arbitrate the dispute, the Departments would select a certified IDR entity that has received approval, as described in paragraph 26 CFR 54.9816–8T(e)(2)(vii)(B), 29 CFR 2590.716–8(e)(2)(vii)(B), and 45 CFR 149.510(e)(2)(vii)(B), to charge a fee outside of the allowed range of certified IDR entity fees. In either case, the Departments would notify the parties of the preliminarily selected certified IDR entity not later than 6 business days after the date of IDR initiation. The Departments are of the view that this proposed requirement would give each party a reasonable opportunity to review the other party's alternative preferred selected certified IDR entity and to notify the other party and the

Departments whether the party agrees or disagrees with the selection. Consistent with section 9816(c)(4)(F) of the Code, section 716(c)(4)(F) of ERISA, and section 2799A–1(c)(4)(F) of the PHS Act, these requirements would ensure that the certified IDR entity selection timeframe occurs within 6 business days after the date of Federal IDR initiation, when the parties do not jointly select the certified IDR entity.

The Departments also propose to amend 26 CFR 54.9816–8T(c)(1)(iii), 29 CFR 2590.716–8(c)(1)(iii), and 45 CFR 149.510(c)(1)(iii) to provide that the date of preliminary selection of the certified IDR entity is 3 business days after the date of IDR initiation if the parties jointly selected a certified IDR entity, or 6 business days after the date of IDR initiation if the parties fail to jointly select a certified IDR entity and the Departments instead select the certified IDR entity.

The Departments seek comment on these proposals.

ii. Final Selection of the Certified IDR Entity and Certified IDR Entity Conflict-of-Interest Review

The Departments propose to add 26 CFR 54.9816–8(c)(1)(iv), 29 CFR 2590.716–8(c)(1)(iv), and 45 CFR 149.510(c)(1)(iv) to establish the process for finalizing certified IDR entity selection. Under the proposed rules, the date of final selection of the certified IDR entity would be the date that triggers the timeframes for the requirement to issue payment determinations (not later than 30 business days after the date of final selection of the certified IDR entity) and the submission of offers from both parties (not later than 10 business days after the date of final selection of the certified IDR entity) under section 9816(c)(5)(A) and (B) of the Code, section 716(c)(5)(A) and (B) of ERISA, and section 2799A–1(c)(5)(A) and (B) of the PHS Act.

The statute provides that a certified IDR entity must meet certain conflict-of-interest standards before being selected as a certified IDR entity assigned to make a payment determination. However, the statute is silent on the specific timeframe or process for the selected certified IDR entity to review the parties' (or the Departments') selection to ensure that a conflict of interest does not exist. Based on feedback from interested parties and the Departments' experience with implementation of the Federal IDR process, the Departments are of the view that it is important to implement a timeframe that permits a meaningful opportunity for conflict-of-interest

¹⁴⁹ Section 9816(c)(4)(F)(ii) of the Code, section 716(c)(4)(F)(ii) of ERISA, and section 2799A–1(c)(4)(F)(ii) of the PHS Act.

review by the certified IDR entity while ensuring that it does not limit the time periods for either disputing parties to submit their offers or for the certified IDR entity to make a payment determination. To streamline this process, the Departments are of the view that permitting the certified IDR entity to be considered preliminarily selected until the certified IDR entity confirms that it has no conflict of interest with either party, would increase the efficiency of the process while balancing the need to ensure that certified IDR entities are free of conflict.

After the certified IDR entity is preliminarily selected pursuant to 26 CFR 54.9816–8(c)(1)(iii), 29 CFR 2590.716–8(c)(1)(iii), and 45 CFR 149.510(c)(1)(iii), the Departments propose that the preliminarily selected certified IDR entity would review the selection and attest to the Departments whether it meets the conflict-of-interest requirements as outlined in proposed 26 CFR 54.9816–8(c)(1)(iv)(A)(1) through (3), 29 CFR 2590.716–8(c)(1)(iv)(A)(1) through (3), and 45 CFR 149.510(c)(1)(iv)(A)(1) through (3). The Departments are not proposing new conflict-of-interest requirements, however, the Departments are proposing to make non-substantive amendments to improve clarity and align with the structure of the reorganized provisions as follows: (1) the certified IDR entity does not have a conflict of interest as defined in paragraphs 26 CFR 54.9816–8(a)(2)(iv), 29 CFR 2590.716–8(a)(2)(iv), and 45 CFR 149.510(a)(2)(iv); (2) the certified IDR entity will only assign personnel to a dispute and make decisions regarding hiring, compensation, termination, promotion, or other similar matters related to personnel assigned to the dispute in a manner that is not based upon the likelihood that the assigned personnel will support a particular party to the dispute; and (3) the certified IDR entity will not assign any personnel to a dispute who would have any conflicts of interest, as defined in paragraphs 26 CFR 54.9816–8(a)(2)(iv), 29 CFR 2590.716–8(a)(2)(iv), and 45 CFR 149.510(a)(2)(iv), regarding any party to the dispute or whose relationship with a party within the 1 year immediately preceding the assignment to the dispute would violate the restrictions on aiding or advising a former employer or principal in a manner similar to the restrictions set forth in 18 U.S.C. 207(b).

Under 26 CFR 54.9816–8(c)(1)(iv)(B), 29 CFR 2590.716–8(c)(1)(iv)(B), and 45 CFR 149.510(c)(1)(iv)(B), the Departments also propose that if the certified IDR entity notifies the Departments within 3 business days of

the date of preliminary selection of the certified IDR entity that it does not meet the conflict-of-interest requirements or does not respond within 3 business days after the date of preliminary selection of the certified IDR entity, the Departments would randomly select another certified IDR entity. The Departments would notify the parties of the new randomly preliminarily selected certified IDR entity no later than 1 business day after the previously selected certified IDR entity notifies the Departments that it has a conflict of interest, or if the previously selected certified IDR entity fails to respond within 3 business days after the date of preliminary selection of the certified IDR entity, no later than 1 business day after the end of the 3-business-day period.

These proposed rules would streamline the process for certified IDR entity selection when the preliminarily selected certified IDR entity fails to timely respond or notifies the Departments that it cannot meet the conflict-of-interest requirements in proposed 26 CFR 54.9816–8(c)(1)(iv)(A), 29 CFR 2590.716–8(c)(1)(iv)(A), and 45 CFR 149.510(c)(1)(iv)(A). Under the October 2021 interim final rules, when a selected certified IDR entity is unable to attest that it has no conflict of interest within 3 business days of certified IDR entity selection, the parties to the dispute are given another opportunity to jointly agree on a certified IDR entity, and the end of the 3-business-day period is treated as the date of initiation of the Federal IDR process. Under these proposed rules, when a preliminarily selected certified IDR entity provides notice of a conflict of interest, the Departments would select another certified IDR entity through random selection, as opposed to allowing the parties additional opportunities to jointly select a different certified IDR entity, in order to create operational efficiencies and minimize delays in processing disputes. Additionally, if the certified IDR entity does not respond to the conflict-of-interest review by the end of the 3-business-day period after preliminary selection of the certified IDR entity, the Departments would randomly select another certified IDR entity. If a certified IDR entity cannot review and provide a response related to a conflict of interest within a 3-business-day period, the dispute would move to a different certified IDR entity that may have the capacity to review the dispute in a timelier manner, which would improve the overall timeliness of dispute processing.

Under 26 CFR 54.9816–8(c)(1)(iv)(C), 29 CFR 2590.716–8(c)(1)(iv)(C), and 45 CFR 149.510(c)(1)(iv)(C) of these

proposed rules, if the certified IDR entity that has been preliminarily selected attests within 3 business days that it meets the conflict-of-interest requirements, the Departments would notify the parties of the final selection of that certified IDR entity no later than 1 business day after the certified IDR entity attests that it meets the conflict-of-interest requirements. The date of final selection of the certified IDR entity is the date that the Departments provide this notice to the parties.

Lastly, the Departments also propose to remove 26 CFR 54.9816–8T(c)(1)(v), 29 CFR 2590.716–8(c)(1)(v), and 45 CFR 149.510(c)(1)(v), as these requirements regarding certified IDR entity conflict of interest and Federal IDR process eligibility review would be required under the paragraphs at 26 CFR 9816–8(c)(1)(iv)(A), 29 CFR 2590.716–8(c)(1)(iv)(A), and 45 CFR 149.510(c)(1)(iv)(A) and 26 CFR 9816–8(c)(2), 29 CFR 2590.716–8(c)(2), and 45 CFR 149.510(c)(2), respectively.

The Departments seek comment on these proposals.

b. Federal IDR Process Eligibility Review

i. Federal IDR Process Eligibility Determination by Certified IDR Entity

The No Surprises Act does not specify a timeframe or process for which the Departments or certified IDR entities must assess a dispute's eligibility for the Federal IDR process. Under the October 2021 interim final rules, certified IDR entities are required to review the information in the notice of IDR initiation and notice of certified IDR entity selection to determine whether the Federal IDR process applies and if not, to notify the Departments within 3 business days of making that determination.¹⁵⁰ The Departments further clarified in the *Federal IDR Process Guidance for Certified IDR Entities*¹⁵¹ that certified IDR entities must make this eligibility determination within 3 business days after they are selected, which is before the parties must submit an offer of an out-of-network rate (not later than 10 business days after the date of selection of the certified IDR entity) and before the certified IDR entity must make a

¹⁵⁰ 26 CFR 54.9816–8T(c)(1)(v), 29 CFR 2590.716–8(c)(1)(v), and 45 CFR 149.510(c)(1)(v).

¹⁵¹ U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury. (Oct. 2022). *Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR Entities*. <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Federal-Independent-Dispute-Resolution-Process-Guidance-for-Certified-IDR-Entities.pdf>.

payment determination (30 business days after the date of selection of the certified IDR entity).

To provide certified IDR entities additional time to conduct eligibility reviews before the parties must submit their offers, the Departments propose to remove 26 CFR 54.9816–8T(c)(1)(v), 29 CFR 2590.716–8(c)(1)(v), and 45 CFR 149.510(c)(1)(v), and add proposed 26 CFR 54.9816–8(c)(2)(i), 29 CFR 2590.716–8(c)(2)(i), and 45 CFR 149.510(c)(2)(i), which would allow certified IDR entities 5 business days after the date of final selection of the certified IDR entity to make an eligibility determination. Under these proposed rules, unless the departmental eligibility review described in section II.E.1.b.ii. of this preamble applies, the selected certified IDR entity would be required to review the information in the notice of IDR initiation, the notice of IDR initiation response, and any additional information as discussed in proposed 26 CFR 54.9816–8(c)(2)(iii), 29 CFR 2590.716–8(c)(2)(iii), and 45 CFR 149.510(c)(2)(iii), and make a final determination as to whether the item or service is a qualified IDR item or service that is eligible for the Federal IDR process. The certified IDR entity would be required to make this eligibility determination and notify the Departments and both parties no later than 5 business days after the date of final selection of the certified IDR entity. If the certified IDR entity determines that the item or service is not a qualified IDR item or service, the dispute would be closed, and the selected certified IDR entity would not take any action with regard to the dispute.

The Departments propose to provide 2 additional business days for certified IDR entities to review the notices and make an eligibility determination. This proposal would provide additional time while meeting the statutory requirement that the submission of offers be submitted no later than 10 days after the date of certified IDR entity selection.¹⁵² More specifically, under these proposed rules, the certified IDR entity would be required to determine whether a dispute was eligible for the Federal IDR process not later than 5 business days after the date of final selection of the certified IDR entity and if eligible, the parties to the dispute would be required to submit their offers not later than 10 business days after the final selection of the certified IDR entity (which would be at least 5 business days after the eligibility

determination). Although currently eligibility reviews are generally taking certified IDR entities longer than 5 business days, these proposed rules are intended to facilitate more efficient processing of eligibility reviews, and the Departments therefore expect that 5 business days would be sufficient for this purpose if these proposed rules are finalized. Further, these proposed rules intend to balance the time certified IDR entities have to conduct eligibility reviews with the time parties are given to submit their final offers. Because the No Surprises Act provides only 10 days from the date of certified IDR entity selection for the parties to submit their offers, these proposed rules would provide equal time for eligibility review and for the parties to submit their offers after the eligibility review.

A non-initiating party's attestation that a dispute is ineligible for the Federal IDR process, alone, would be insufficient to substantiate a determination of ineligibility. The certified IDR entity (or the Departments, if conducting eligibility reviews as described in section II.E.1.b.ii. of this preamble) would review disputes for eligibility in all instances.

The Departments seek comment on these proposals, including the appropriate amount of time certified IDR entities should be provided to conduct eligibility reviews.

ii. Departmental Eligibility Review for Federal IDR Process Eligibility Determinations

Even if the proposals in these proposed rules are finalized and the intended results of a more efficient eligibility review process and fewer ineligible initiated disputes are realized, circumstances may still arise where the Departments would need to take actions to facilitate more timely dispute processing, such as when the volume of disputes outpaces the capacity of certified IDR entities to timely process eligibility determinations. To address such circumstances, and provide for such flexibility, the Departments propose adding 26 CFR 54.9816–8(c)(2)(ii), 29 CFR 2590.716–8(c)(2)(ii), and 45 CFR 149.510(c)(2)(ii), which would establish an eligibility review process whereby, when the conditions set forth in 26 CFR 54.9816–8(c)(2)(ii)(A), 29 CFR 2590.716–8(c)(2)(ii)(A), and 45 CFR 149.510(c)(2)(ii)(A) are met, as described in section II.E.1.b.ii. of this preamble, the Departments would conduct the eligibility review and make the eligibility determination on behalf of the certified IDR entity (departmental eligibility review).

Under these proposed rules, if the Departments determine that an item or service is not a qualified IDR item or service, the dispute would be closed, and the preliminarily selected certified IDR entity would not take any action regarding the dispute. If the dispute were found to be eligible, the Departments would inform the preliminarily selected certified IDR entity of eligibility so that it may conduct its conflict-of-interest assessment, and the dispute would otherwise continue through the Federal IDR process, including notification of the eligibility determination to the disputing parties by the preliminarily selected certified IDR entity.

From the disputing parties' perspectives, Federal IDR process operations during departmental eligibility reviews would largely be unchanged. Timeframes and processes to initiate the Federal IDR process, conduct certified IDR entity selection, and submit offers would be the same. The noticeable differences for disputing parties would be that correspondence related to a dispute's eligibility, including any related information requests, would come from the Departments, rather than one of the certified IDR entities, and the potential impact departmental eligibility reviews may have on the administrative fee as outlined in section II.E.3.a. of this preamble. Additionally, depending on dispute volume and other factors impacting the Departments' decision to conduct eligibility reviews, the Departments may choose to exercise their authority to extend time periods for extenuating circumstances as discussed in section II.E.5. of this preamble to allow more time for the Departments to conduct eligibility reviews. This proposed approach is similar to what is currently occurring under the technical assistance provided to certified IDR entities that was announced in November 2022.¹⁵³ The principal difference is that under these proposed rules, when departmental eligibility review is in effect, the Departments would be able to close a case after determining it is ineligible, rather than forwarding the Departments' eligibility recommendation to the certified IDR entity to make the final eligibility determination.

For certified IDR entities, the Federal IDR process operations under the proposed departmental eligibility reviews would also function similarly to current operations except that, to

¹⁵² Section 9816(c)(5)(B) of the Code, section 716(c)(4)(B) of ERISA, and section 2799A–1(c)(4)(B) of the PHS Act.

¹⁵³ See <https://www.cms.gov/files/document/idre-eligibility-support-guidance-11212022-final-updated.pdf>.

prevent certified IDR entities from conducting duplicative eligibility screenings, a certified IDR entity would not be notified of their selection for the purposes of their conflict-of-interest review until after eligibility has been determined by the Departments. The Departments are proposing the departmental eligibility review under certain circumstances to relieve the burden on certified IDR entities and to ensure that they can focus their time and resources on payment determinations in accordance with statutory timeframes. For the reasons discussed in section I.H. of this preamble, eligibility determinations have proven to be complex and time-consuming for certified IDR entities, and certified IDR entities are not compensated for the time and effort expended in assessing dispute eligibility when a dispute is determined ineligible for the Federal IDR process. This is because the statute provides that certified IDR entities may only retain their fees from the non-prevailing party to a dispute (unless the dispute is withdrawn or settled as discussed in section II.E.1.d. of this preamble). Moreover, some certified IDR entities have been unable to accept new disputes because they are overburdened with making eligibility determinations. Certified IDR entities have informally reported to the Departments during regular communications that they spend 50–80 percent of their time on making eligibility determinations and a few certified IDR entities have had to temporarily suspend accepting new disputes to manage their backlogs. When they are focused on eligibility challenges, certified IDR entities have less time and fewer resources to devote to making timely payment determinations.

Ultimately, the certified IDR entities' participation in the Federal IDR process is voluntary and must be financially sustainable. Furthermore, the No Surprises Act directs the Departments to administer the Federal IDR process in a manner that ensures participation by a sufficient number of certified IDR entities.¹⁵⁴ If certified IDR entities decline to participate because it is not economically viable to do so, the directive of the statute is defeated. Thus, the ability for certified IDR entities to obtain fair compensation for the work conducted is critical to the success of the Federal IDR process, and the Departments are therefore of the view that it is in the best interests of all

parties to reduce the burden of eligibility determinations when feasible.

The Departments intend for their role in conducting eligibility determinations to be temporary. The Departments are of the view that when eligibility determinations are less burdensome and the volume of disputes is manageable, certified IDR entities are better equipped to conduct eligibility determinations. Further, the Departments do not possess the staff or resources to carry out the eligibility determinations in the long term and must retain contract support to carry out the eligibility determinations in the short term. The Departments acknowledge that any increased expenditures related to conducting final eligibility determinations would be reflected in the non-refundable Federal IDR administrative fees because these fees must reflect the amount of expenditures estimated to be made by the Departments for the year in carrying out the Federal IDR process.¹⁵⁵ Therefore, the Departments would not intend to continue this role if the other proposed policies in these rules, along with ongoing Federal IDR portal improvements, are successful in improving dispute processing and reducing the volume of ineligible disputes.

iii. Application of the Departmental Eligibility Review

The departmental eligibility review would apply when the Departments determine that extenuating circumstances under proposed 26 CFR 54.9816–8(g)(1), 29 CFR 2590.716–8(g)(1), and 45 CFR 149.510(g)(1) require application of the departmental eligibility review to facilitate timely payment determinations or the effective processing of disputes under the Federal IDR process.

iv. Notification Regarding Applicability of the Departmental Eligibility Review

Before invoking the application of the departmental eligibility review, the Departments propose to post advance public notification of the date on which the departmental eligibility review would take effect, and the reasons for invoking the application of the departmental eligibility review. Before ending the application of the departmental eligibility review, the Secretary will post advance public notification of the date on which the departmental eligibility review would no longer be in effect and the reasons for ending the application of the

departmental eligibility review, as applicable.

The Departments seek comment on these proposals, including whether the departmental eligibility reviews, when they are applicable, should be applied to all certified IDR entities or if the Departments should apply these proposed rules to only the certified IDR entities with significant dispute backlogs.

c. Request for Additional Information

Based on the Departments' experience operating the Federal IDR process, disputing parties have not consistently submitted all information necessary for a certified IDR entity to make an eligibility determination, a conflict-of-interest assessment, or a payment determination. Certified IDR entities frequently must reach out to the disputing parties, sometimes multiple times, to obtain the required information. Such outreach is time intensive, inefficient, and costly. Even as the Departments propose other methods to promote information submission by disputing parties throughout the Federal IDR process (as described throughout this preamble), certified IDR entities and the Departments likely will still need to collect additional information to make accurate determinations in a timely fashion. Thus, using the general rulemaking authority granted to the Departments to establish the Federal IDR process under section 9816(c)(2)(A) of the Code, section 716(c)(2)(A) of ERISA, and section 2799A–1(c)(2)(A) of the PHS Act, the Departments are proposing in new 26 CFR 54.9816–8(c)(2)(iii), 29 CFR 2590.716–8(c)(2)(iii), and 45 CFR 149.510(c)(2)(iii) to establish that the Departments and the certified IDR entity may request additional information from either party to a dispute at any time, including for the purpose of assessing whether a conflict of interest exists, conducting an eligibility determination, or making a payment determination. Under this proposal, a party must submit the requested additional information within 5 business days to the Departments or the selected certified IDR entity, as applicable, through the Federal IDR portal. Following a request for additional information, under these proposed rules, the time period for the applicable stage of the Federal IDR process would be tolled until the earlier of the date either all of the requested information is provided or the 5-business-day period expires, and each subsequent timeframe in the Federal IDR process would be determined based on the date of completion of the stage

¹⁵⁴ Section 9816(c)(4)(E) of the Code, section 716(c)(4)(E) of ERISA, and section 2799A–1(c)(4)(E) of the PHS Act.

¹⁵⁵ Section 9816(c)(8) of the Code, section 716(c)(8) of ERISA, and section 2799A–1(c)(8) of the PHS Act. *Also see* IDR Process Fees proposed rules at 88 FR 65893 (Sept. 26, 2023).

of the Federal IDR process that was tolled for provision of the requested information.

However, under the statute, the timeframe for parties making payment after the payment determination cannot be extended. Therefore, payments required as a result of a payment determination must be provided within 30 calendar days of that payment determination. If a party fails to submit the additional information as required, the related determination, including the eligibility determination, conflict-of-interest review, or payment determination will be made without the requested information unless a good-cause extension of the 5-business-day period, as specified in 26 CFR 54.9816–8(g)(1)(i), 29 CFR 2590.716–8(g)(1)(i), and 45 CFR 149.510(g)(1)(i) has been provided, and the party subsequently submits the additional information requested within the extended period.

The Departments are of the view that a 5-business-day period is sufficient for a response without unduly delaying the Federal IDR process. This 5-business-day period is consistent with the 5-business-day outreach period set forth in the *August 2022 Technical Assistance for Certified IDR Entities*.¹⁵⁶ The Departments anticipate that this deadline would incentivize parties to submit information promptly, and that tolling any applicable time periods would give the Departments and certified IDR entities sufficient time to make such additional information requests without encroaching on other timeframes.

The Departments seek comment on these proposals, including whether certified IDR entities should still be required to make a payment determination and provide notification of the payment determination to the parties not later than 30 business days after the date of final selection of the certified IDR entity, after a preceding timeframe in the process has been tolled, such as for an eligibility determination.

d. Authority To Continue Negotiations or Withdraw

i. Authority To Continue To Negotiate

To correct an omission, HHS is proposing a non-substantive change to 45 CFR 149.510(c)(3)(i) to add the term “enrollee” to references to participants

and beneficiaries. HHS is proposing to add the term “enrollee” to account for individuals who are enrolled in the individual health insurance market when referencing whose cost sharing must be considered as part of the total out-of-network rate agreed upon by both parties and to clarify who may not be billed for additional payments if the agreed upon out-of-network rate exceeds the QPA.

ii. Withdrawals

The Departments propose to add 26 CFR 54.9816–8(c)(3)(ii), 29 CFR 2590.716–8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii) to establish a process for disputes to be withdrawn from the Federal IDR process. Under these proposed rules, a dispute may be withdrawn from the Federal IDR process by the initiating party, the Departments, or the certified IDR entity before a payment determination is made if any one of the following four conditions is met. Under the proposed new 26 CFR 54.9816–8(c)(3)(ii)(A), 29 CFR 2590.716–8(c)(3)(ii)(A), and 45 CFR 149.510(c)(3)(ii)(A), the first condition would allow for withdrawal when the initiating party provides notification through the Federal IDR portal to the Departments and the certified IDR entity (if selected) that both parties to the dispute agree to withdraw the dispute from the Federal IDR process without agreement on an out-of-network rate. An initiating party generally should not be able to unilaterally withdraw a dispute once it is initiated because the non-initiating party may not wish to withdraw the dispute. Therefore, under these proposed rules, the notification must include the dispute number, a statement about both parties’ agreement to withdraw and authorized signatures from both parties. A withdrawal that is agreed to by both parties would remove disputes from the system in the most efficient manner without the need for additional outreach.

The Departments also propose to add 26 CFR 54.9816–8(c)(3)(ii)(B), 29 CFR 2590.716–8(c)(3)(ii)(B), and 45 CFR 149.510(c)(3)(ii)(B), to allow for withdrawal when the initiating party provides a standard withdrawal request notice through the Federal IDR portal to the Departments, the certified IDR entity (if selected), and the non-initiating party of its request to withdraw the dispute from the Federal IDR process, and the non-initiating party notifies the Departments, certified IDR entity (if selected), and the initiating party through the Federal IDR portal of its agreement to withdraw from the Federal IDR process within 5 business days of the initiating party’s request. If the non-

initiating party fails to respond within 5 business days of the initiating party’s request, the non-initiating party would be considered to have agreed to the withdrawal, and the dispute would be withdrawn. The Departments propose adding withdrawal of a dispute in this situation to address circumstances in which the non-initiating party fails to respond because they are not engaging in the process. Permitting withdrawal of a dispute in such cases would decrease the number of payment determinations the certified IDR entity is required to adjudicate. These proposals strike a balance between fairness to the disputing parties and efficiency of the Federal IDR process by generally requiring mutual agreement by the disputing parties to withdraw the dispute but providing that the dispute would be withdrawn in the event the non-initiating party is nonresponsive within the specified timeframe.

Under proposed new 26 CFR 54.9816–8(c)(3)(ii)(C), 29 CFR 2590.716–8(c)(3)(ii)(C), and 45 CFR 149.510(c)(3)(ii)(C), the third condition under which a dispute may be withdrawn is when a certified IDR entity or the Departments cannot determine eligibility because both parties are unresponsive to a request for additional information as described in proposed 26 CFR 54.9816–8(c)(2)(iii), 29 CFR 2590.716–8(c)(2)(iii) and 45 CFR 149.510(c)(2)(iii). In situations where neither party responds to the requested information, the Departments believe it appropriate for the dispute to be withdrawn because the certified IDR entity lacks the appropriate information to make the required eligibility determination properly and the parties are failing to engage in the process.

Under proposed new 26 CFR 54.9816–8(c)(3)(ii)(D), 29 CFR 2590.716–8(c)(3)(ii)(D), and 45 CFR 149.510(c)(3)(ii)(D), the fourth condition under which a dispute may be withdrawn is when the certified IDR entity cannot make a payment determination because both parties have failed to submit an offer as described in proposed 26 CFR 54.9816–8(c)(5)(i), 29 CFR 2590.716–8(c)(5)(i) and 45 CFR 149.510(c)(5)(i). The Departments are of the view that such disputes should be withdrawn from the Federal IDR process because under the statute, parties have ceased to participate in the Federal IDR process and failed to submit an offer that the certified IDR entity must select as the out-of-network payment amount. In addition, if neither party has submitted an offer, there is nothing from

¹⁵⁶ U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury. (Oct. 2022) (Federal Independent Dispute Resolution (IDR) Process Technical Assistance for Certified IDR Entities. August 2022, available at: <https://www.cms.gov/files/document/TA-certified-independent-dispute-resolution-entities-August-2022.pdf>.

which the certified IDR entity may select.¹⁵⁷

In addition to the proposals described in this section of the preamble, the Departments also propose technical revisions to the existing requirements for the authority to continue negotiations, which are currently set forth at 26 CFR 54.9816–8T(c)(2), 29 CFR 2590.716–8(c)(2), and 45 CFR 149.510(c)(2). These proposed rules would redesignate paragraph (c)(2) as (c)(3) and amend the title at current paragraph (c)(2) by adding to the end of it “or withdraw”.

The Departments seek comment on these proposals, including if there are other circumstances for which the Departments should consider a dispute withdrawn.

2. Treatment of Batched Items and Services and Bundled Payment Arrangements

The Departments propose revisions to the requirements for the treatment of batched items and services which are currently set forth at 26 CFR 54.9816–8T(c)(3)(i), 29 CFR 2590.716–8(c)(3)(i), and 45 CFR 149.510(c)(3)(i). However, as discussed in section I.D. of this preamble, the requirements at 26 CFR 54.9816–8T(c)(3)(i)(C), 29 CFR 2590.716–8(c)(3)(i)(C), and 45 CFR 149.510(c)(3)(i)(C) have been vacated by the District Court in *TMA IV* order. The Departments also propose technical changes to the treatment of bundled payment arrangements, currently set forth at 26 CFR 54.9816–8T(c)(3)(ii), 29 CFR 2590.716–8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii). The batching and bundling payment proposals are informed by the Departments’ experience implementing the regulatory requirements on the batching of items and services related to the treatment of a similar condition and relevant feedback from interested parties, including comments submitted in response to the October 2021 interim final rules.

a. Treatment of Batched Items and Services and Bundled Payment Arrangements Under Current and Vacated Rules

Under the October 2021 interim final rules, multiple qualified IDR items and services were required to meet four conditions to be batched and considered as part of a single payment determination. First, the qualified IDR items and services must be billed by the same provider or group of providers, the

same facility, or same provider of air ambulance services, which means the items and services must be billed under the same NPI or TIN.

Second, the initial payment (or notice of denial of payment) for the items and services must be made by the same group health plan or health insurance issuer. The Departments clarified in *August 2022 Technical Assistance for Certified IDR Entities* that qualified IDR items or services can be batched if payment is made by the same issuer even if the qualified IDR items and services relate to claims from different fully-insured group or individual health plan coverage offered by the issuer; and that for self-insured group health plans, qualified IDR items or services can be batched only if payment is made by the same plan, even if the same TPA administers multiple self-insured plans.

Third, the October 2021 interim final rules established that qualified IDR items and services were related to the treatment of a similar condition if the qualified IDR items and services were the same or similar items or services, meaning that those items and services are billed under the same service code with modifiers (if applicable), or billed under a comparable service code with modifiers (if applicable) under a different procedural code system.¹⁵⁸ However, as discussed in section I.D. of this preamble, on August 3, 2023, the District Court vacated this provision on the grounds that it violated the notice-and-comment requirement of the Administrative Procedure Act. The *TMA IV* order vacated the parts of the *August 2022 Technical Assistance for Certified IDR Entities* that stated that multiple qualified IDR items or services may be batched in a single dispute if the qualified IDR items or services were billed under the same service code with modifiers, or billed under comparable codes with modifiers under different procedural code systems. Further, as discussed in section I.D. of this preamble, on August 24, 2023, the District Court vacated that portion of the *August 2022 Technical Assistance for Certified IDR Entities* on the basis that the guidance prohibits a single air ambulance transport, which is billed under two service codes (one for the base rate and one for the mileage rate), to be submitted as a single dispute, and instead required two separate disputes

to be submitted. The District Court vacated this provision as a violation of the statute which defines each air ambulance transport as a single service.¹⁵⁹

Fourth, all the qualified IDR items and services must have been furnished within the same 30-business-day period or the 90-calendar-day suspension period (also referred to as the “cooling-off period”) under 26 CFR 54.9816–8T(c)(5)(vii)(B), 29 CFR 2590.716–8(c)(5)(vii)(B), and 45 CFR 149.510(c)(5)(vii)(B).¹⁶⁰ As stated in the preamble to the October 2021 interim final rules, for claims for an item or service for which the end of the open negotiation period occurs during the 90-calendar-day suspension period, after the end of the 90-calendar-day suspension period, either party may initiate the Federal IDR process for any item or service affected by the suspension. For these items or services, the initiating party must submit the notice of IDR initiation within 30 business days following the end of the 90-calendar-day suspension period, as opposed to the standard 4-business-day period following the end of the open negotiation period. The 30-business-day period begins on the day after the last day of the 90-calendar-day suspension period.

Section 9816(c)(3)(B) of the Code, section 716(c)(3)(B) of ERISA, and section 2799A–1(c)(3)(B) of the PHS Act direct the Departments, as part of specifying criteria for batched disputes, to provide that qualified IDR items and services included by a provider or facility as part of a bundled payment may be part of a single determination. The October 2021 interim final rules specify that items and services may be submitted as a bundled payment arrangement when qualified IDR items and services are billed by a provider, facility, or provider of air ambulance services as part of a bundled payment arrangement, or where a plan or issuer makes or denies an initial payment as a bundled payment. The *August 2022 Technical Assistance for Certified IDR Entities* clarified that for the purposes of the Federal IDR process, a bundled arrangement is an arrangement under which: (1) a provider, facility, or provider of air ambulance services bills

¹⁵⁹ 42 U.S.C. 300gg–112(b)(1)(B), (c)(1).

¹⁶⁰ The Departments propose a non-substantive amendment to 26 CFR 54.9816–8(c)(4)(i)(D), 29 CFR 2590.716–8(c)(4)(i)(D), and 45 CFR 149.510(c)(4)(i)(D) to correct the cross-reference to the cooling-off period from 26 CFR 54.9816–8T(c)(4)(vi)(B), 29 CFR 2590.716–8(c)(4)(vi)(B), and 45 CFR 149.510(c)(4)(vi)(B) to 26 CFR 54.9816–8T(c)(5)(vii)(B), 29 CFR 2590.716–8(c)(5)(vii)(B), and 45 CFR 149.510(c)(5)(vii)(B).

¹⁵⁷ Section 9816(c)(5)(A)(i) of the Code, section 716(c)(5)(A)(i) of ERISA, and section 2799A–1(c)(5)(A)(i) of the PHS Act.

¹⁵⁸ In the July 2021 interim final rule (86 FR 36890), the Departments defined the service code as the code that describes an item or service using the Current Procedural Terminology (CPT), Healthcare Common Procedure Coding System (HCPCS), and the Diagnosis-Related Group (DRG) codes. *See also* 26 CFR 54.9816–6T(a)(14), 29 CFR 2590.716–6(a)(14), and 45 CFR 149.140(a)(14).

for multiple items or services under a single service code; or (2) a plan or issuer makes an initial payment or notice of denial of payment to a provider, facility, or provider of air ambulance services under a single service code that represents multiple items or services (for example, a DRG).¹⁶¹ The Departments also specified that bundled payment arrangements submitted under 26 CFR 54.9816–8T(c)(3)(ii), 29 CFR 2590.716–8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii) are subject to the rules for batched determinations and the certified IDR entity fee for single determinations.

b. Feedback From Interested Parties on Current Batching Rules

Since the publication of the October 2021 interim final rules, the Departments have reviewed comments in response to the rules and continue to engage interested parties to identify opportunities for improvements in the Federal IDR process. In particular, the Departments have received substantial feedback from interested parties on the batching criteria that specifies how multiple qualified IDR items or services that relate to the treatment of a similar condition may be batched. Specifically, some providers of air ambulance services have expressed that the now-vacated batching rule finalized in the October 2021 interim final rules was burdensome because it prohibited a single air ambulance transport service from being the subject of a single dispute (for example, charges for fuel and mileage are two separate codes and could not be batched under the vacated batching rule). They highlighted that this essentially doubled their costs to dispute an out-of-network payment through the Federal IDR process. Some radiologists asserted that the vacated batching rule prohibited them from batching radiology items and services for multiple body parts for a single patient (for example, lumbar and thoracic spine) because these items and services are billed under different service codes, even though they may relate to a similar condition. They further asserted that, absent the ability to batch, radiologists are effectively denied access to the Federal IDR process because the reimbursements for most individual radiology codes are low-dollar and therefore are not cost-effective to dispute individually. The

Departments received similar feedback from other specialty providers, including laboratory and pathology physicians. Emergency physicians have stated that the nature of emergency care makes it difficult for them to batch claims under the vacated batching rule. For example, emergency physicians note that emergency care is characterized by a range of severity that patients present with, and a corresponding range of diagnostic, therapeutic, and decision-making intensity, which is different from scheduled surgery or office visits where the patient's diagnosis or condition is most often explicitly known. For this reason, emergency physicians recommend that for the purpose of emergency physicians, the "condition" should be defined as "emergency medical care" or "EMTALA-related care"¹⁶² and that limiting batching to individual "conditions" would result in a high number of disputes in the Federal IDR process, expense, and administrative burden.

Anesthesiologists have recommended two different mechanisms by which claims for services should be able to be batched. First, anesthesiologists have stated that anesthesia services should be batched based on anesthesia code families. Anesthesia services are classified in a distinct code set in which CPT codes are grouped according to body parts (for example, head, neck, thorax, etc.). Anesthesiologists have highlighted that if they are not permitted to batch claims for services within a related body-part code group, they will be confronted with unique and significant administrative burdens in the Federal IDR process. Second, anesthesiologists have raised that they should be able to batch all claims with the same anesthesia conversion factor because this reflects industry practice. The conversion factor is the basis for their negotiations with payers for in-network services; a payer generally contracts with an anesthesiologist or their group for payment for the full range of anesthesia services based upon a single, common anesthesia conversion factor (expressed in dollars per unit). Whether the anesthesia service is for a surgical procedure on the head, shoulder, arm, or leg, the anesthesia

conversion factor for each service is the same¹⁶³ and the assigned base units vary based on the procedure and the time units vary as determined by actual time.

The Departments also have received feedback from certified IDR entities regarding the batching rules and potential impacts of expanding batching. Certified IDR entities have indicated that disputes involving batched items and services under the current and now-vacated rules are more administratively burdensome than non-batched disputes, often due to the extra time and resources they must expend in verifying that the items and services are properly batched and eligible for the Federal IDR process. Further, certified IDR entities have stated that a substantial portion of the time and expense related to resolving disputes is spent on these administrative and eligibility-related tasks; and once the dispute reaches the certified IDR entities, they are able to make the substantive payment determinations relatively efficiently. However, in providing feedback to the Departments on ways to improve batching in the Federal IDR process, certified IDR entities signaled that processing batched disputes would become substantially more difficult if broad categories of items and services could be submitted to the Federal IDR process in a single batched dispute. This is because, in addition to adding further complexity to the eligibility review process, certified IDR entities would also need to closely review the potentially unique factual circumstances of each item and service contained within the batch in making the payment determination. This could include differing evidence of the additional circumstances described in section 9816(c)(5)(C) of the Code, section 716(c)(5)(C) of ERISA, and section 2799A–1(c)(5)(C) of the PHS Act for each batched item and service.

Certified IDR entities recommended implementing a cap on the number of qualified IDR items and services (or "line items") included in batched disputes in order to ensure that they can resolve payment determinations within the 30-business-day requirement. Specifically, many certified IDR entities

¹⁶¹ U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury. (August 2022). *Technical Assistance for Certified IDR Entities*. <https://www.cms.gov/files/document/TA-certified-independent-dispute-resolution-entities-August-2022.pdf>.

¹⁶² An emergency medical condition is defined in the Emergency Medical Treatment and Active Labor Act (EMTALA) in part as: "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the individual's health [or the health of an unborn child] in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of bodily organs." 42 U.S.C. 1395dd(e)(1).

¹⁶³ In the *August 2022 Technical Assistance for Certified IDR Entities*, the Departments noted that plans and issuers generally calculate payment amounts for anesthesia services by multiplying the rate for the anesthesia conversion factor by (1) the base unit for the anesthesia service code, (2) the time unit, and (3) the physical status modifier unit. The base unit, time unit, and physical status modifier unit are specific to the individual receiving the anesthesia services. These base units are assigned to the services codes for anesthesia services, specifically CPT codes 00100 to 01999.

suggested imposing a 25-line-item cap on the number of items and services that could be submitted in a batched dispute, to the extent factual circumstances among them differed. Some certified IDR entities mentioned that the necessary line-item cap would depend on how the parties would be permitted to batch items and services; however, certified IDR entities generally indicated that in any circumstance, it would not be feasible to resolve disputes in excess of 100 items and services within the 30-business-day period for making payment determinations. Certified IDR entities indicated they could manage batched claims containing a larger number of items and services (for example, 25 to 50) to the extent they involved the same type of claim and when the relevant facts are identical across the items or services in the batch. For example, some certified IDR entities stated that batching items and services from a single patient encounter and claim would be manageable and create efficiencies. However, certified IDR entities maintained that once the line items included in a batch reach a certain number, efficiencies are lost, and the batched dispute becomes unmanageable.

Plans and issuers have also indicated that the relatively frequent submission of incorrectly batched items and services as a single dispute by providers and facilities poses a substantial administrative burden for them. This is because the initiating party may need to resubmit the dispute, which, under the current rules, could also result in the non-initiating party paying the applicable administrative fee, potentially multiple times. Such interested parties urged the Departments to avoid adding further complexity or ambiguity with respect to the ability to batch items and services.

c. Proposals To Improve Batching in the Federal IDR Process

After considering comments and feedback from interested parties (including certified IDR entities, plans and issuers, providers, facilities, and providers of air ambulance services), and the Departments' general experience with operationalizing the Federal IDR process to date, the Departments are of the view that, under some circumstances, allowing multiple qualified IDR items and services that treat a similar condition to be batched together in a single payment determination proceeding, in accordance with the requirements of 26 CFR 54.9816–8T(c)(3)(i), 29 CFR 2590.716–8(c)(3)(i), and 45 CFR

149.510(c)(3)(i), encourages efficiency and can result in cost savings for disputing parties.¹⁶⁴

In these proposed rules, the Departments are proposing new batching provisions that are intended to achieve a balance among several important objectives, including ensuring the batching rules do not unreasonably impede parties' access to the Federal IDR process considering relative costs and administrative burden, and simplifying Federal IDR process operations while avoiding new operational complexities that could create or exacerbate dispute backlogs. The Departments are of the view that the proposed provisions would help ensure that qualified IDR items and services included in batched determinations have clear definitional principles that would yield logical payment determinations across certified IDR entities, including determinations of whether items or services are properly submitted as batched determinations. The Departments are also of the view that these proposals would reduce potential risk that large and complicated batches would extend the time needed for certified IDR entities to make eligibility and payment determinations.¹⁶⁵ In addition to these proposals, the Departments are considering altering current guidance on the resubmission of incorrectly batched disputes. In the *August 2022 Technical Assistance for Certified IDR Entities*, the Departments stated that inappropriately batched or bundled disputes may be re-submitted as properly batched or single disputes if the qualified IDR items and services that are subject to the disputes meet all other applicable requirements, including requirements for timely initiation of the Federal IDR process. The Departments are considering removing this flexibility 90 business days after the proposed batching provisions, as finalized, would become applicable. This would allow parties time to adjust to the new proposed batching rules, if finalized.

¹⁶⁴ Section 9816(c)(3)(A)(iv) of the Code, section 716(c)(3)(A)(iv) of ERISA, and section 2799A–1(c)(3)(A)(iv) of the PHS Act.

¹⁶⁵ Under this notice of proposed rulemaking, the Departments propose new requirements related to the treatment of batched items and services and bundled payment arrangements. While the Departments consider and discuss feedback from interested parties in the context of these new proposals, they do not specifically address all public comments on batching and bundling received in response to the October 2021 interim final rule.

i. Treatment of Batched Items and Services

The Departments first propose to redesignate paragraph (c)(3) as paragraph (c)(4) under 26 CFR 54.9816–8, 29 CFR 2590.716–8, and 45 CFR 149.510. Newly redesignated paragraph (c)(4)(i) of these sections would provide that up to 25 qualified IDR items and services may be batched and considered jointly as part of one payment determination only if all requirements under paragraphs (c)(4)(i)(A) through (D) are met.

A. Line-Item Limit for Batched Items and Services

The Departments propose to limit batched determinations to 25 line items in a single dispute. Without such a limit, the additional batching provisions in these proposed rules could increase the time and level of effort certified IDR entities spend on resolving payment determinations, which, in turn, would hinder their ability to make timely payment determinations. The Departments must ensure that the Federal IDR process operates efficiently, as section 9816(c)(3)(A) of the Code, section 716(c)(3)(A) of ERISA, and section 2799A–1(c)(3)(A) of the PHS Act direct the Departments to “specify criteria under which multiple qualified IDR dispute items and services are permitted to be considered jointly as part of a single determination by an entity for purposes of encouraging the efficiency (including minimizing costs) of the IDR process.” The Departments, therefore, and in line with the feedback from certified IDR entities discussed in section II.E.2.b of the preamble, propose a 25-line-item limit as a reasonable cap to ensure that large and complicated batches do not extend the timeframe needed for certified IDR entities to make eligibility and payment determinations. Further, a 25-line-item limit is intended to help ensure that certified IDR entities are able to reasonably forecast and cover their costs through the fees they set for batched disputes and to process batched disputes in a more timely manner.

The Departments seek comment on the proposed limit on the number of qualified IDR items and services in a batched determination and whether an alternative line-item limit that is higher or lower than 25 line items would be more appropriate to promote efficiencies and cost savings in the Federal IDR process. The Departments are considering whether a 50-line-item limit is a more reasonable cap to encourage efficiencies for disputing parties, while still allowing certified IDR entities sufficient time to review the

eligibility of batched disputes and make payment determinations within the 30-business-day requirement. The Departments also solicit comment on whether the line-item limit should vary depending on the type of batched dispute. For example, there could be a 25-line-item limit for items and services furnished to a single patient on the same or consecutive dates of service and billed on the same claim, and a 50-line-item limit for items and services furnished to one or more patients under the same service code.

The Departments also seek comment on whether a line-item limit should be imposed and whether and how such a provision could increase efficiency and process disputes in a more timely manner. The Departments also solicit comment on whether the certified IDR entity fee structure for batched determinations should be adjusted given the proposed changes to the batching rules.

B. Batched Items and Services Must Be Billed by the Same Provider, Facility, or Provider of Air Ambulance Services

The Departments propose to redesignate 26 CFR 54.9816–8(c)(3)(i)(A), 29 CFR 2590.716–8(c)(3)(i)(A), and 45 CFR 149.510(c)(3)(i)(A) as 26 CFR 54.9816–8(c)(4)(i)(A), 29 CFR 2590.716–8(c)(4)(i)(A), and 45 CFR 149.510(c)(4)(i)(A), respectively. The Departments propose no substantive changes to this provision, which provides that qualified IDR items and services may be considered as part of a single batched determination only where they were billed by the same provider or group of providers, the same facility, or the same provider of air ambulance services. The provision also provides that qualified IDR items and services are billed by the same provider or group of providers, the same facility, or the same provider of air ambulance services if the items or services are billed with the same NPI or TIN. This provision reflects the first of four statutory requirements that must be satisfied for a qualified IDR item or service to be considered as part of a batched determination.¹⁶⁶

C. Batched Items and Services Must Be Paid by the Same Plan or Issuer

Under proposed 26 CFR 54.9816–8(c)(4)(i)(B), 29 CFR 2590.716–8(c)(4)(i)(B), and 45 CFR 149.510(c)(4)(i)(B), the Departments propose that qualified IDR items and

services may be batched and considered jointly as part of one payment determination if payment for the qualified IDR items and services is made by the same group health plan or health insurance issuer. Because the Departments have received questions about how to batch for claims involving group health plans that are fully-insured versus self-insured, the proposed rules specify that this requirement would be satisfied if the same issuer is required to make payment for the qualified IDR items and services, even if the qualified IDR items and services relate to claims from different group health plans or individual market policies. For self-insured group health plans, this requirement would be satisfied if the same self-insured group health plan is required to make payment for the qualified IDR items and services, including when the plan makes payments through a TPA: the requirement would not be satisfied if multiple self-insured group health plans are required to make payments for the qualified IDR items and services, even if those group health plans make payments through the same third party administrator. While a given TPA may administer multiple self-insured plans, the self-insured group health plan generally is the responsible party for payment or reimbursement of the qualified IDR items and services.

D. Batched Items and Services Must Be Related to the Treatment of a Similar Condition

The Departments propose to add 26 CFR 54.9816–8(c)(4)(i)(C), 29 CFR 2590.716–8(c)(4)(i)(C), and 45 CFR 149.510(c)(4)(i)(C) to permit initiating parties to batch qualified IDR items and services in specific circumstances, so long as the items and services relate to the treatment of a similar condition and the batching of the items and services would encourage efficiency (including minimizing costs) in the Federal IDR process. As the Departments explained earlier in section II.E.2. of this preamble, the Departments are proposing new batching criteria for multiple qualified IDR items and services that relate to the treatment of a similar condition in an effort to ensure the Federal IDR process is efficient and economically feasible for providers, facilities, providers of air ambulance services, plans, and issuers. The Departments must also ensure that the Federal IDR process operates efficiently, as section 9816(c)(3)(A) of the Code, section 716(c)(3)(A) of ERISA, and section 2799A–1(c)(3)(A) of the PHS Act directs the Departments to “specify criteria under which multiple qualified IDR dispute items and services are

permitted to be considered jointly as part of a single determination by an entity for purposes of encouraging the efficiency (including minimizing costs) of the IDR process.” However, there is a threshold number of items and services in a single batch at which that batch becomes so large that no efficiencies are gained, and an additional burden is imposed on the certified IDR entity, as discussed in section II.E.2.i.A. of this preamble (regarding line-item limits). Therefore, the Departments do not intend for the additional flexibility proposed under these rules to be unlimited or available in circumstances that would not promote efficiency in the Federal IDR process. The Departments propose four circumstances under which qualified IDR items and services would be considered to relate to the treatment of a similar condition such that a certified IDR entity’s consideration of the items and services in a single payment determination would promote efficiency in the Federal IDR process.

Under new 26 CFR 54.9816–8(c)(4)(i)(C)(1), 29 CFR 2590.716–8(c)(4)(i)(C)(1), and 45 CFR 149.510(c)(4)(i)(C)(1), the Departments propose that qualified IDR items and services would be considered to relate to the treatment of a similar condition and encourage efficiency in the Federal IDR process when they were furnished to a single patient during the same patient encounter. For purposes of these proposed regulations, the Departments propose to define a single patient encounter as a patient encounter on one or more consecutive days during which the qualified IDR items or services were furnished to the same patient and billed on the same claim form.

The Departments understand from engagement with providers, medical coding professionals, and certified IDR entities that while there may be some instances where a patient is treated for two or more unrelated or dissimilar conditions during a single patient encounter, in general, items and services furnished during a patient encounter and billed by the same provider, facility, or provider of air ambulance services on one claim form tend to relate to the treatment of the same or similar condition. The Departments are of the view that the proposed definition of a single patient encounter would promote efficiency by avoiding the requirement that an initiating party file separate disputes to obtain payment determinations for each of the items and services that were part of a single claim and patient encounter.

Allowing qualified IDR items or services to be included in a batched

¹⁶⁶ Section 9816(c)(3)(A) of the Code, section 716(c)(3)(A) of ERISA, and section 2799A–1(c)(3)(A) of the PHS Act.

determination when they were furnished to the same patient on one or more consecutive days and billed on the same claim form would simplify and encourage efficiency of the Federal IDR process. For example, evidence of the additional circumstances described in section 9816(c)(5)(C) of the Code, section 716(c)(5)(C) of ERISA, and section 2799A–1(c)(5)(C) of the PHS Act would generally be identical for each qualified IDR item and service furnished during a single patient encounter. This would limit the burden on certified IDR entities considering such additional circumstances and making a payment determination for the batch. In addition, permitting batching of items and services furnished to a single patient during the same patient encounter would help the non-initiating party more readily identify the claims involved since the dispute submitted by the initiating party to the Federal IDR process would relate to a single claim form in the non-initiating party's records, as opposed to having to locate and review multiple claim forms.

The Departments note that the proposed requirement to permit batching by patient encounter would increase procedural efficiency compared to the vacated batching provision for providers of air ambulance services by allowing them to submit a single dispute for a patient's air ambulance transport (provided the other batching requirements are met). This approach is consistent with the *TMA III* order and opinion, which vacated provisions of the *August 2022 Technical Assistance for Certified IDR Entities* that in effect required each air ambulance service code to be submitted as a single dispute, requiring two separate IDR disputes for a single air ambulance transport. Under these proposed rules, mileage and base rates, as well as any other item or service furnished during a single air transport and billed for on the same claim form, could be batched in a single payment determination. The Departments request comment on this proposal, including any data or other information that supports or contradicts the Departments' understanding underlying this proposal.

At new 26 CFR 54.9816–8(c)(4)(i)(C)(2), 29 CFR 2590.716–8(c)(4)(i)(C)(2), and 45 CFR 149.510(c)(4)(i)(C)(2), the Departments would reestablish the provision that qualified IDR items and services also would be considered to relate to the treatment of a similar condition and encourage efficiency when they were furnished to one or more patients during different patient encounters and were billed under the same service code or a

comparable code under a different procedural code system, such as CPT codes with modifiers, if applicable, Healthcare Common Procedure Coding System (HCPCS) with modifiers, if applicable, or DRG codes with modifiers, if applicable. As discussed in section I.D. of this preamble, in *TMA IV*, the District Court's decision vacated this previously established provision only on the grounds that it violated the notice-and-comment requirement under the Administrative Procedure Act and did not address whether this criterion is a reasonable interpretation of the No Surprises Act.

Qualified IDR items or services billed under the same code or under comparable codes of different coding systems would be considered to generally relate to treatment of a similar condition because they essentially would be the same item or service. For example, CPT code 93000 and HCPCS code G0403 both correspond to a routine electrocardiogram (with 12 leads). The proposal would simplify and encourage the efficiency of the Federal IDR process by retaining a clearly defined methodology for disputing parties and certified IDR entities to determine whether qualified IDR items and services are appropriately batched, which would contribute to the efficiency and consistency of such determinations across certified IDR entities. However, the Departments request comment on whether there are circumstances in which a single provider, facility, or provider of air ambulance services—as a practical matter—would bill for the same qualified IDR item or service using different code sets or whether the proposed flexibility could potentially incentivize billing practices specifically intended to circumvent these batching rules or other requirements of the Federal IDR process. The Departments request comment on this proposal, including any data or other information that supports or contradicts the Departments' understanding underlying this proposal.

Some interested parties have suggested that the Departments should deem all qualified IDR items and services within the same major CPT Category I codes or “family” to relate to the treatment of similar conditions. These sub-categories include Evaluation and Management, Anesthesia, Surgery, Radiology/Diagnostic Radiology/Diagnostic Ultrasound, Pathology and Laboratory/Proprietary Laboratory Analysis, and Medicine. The Departments seek to balance the breadth of the interpretation of the statutory requirement that batched items and

services relate to the treatment of a “similar condition” with the goal of efficiency. The Departments have heard from certified IDR entities that significant variability among items or services in a batched claim often leads to payment determinations that are significantly more time-intensive and burdensome to review than claims for items and services that are significantly similar. Efficiency in making eligibility and payment determinations is affected by several factors including the payer, the provider, the circumstances of each patient's treatment, and the QPA for the items and services under dispute. Grouping larger numbers of items and services together into a single batch can lower costs to the extent that it minimizes effort on the part of the certified IDR entity in evaluating factors related to the dispute or disputing parties, such as eligibility for the Federal IDR process. However, larger batches of services with greater variability can also increase review time and costs of certified IDR entities, because larger batches that include disparate services and patient circumstances associated with different supporting information submitted by disputing parties, require certified IDR entities to analyze more information, often taking longer to review. For example, if the Departments permitted batching across the entirety of the Category I CPT code subcategory for radiology, an individual dispute could contain an X-ray of the eye for detection of a foreign body (CPT code 70030), a bilateral screening mammography (CPT code 77067), and simple intensity modulated radiation treatment (IMRT) delivery (CPT code 77385). These services would have different circumstances for the treatment of the patient and would result in the certified IDR entity evaluating a unique set of factors and supporting documentation for each of these services, thus reducing the ability of the certified IDR entity to make timely payment determinations for such disputes.

The Departments are of the view that the variability of the conditions represented within the CPT Category I sub-categories would reduce, rather than promote greater efficiency of the Federal IDR process and would be less likely to relate to the treatment of a similar condition. Thus, the Departments propose to specify in guidance ranges of CPT codes within sub-categories of CPT Category I codes that may be batched, in order to promote efficiency in the Federal IDR process. Specifically, the Departments propose at 26 CFR 54.9816–

8(c)(4)(i)(C)(3), 29 CFR 2590.716–8(c)(4)(i)(C)(3), and 45 CFR 149.510(c)(4)(i)(C)(3) that for anesthesiology, radiology, pathology, and laboratory qualified IDR items and services, items and services would be considered to relate to the treatment of similar conditions when they are furnished to one or more patients and were billed under service codes belonging to the same Category I CPT code ranges, which would be specified in guidance published by the Departments.

The Departments propose to divide Category I CPT codes into ranges based on the Departments' characterization of those codes as being related to the treatment of a similar condition. In Tables 2 through 4, the Departments detail proposed ranges of Category I CPT sub-categories for anesthesiology, radiology, pathology, and laboratory items or services that an initiating party may batch together within a single dispute (provided the other batching requirements are met). Under this proposal, the Departments would permit batching only of codes within these ranges for anesthesiology, radiology,

pathology, and laboratory qualified IDR items and services. By allowing for the more narrowly defined Category I CPT code spans for batched determinations indicated in Tables 2 through 4, the Departments could increase the probability that the items or services in a dispute both relate to the treatment of a similar condition and increase the efficiency of the Federal IDR process, since the associated items or services would share the clinical commonality of pertaining to patients who require diagnostic imaging, radiation oncology, similar laboratory tests, etc.

If these proposed rules are finalized, the Departments would establish descriptions of each sub-category of CPT codes, and update periodically as necessary the allowable ranges of service codes belonging to the same CPT sub-category for purposes of batching under proposed 26 CFR 54.9816–8(c)(4)(i)(C)(3), 29 CFR 2590.716–8(c)(4)(i)(C)(3), and 45 CFR 149.510(c)(4)(i)(C)(3) in guidance. CPT codes are defined in the American Medical Association's (AMA's) "CPT Manual," which is updated and published annually. The AMA releases

the CPT manual in the fall of each year to precede their January 1st effective date. The Departments would review the modifications made to the CPT manual once available and determine if the modifications necessitate updates to the Category I CPT code spans for batched determinations based on the Departments' interpretation of the pre-existing descriptive categories with which a new Category I CPT code most closely aligns. For example, if a new CPT manual established a new Category I CPT code for diagnostic radiology (imaging) that would fall outside of CPT code spans 70010–71555, the Departments would need to release updated guidance for batched determinations to advise parties of which pre-existing descriptive categories of CPT code spans most closely align with the new code, and, thus, with which it can be batched. In such circumstances, the Category I CPT code spans for batched determinations most recently established by the Departments would stand until the publication of further guidance.

BILLING CODE 6325–63–P; 4830–01–P; 4510–29–P; 4120–01–P;

**TABLE 2: Proposed Radiology CPT Code Spans for Permissible Batched Determinations-
Level I HCPCS Codes (CPT)**

Code Span		Description
Level I HCPCS Codes (CPT)		
Diagnostic Radiology (Imaging)		
Diagnostic Radiology (Imaging)	70010 – 71555	Head and Neck, Chest
	72020 – 72295	Spine and Pelvis
	73000 – 73725	Upper Extremities, Lower Extremities
	74018 – 74363	Abdomen, Gastrointestinal Tract
	74400 – 74775	Urinary Tract, Gynecological and Obstetrical
	75557 – 75989	Heart, Vascular
	76000 – 76499	Other Procedures
	R0070 – R0076	Transportation, Portable Radiology Equipment
Diagnostic Ultrasound		
Diagnostic Ultrasound	–76506 - 76642	Head and Neck, Chest
	76700 – 76776	Abdomen and Retroperitoneum
	–76800 - 76873	Spinal Canal, Pelvis, Genitalia
	76881 – 76886	Extremities
	76392 – 76965	Ultrasonic Guidance Procedures
	76975 – 76999	Other Procedures
Radiologic Guidance		
Radiologic Guidance	77001 – 77003	Fluoroscopic Guidance
	77011 – 77014	CT Guidance
	77021 – 77022	MRI Guidance
Breast Mammography		
Breast Mammography	77076 – 77067	Mammography
Bone/Joint Studies		
Bone/Joint Studies	–77071 - 77092	Bone/Joint Studies
Radiation Oncology		
Radiation Oncology	77261 – 77370	Clinical Treatment Planning, Medical Radiation Physics
	77371 – 77425	Stereotactic Radiation Treatment Delivery, Other, Radiation Treatment Delivery, Neutron Beam Radiation Delivery
	–77427 - 77499	Radiation Treatment Management
	77520 – 77525	Proton Beam Treatment Delivery
	–77600 - 77620	Hyperthermia, Clinical Intracavitary Hyperthermia
	–77750 - 77799	Clinical Brachytherapy
Nuclear Medicine		
Nuclear Medicine	78012 – 78999	Diagnostic Nuclear Medicine
	79005 – 79999	Therapeutic Nuclear Medicine

TABLE 3: Proposed Pathology and Laboratory CPT Code Spans for Permissible Batched Determinations

Code Span		Description
Level I HCPCS Codes (CPT)		
Pathology and Laboratory Diagnostic Radiology (Imaging)		
	80047 – 80081	Organ or Disease Oriented Panels ^a
	80305 – 80377, 83992, 80143 – 80299	Drug Assay, Therapeutic Drug Assay
	80400 – 80439	Evocative Suppression Testing
	80503 – 80506	Pathology Clinical Consultations, Molecular Pathology
	81105 – 81383	Molecular Pathology Tier I
	81400 – 81408, 81479	Molecular Pathology Tier II
	81410 – 81471, 81490 – 81599	Genomic Sequencing and Other Molecular Multianalyte Assays, Multianalyte Assays with Algorithmic Analysis
	81000 – 81099	Urinalysis ^b
	82009 – 84999	Chemistry ^c
	85002 – 85999	Hematology and Coagulation
	86015 – 86849, –86850 - 86999	Immunology, Transfusion Medicine
	87003 – 87999	Microbiology
	88104 – 88199, –88230 - 88299	Cytopathology and cytogenetic studies
	88000 – 88099	Anatomic Pathology
	88300 – 88399	Surgical Pathology
	88720 – 88749, –89049 - 89240	In Vivo, Other Procedures
	89250 – 89398	Reproductive Medicine Procedures
	0001U – 0284U	Proprietary Laboratory Analysis
	P2028 – P2038, P3000 – P3001, P7001, P9603 – P9604, P9612 – P9615	Laboratory Tests of Blood and Hair, Pap Smears, Urine Bacterial Culture and Sensitivity Studies, Specimen Collection Travel Allowance, Specimen Collection, Catheterization
	P9010 – P9100	Blood and Blood Products

^{a/} The Departments note that organ or disease-oriented panels, urinalysis, and chemistry CPT codes could also be combined. The Departments understand that these are frequently-billed codes, and that such high volume would be a reason to not combine these three code-span ranges together.

^{b/} Id.

^{c/} Id.

TABLE 4: Proposed Anesthesiology CPT Code Spans for Permissible Batched Determinations

Code Span		Description
Level I HCPCS Codes (CPT)		
Anesthesiology		
	00100 – 01999	Anesthesia
	00100 – 00222	Head
	00300 – 00352	Neck
	00400 – 00474	Thorax (Chest Wall and Shoulder Girdle)
	00500 – 00580	Intrathoracic
	00600 – 00670	Spine and Spinal Cord
	00700 – 00797	Upper Abdomen
	00800 – 00882	Lower Abdomen
	00902 – 00952	Perineum
	01112 – 01173	Pelvis (Except Hip)
	01200 – 01274	Upper Leg (Except Knee)
	01320 – 01444	Knee and Popliteal Area
	01462 – 01522	Lower Leg (Below knee, Includes Ankle and Foot)
	01610 – 01680	Shoulder and Axilla
	01710 – 01782	Upper Arm and Elbow
	01810 – 01860	Forearm, Wrist and Hand
	01916 – 01942	Radiological Procedures
	01951 – 01953	Burn Excisions or Debridement
	01958 – 01969	Obstetric
	01990 – 01999	Other Procedures

BILLING CODE 6325–63–C; 4830–01–C; 4510–29–C; 4120–01–C;

Another goal of this proposal is to ensure that the batching rules facilitate access to the Federal IDR process considering the relative costs and administrative burden associated with participating. Consistent with feedback from interested parties, this proposal would also allow providers of lower-dollar qualified IDR items and services, such as providers of radiology, pathology, and laboratory items or services, to batch more services than was permitted under the October 2021 interim final rules, because such qualified IDR items and services may not be cost-effective to dispute individually.

As discussed earlier in section II.E.2.c of this preamble, the Departments are proposing new batching provisions to ensure the batching rules do not unreasonably impede the parties' access to the Federal IDR process considering relative costs and administrative burden. The Departments intend these provisions to improve the efficiency of the Federal IDR process while avoiding

new operational complexities that could create or exacerbate dispute backlogs. The proposed rule would provide new flexibility in two ways: first, it would allow initiating parties to batch all items and services related to a single patient encounter; second, it would allow batching of certain items and services within the same Category I CPT code sub-sections. For the purposes of this proposal, the Departments are primarily focusing on provider specialties that have been involved in a majority of disputes under the Federal IDR process, with one exception (emergency medicine, discussed in further detail below). The Departments solicit comment on whether there are other Category I CPT code subsections (for example, Medicine and Surgery) that would satisfy the statutory requirements that batched items and services relate to the treatment of a similar condition and encourage efficiency of the Federal IDR process. Although batching of items and services within the same Category I CPT code subsection is not available for all medical specialties, the Departments are

of the view that the proposed batching provisions that would allow batching for a single patient encounter would improve efficiency of the Federal IDR process for medical, surgical, and emergency providers.

As discussed in section II.E.2.b. of this preamble, emergency providers have recommended that the Departments permit batching of the most common evaluation and management CPT codes (99281–99285) for items and services furnished in emergency departments. After considering this feedback, the Departments are concerned that the variability of the conditions that are represented across the emergency medicine evaluation and management CPT codes would increase the likelihood for dissimilar conditions and patient acuties to be batched, which would be inefficient and highly burdensome for certified IDR entities. For instance, if these five different emergency medicine evaluation and management codes could be batched together, the conditions represented in

one batched dispute could include such diverse situations as a patient evaluated for an insect bite and one patient treated for a heart attack. The Departments seek comment on whether there are ways to provide additional batching flexibility for emergency department services in a way that mitigates the Departments' concerns that such flexibility would increase the likelihood that claims for treatment of dissimilar conditions would be batched and promotes the efficiency of the IDR process, for example, data or estimates related to a potential decrease in the number of disputes involving emergency department services that would be realized if emergency department providers were permitted to batch items and services across the five evaluation and management Level I CPT codes, without a commensurate increase in the diversity of documentation that certified IDR entities would need to review to evaluate disputes related to different, but similar conditions.

The Departments seek comment on the proposal to permit anesthesiology, radiology, pathology, and laboratory qualified IDR items and services that were furnished under service codes belonging to the same Category I CPT code section, as specified in guidance published by the Departments, including the proposed Category I CPT code spans for batched determinations, and whether there are any items and services similar to pathology, radiology, and laboratory qualified IDR items and services to which this policy should apply. For example, the Departments seek comment on whether additional batching flexibility, consistent with the statutory requirements, is necessary or appropriate for providers of lower-dollar items or services other than laboratory, pathology, or radiology services, to remove impediments and promote reasonable access to the Federal IDR process. The Departments also request comment on the proposed pathology and laboratory Category I CPT code spans for batched determinations. Specifically, the Departments solicit comment on whether Organ or Disease Oriented Panels, Urinalysis, and Chemistry Category I CPT codes should be combined for batched determinations. The Departments understand that these are frequently billed codes, and that such high volume would be a reason to not combine these three code-span ranges together. The Departments seek comment on this assumption, including any data or other information that supports or contradicts the Departments' understanding, such as if the volume of these codes for out-

of-network services would be substantially less.

Further, consistent with feedback from anesthesiologists, this proposal would allow anesthesiologists to batch items and services within a related body-part code group, which would align with the established framework in the field. Anesthesiologists have expressed to the Departments that while an anesthesia service for one spinal procedure may be related to multiple different medical conditions, the anesthesia administration itself is substantially similar. For example, for spinal procedures, the anesthesia service may be related to different spinal conditions such as stenosis or discectomy. Since the anesthesia administration itself is substantially similar for these different conditions, the Departments are of the view that these conditions could be considered similar and that the payment considerations a certified IDR entity would evaluate are similar.

As discussed in section II.E.2.b. of this preamble, anesthesiologists have requested that claims be batched by the same conversion factor, since contracting practices for anesthesiology items and service focus on conversion factor rates, and not traditional codes like CPT codes. The Departments have not identified a basis upon which such conversion factor rates would satisfy the statutory requirement that batched items and services relate to a similar condition at section 9816(c)(3)(A)(iii) of the Code, section 716(c)(3)(A)(iii) of ERISA, and section 2799A-1(c)(3)(A)(iii) or how conversion factors are a meaningful method of encouraging efficiency. It is the Departments' understanding that because conversion factors would be identical for every out-of-network service furnished by an anesthesiologist provider or provider group, use of the "same conversion factor" for batching would result in the provider or provider group being able to batch every out-of-network service it furnishes that otherwise satisfies the remaining batching factors. Instead, the Departments are of the view that batching based on CPT code categories would lead to greater efficiency, would more closely align with the statutory requirement that batched items and services relate to the treatment of a similar condition, and would lead to less variability among the items and services and factual circumstances that certified IDR entities must consider.

The Departments request comment on the proposal that would govern whether anesthesiology qualified IDR items and services are considered to relate to the treatment of similar conditions.

Specifically, the Departments solicit comment on whether and how items and services that share the same anesthesia conversion factor could be considered to relate to the treatment of similar conditions and could meaningfully encourage efficiency in the Federal IDR process. The Departments request comment on these proposals, including any data or other information that supports or contradicts the Departments' understanding underlying this proposal.

E. Batched Items and Services Must Have Been Furnished Within the Same Time Period

Finally, the Departments propose at 26 CFR 54.9816-8(c)(4)(i)(D), 29 CFR 2590.716-8(c)(4)(i)(D), and 45 CFR 149.510(c)(4)(i)(D) that batched qualified IDR items and services must have been furnished within the same 30-business-day period following the date on which the first item or service included in the batched determination was furnished and have been the subjects of a 30-business-day open negotiation period that ended within 4 business days of IDR initiation, except as provided in proposed 26 CFR 54.9816-8(c)(5)(vii)(B), 29 CFR 2590.716-8(c)(5)(vii)(B), and 45 CFR 149.510(c)(5)(vii)(B), which refer to the 90-calendar-day "cooling off" period. This is consistent with section 9816(c)(3)(B) of the Code, section 716(c)(3)(B) of ERISA, and section 2799A-1(c)(3)(B) of the PHS Act and is in effect the same as the current regulations at 26 CFR 54.9816-8T(c)(3)(i)(D), 29 CFR 2590.716-8(c)(3)(i)(D), and 45 CFR 149.510(c)(3)(i)(D). The Departments are also proposing a non-substantive amendment at 26 CFR 54.9816-8(c)(4)(i)(D), 29 CFR 2590.716-8(c)(4)(i)(D), and 45 CFR 149.510(c)(4)(i)(D) to both remove the redundant language on the 90-calendar-day "cooling off" period and correct the cross-reference to paragraph 26 CFR 54.9816-8T(c)(5)(vii)(B), 29 CFR 2590.716-8(c)(5)(vii)(B), and 45 CFR 149.510(c)(5)(vii)(B). The Departments do not propose any alternative time periods for batched determinations, as the Departments are of the view that the batching rules proposed in these rules are sufficient to encourage procedural efficiency and minimize administrative costs for the disputing parties.

The Departments solicit comment on the application of the cooling off period after a determination on a dispute consisting of multiple items and services batched by patient encounter or CPT code ranges. For example, if provider X submitted a notice of IDR

initiation that included as part of a batched determination a single view x-ray of the abdomen (CPT code 74018) to payer Y and the certified IDR entity made a determination on the dispute, should provider X be allowed to submit another dispute, such as a batched patient encounter dispute, within the 90-day period following such determination that involves a single view x-ray of the abdomen (CPT code 74018) to payer Y? It is the Departments' understanding that under these proposed batching rules, the 90-calendar-day cooling off period could result in operational challenges and barriers both to disputing parties submitting subsequent IDR disputes and certified IDR entities' review. In the example of provider X that submitted a batched dispute with an x-ray of the abdomen (CPT code 74018) to payer Y, and for which a certified IDR entity had made a determination, provider X under the proposed rules would have to ensure to not include an x-ray of the abdomen (CPT code 74018) in any subsequent notices of IDR initiation to payer Y within the 90-calendar-day period following such determination. Where subsequent disputes involve larger numbers of items or services, such as batched disputes based on patient encounters or CPT code ranges, this could result in additional time a party must spend excluding the specific item or service subject to the cooling off period from the batch and could also present additional burdens on certified IDR entities in assessing whether the cooling off period applies to one item or service within a batch and therefore whether the batched dispute is eligible for initiation of the Federal IDR process. In addition, the Departments have heard from some providers that since cooling off periods are allowed to overlap, and with each new written determination issued the current cooling off period is extended before it has ended, there are certain high-volume payers with which providers may be required to wait multiple years before the Federal IDR process could be initiated again. Batches for single patient encounters may exacerbate this situation.

Under section 9816(c)(9) of the Code, section 716(c)(9) of ERISA, and section 2799A-1(c)(9) of the PHS Act, the time periods required under the No Surprises Act and 26 CFR 54.9816-8T, 26 CFR 54.9816-8, 29 CFR 2590.716-8, and 45 CFR 149.510 (other than the timing of the payments to prevailing parties) may be modified at the Departments' discretion to ensure that all claims that occur during a 90-day period following a payment determination for which a

notification is not permitted to be submitted during such period by reason of the cooling-off-period requirements are eligible for the IDR process. If the proposed batching provisions are finalized, the Departments are considering using this statutory waiver authority under section 9816(c)(9) of the Code, section 716(c)(9) of ERISA, and section 2799A-1(c)(9) of the PHS Act, to shorten the 90-day cooling off time period with respect to qualified IDR items and services for which a certified IDR entity makes a payment determination as part of a batched dispute. This would increase the efficiency of processing subsequently submitted batched disputes and ensure that claims that occur during the cooling off period are eligible for the Federal IDR process. The Departments seek comment on this exception and alternative time periods the Departments should consider for the cooling off period in this circumstance. The Departments are considering shortening the cooling off period for batched disputes to between 1 to 30 business days, if the batching proposals are finalized. As discussed in this section of the preamble, the Departments are of the view that the interaction of the 90-day cooling off period with the proposed batching provisions would reduce inefficiencies for the disputing parties, certified IDR entities, and the Federal IDR process. Further, as discussed in section II.E.2.c. of this preamble, section 9816(c)(3)(A) of the Code, section 716(c)(3)(A) of ERISA, and section 2799A-1(c)(3)(A) of the PHS Act directs the Departments to ensure that the Federal IDR process operates efficiently. Thus, the Departments are of the view that to encourage the efficiency of the Federal IDR process (including minimizing costs), the Departments should exercise their waiver authority to reduce the length of the cooling off period to be as short as 1 business day. Under these proposed rules, disputing parties would not be able to realize the efficiencies of batching by patient encounter if both parties may have to wait 90 business days before submitting a subsequent dispute. For example, it is the Departments understanding that it is highly likely that provider X could have multiple patient encounter batched disputes that involve payer Y where at least one common item or service would overlap in each of those disputes. The Departments are also aware of concerns that due to throughput issues, when payment determinations are made, and the inability to submit disputes either because they could not be submitted as

batched disputes under the vacated batching rules or because the cooling off period applied, the Federal IDR process has not been economically feasible for all providers. The Departments are of the view that markedly reducing the cooling off period, in combination with the other proposed provisions in these rules, would help make the Federal IDR process both more economically feasible and efficient for disputing parties. The Departments have also heard from some payers that they are inundated with multiple open negotiation notices and disputes from certain providers making it difficult to meet the deadlines for each dispute. For this reason, the Departments are considering as much as 30 business days for the duration of the cooling off period for batched disputes as it may help ensure parties are not inundated with disputes and provide parties sufficient time to meet the different time-period requirements of the Federal IDR process. The Departments solicit comment on this proposal, including specific alternative time periods the Departments should consider for the cooling off period. The Departments request any data or other information that supports or contradicts the Departments' understanding.

The Departments request comment on these proposals, including whether there are different or additional ways to encourage procedural efficiency and minimize administrative costs through the batching rules.

ii. Treatment of Bundled Payment Arrangements

The Departments propose at 26 CFR 54.9816-8(c)(4)(ii), 29 CFR 2590.716-8(c)(4)(ii), and 45 CFR 149.510(c)(4)(ii) that qualified IDR items and services that meet the definition of a bundled payment arrangement at proposed 26 CFR 54.9816-3, 29 CFR 2590.716-3, and 45 CFR 149.30 may be submitted and considered as a single payment determination for which the certified IDR entity must make one payment determination for the multiple items and services included in the bundled payment arrangement. The Departments further propose that bundled payment arrangements submitted under paragraph (c)(4)(ii) would continue to be subject to the certified IDR entity fee for single determinations as described at 26 CFR 54.9816-8T(e)(2)(vii), 29 CFR 2590.716-8(e)(2)(vii), and 45 CFR 149.510(e)(2)(vii). These proposed technical amendments to 26 CFR 54.9816-8(c)(4)(ii), 29 CFR 2590.716-8(c)(4)(ii), and 45 CFR 149.510(c)(4)(ii) would include a reference to the definition of "bundled payment

arrangement,”¹⁶⁷ a correction that the certified IDR entity must make one payment determination for the multiple qualified IDR items and services included in the bundled payment arrangement, removal of the language that bundled payment arrangements are subject to the rules for batched determinations, and an updated cross reference to paragraph (c)(4)(ii).

3. Administrative and Certified IDR Entity Fee Collection

The Departments propose to amend the administrative and certified IDR entity fee provisions of 26 CFR 54.9816–8(d), 29 CFR 2590.716–8(d), and 45 CFR 149.510(d) to adjust the timing of collection of the administrative fee and make changes to the administrative fee structure to ensure that the financial costs to the Departments to administer the Federal IDR process align with the assessed administrative fees, to encourage disputing parties to engage in meaningful open negotiations, to accelerate dispute processing, and to reduce the burden on certified IDR entities.

a. Establishment of the Administrative Fee Amount

Under section 9816(c)(8)(A) of the Code, section 716(c)(8)(A) of ERISA, section 2799A–1(c)(8)(A) of the PHS Act, and the October 2021 interim final rules,¹⁶⁸ each party to a determination must pay an administrative fee for participating in the Federal IDR process. Under section 9816(c)(8)(B) of the Code, section 716(c)(8)(B) of ERISA, section 2799A–1(c)(8)(B) of the PHS Act, and the October 2021 interim final rules,¹⁶⁹ the administrative fee is established annually in a manner so that the total administrative fees paid for a year are estimated to be equal to the amount of expenditures estimated to be made by the Departments to carry out the Federal IDR process for that year.

On September 26, 2023, the Departments issued the IDR Process Fees proposed rules,¹⁷⁰ proposing to amend the language at 26 CFR 54.9816–8(d)(2)(ii), 29 CFR 2590.716–8(d)(2)(ii), and 45 CFR 149.510(d)(2)(ii) to establish the Federal IDR process administrative fee amount through notice and comment rulemaking, rather than in guidance.¹⁷¹

¹⁶⁷ As discussed in section II.A. of the preamble, the Departments propose to amend 26 CFR 54.9816–3, 29 CFR 2590.716–3, and 45 CFR 149.30 to define the term “bundled payment arrangement.”

¹⁶⁸ 26 CFR 54.9816–8T(d)(2)(i), 29 CFR 2590.716–8(d)(2)(i), and 45 CFR 149.510(d)(2)(i).

¹⁶⁹ 26 CFR 54.9816–8T(d)(2)(ii), 29 CFR 2590.716–8(d)(2)(ii), and 45 CFR 149.510(d)(2)(ii).

¹⁷⁰ 88 FR 65888 (September 26, 2023).

¹⁷¹ In *TMA IV*, the District Court issued an opinion and order holding that the process by

In the IDR Process Fees proposed rules, the Departments proposed the methodology to calculate the administrative fee amount for disputes initiated on or after the later of the effective date of the IDR Process Fees proposed rules or on January 1, 2024, by projecting the amount of expenditures to be made by the Departments in carrying out the Federal IDR process and dividing this by the projected number of administrative fees to be paid by the parties. Using this methodology, the Departments proposed an administrative fee of \$150 per party per dispute. Additionally, the Departments proposed that the administrative fee amount specified in rulemaking would remain in effect until a new administrative fee amount is specified in subsequent rulemaking. Furthermore, in the IDR Process Fees proposed rules, the Departments proposed to remove the requirement to set the administrative fee amount annually, allowing the Departments the flexibility to update the administrative fee amount more or less frequently than annually to increase the Departments’ ability to respond to changes in expenditures or collections that would require a new administrative fee amount. The comment deadline on the IDR Process Fees proposed rules is October 26, 2023. The Departments will review all public comments received on the IDR Process Fees proposed rules.

The Departments note that a number of the proposed provisions in these proposed rules would impact the collection of administrative fees, including the time of collection of the administrative fee discussed in section II.E.3.b. of this preamble, the proposed reduced administrative fee for both parties in low-dollar disputes discussed in section II.E.3.e. of this preamble, and the proposed reduced administrative fee for non-initiating parties in ineligible disputes discussed in section II.E.3.f. of this preamble and would therefore impact the methodology that the Departments use to determine the administrative fee. Accordingly, in these proposed rules, the Departments propose to adjust the methodology for

which the Departments amended the December 2022 fee guidance to increase the administrative fee for the Federal IDR process from \$50 to \$350 per party for disputes initiated during the calendar year beginning January 1, 2023, was a violation of the Departments’ obligation under the Administrative Procedure Act to give affected parties notice of and an opportunity to comment on the administrative fee. In light of the District Court’s opinion and order, as well as the Departments’ reassessment regarding the practicability of establishing the administrative fee through notice and comment rulemaking, the Departments proposed in the IDR Process Fees proposed rules to establish the amount of the administrative fee through notice and comment rulemaking.

calculating the administrative fee amount that was proposed in the IDR Process Fees proposed rules. As discussed in greater detail below, while in the IDR Process Fees proposed rules the Departments proposed to calculate the projected number of administrative fees to be paid using the total volume of disputes to be closed, in these proposed rules, the Departments propose to instead use the total volume of disputes to be initiated, due to the proposal to collect the administrative fee earlier in the Federal IDR process, as discussed further in section II.E.3.b. of this preamble.

In addition, the Departments are proposing other policies in these proposed rules that, if finalized, would impact the Departments’ expenditures in carrying out the Federal IDR process, including the proposed departmental eligibility review discussed in section II.E.1.b.ii. of this preamble, the direct collection of the administrative fee by the Departments discussed in section II.E.3.c. of this preamble, and the proposed Federal IDR process registry discussed in section II.F. of this preamble, which would impact the inputs under the methodology used to calculate the administrative fee amount.

The Departments note that, using the base methodology as proposed in the IDR Process Fees proposed rules, and taking into account the additional proposed policies in these rules and their impact on the inputs under the administrative fee methodology proposed in the IDR Process Fees proposed rules, the administrative fee amount would continue to be \$150 per party per dispute.

In light of the proposals in these rules, the Departments project the annual expenditures to carry out the Federal IDR process, if the proposals in these rules are finalized, to be approximately \$100.2 million. The proposed expenditures upon which the administrative fee amount in these rules is based include contract costs and Federal resources associated with:

- Maintaining the Federal IDR portal, including the proposed Federal IDR process registry discussed in section II.F. of this preamble, which is intended to make the parties’ and certified IDR entities’ experiences using the portal more efficient, clear, and streamlined;
- Certifying IDR entities and collecting data from them, which is intended to increase the number of certified IDR entities, improve the speed of eligibility and payment determinations, and assist the Departments in understanding where efficiencies may still be gained in the process;

- Conducting program integrity activities, such as QPA audits and IDR decision audits, which are intended to ensure the program integrity by reducing and preventing errors in the Federal IDR process;
- Investigating relevant complaints, which is intended to ensure compliance with the Federal IDR process requirements;
- Providing outreach to parties and technical assistance to certified IDR entities, which is intended to streamline the experience and further improve the speed and integrity of eligibility and payment determinations;
- Collecting administrative fees directly from disputing parties, which is intended to reduce burden on certified IDR entities, increasing capacity of certified IDR entities to perform other required functions;
- Conducting eligibility determinations when any of the extenuating circumstances described in proposed 26 CFR 54.9816–8(g), 29 CFR 2590.716–8(g), and 45 CFR 149.510(g) require application of the departmental eligibility review to facilitate timely payment determinations or the effective processing of disputes under the Federal IDR process; and
- Retaining and making available Federal personnel dedicated to carrying out Federal IDR process activities.

Further, as described above, estimates for these expenditures assume that the Departments would determine that extenuating circumstances exist to invoke the departmental eligibility review, as discussed in sections II.E.1.b.ii. through iv. of this preamble and as proposed in 26 CFR 54.9816–8(c)(2)(ii), 29 CFR 2590.716–8(c)(2)(ii), and 45 CFR 149.510(c)(2)(ii). The Departments began conducting pre-eligibility reviews in 2023 to allow the certified IDR entities to complete their eligibility determinations more efficiently. As discussed in section II.E.1.b.ii. of this preamble, the departmental eligibility review proposed in these proposed rules contemplates a similar process except that the Departments would make eligibility determinations, rather than eligibility recommendations, to certified IDR entities.

With respect to the Departments' projected number of administrative fees to be paid, in the IDR Process Fees proposed rules, the Departments proposed to base this number on the total volume of disputes that were projected to be *closed*. However, in these proposed rules, the Departments propose to project the number of administrative fees to be paid based on the total volume of disputes projected to

be initiated. In the IDR Process Fee proposed rules, the Departments proposed to use the total volume of disputes projected to be closed, rather than the total volume of disputes projected to be initiated, because the total volume of closed disputes would be more indicative of the total volume of disputes for which fees are paid under the Departments' current collections process.¹⁷² In these proposed rules, the Departments propose to instead use the total volume of disputes projected to be initiated because the proposed operational changes in these proposed rules, if finalized, would result in the Departments' collection of administrative fees closer to a dispute's date of initiation, and therefore, the total volume of initiated disputes would be indicative of the total volume of disputes for which fees would be paid.

Additionally, in projecting the administrative fees to be paid, the Departments consider that, if the proposed policies described in sections II.E.3.e. and II.E.3.f. of this preamble are finalized, the initiating and non-initiating parties in ineligible and low-dollar disputes may pay a reduced administrative fee, which would be percentages of the full administrative fee amount. To arrive at the proposed reduced administrative fee percentages, the Departments analyzed historical trends of low-dollar and ineligible disputes and include further discussion of the calculation of these percentages in sections II.E.3.e. and II.E.3.f. of this preamble. As with the full administrative fee amount, the Departments propose at 26 CFR 54.9816–8(d)(2)(iii), 29 CFR 2590.716–8(d)(2)(iii), and 45 CFR 149.510(d)(2)(iii) that the reduced administrative fee amounts would remain in effect until changed by subsequent rulemaking. Accordingly, the total amount of projected administrative fees paid is calculated to reflect that the Departments would not collect a full administrative fee from both parties on a portion of disputes.

To determine the administrative fees to be paid, the Departments project approximately 420,000 disputes will be initiated annually. This projection is based on the most recent 6-month period of continuous Federal IDR process data before Federal IDR process operations were temporarily paused on August 3, 2023.¹⁷³ Using this projected

volume of disputes, the Departments assume a prospective reduction of approximately 25 percent in the volume of initiated disputes because of the anticipated impact of the proposed batching policies in these proposed rules, if finalized. As previously explained, to calculate the number of administrative fees to be paid from the projected volume of disputes initiated, the Departments consider that non-initiating and initiating parties may pay a reduced administrative fee in low-dollar and ineligible disputes if the proposed policies described in sections II.E.3.e. and II.E.3.f. of this preamble are finalized. Additionally, the Departments consider the proposals in these rules pertaining to open negotiation, initiation, batching, registration, and the other administrative fee policies, if finalized, in calculating the number of disputes initiated and this administrative fee amount.

Therefore, the Departments estimate that 420,000 initiated disputes, which include low-dollar and ineligible disputes with reduced administrative fees, would translate to an amount approximately equal to 691,000 full administrative fees paid. This estimate reflects that both parties to a dispute pay an administrative fee. Further, based on Federal IDR process data, the Departments estimate that 20 percent of initiated disputes would qualify as low-dollar disputes and 22 percent of initiated disputes would be ineligible. As described in Table 5, the Departments estimate that low-dollar and ineligible disputes will overlap such that some low-dollar disputes are determined to be ineligible. As explained further in sections II.E.3.e. and II.E.3.f. of this preamble, non-initiating parties would pay 20 percent of the full administrative fee in ineligible disputes and both initiating and non-initiating parties would pay 50 percent of the full administrative fee in low-dollar disputes.

Using the proposed methodology and inputs discussed above, the administrative fee for disputes initiated on or after January 1, 2025, and continuing until changed by subsequent rulemaking, would be calculated by dividing the projected annual expenditures of approximately \$100.2 million to be made by the Departments in carrying out the Federal IDR process by the projected annual number of administrative fees to be paid by the disputing parties of 691,000. This results in a full administrative fee amount of \$150 per party per dispute, which is the same amount as the Departments proposed in the IDR Process Fees proposed rules. However,

¹⁷² 88 FR 65888, 65893.

¹⁷³ The Departments applied the approximate 25 percent reduction described in these rules to the average monthly volume and multiplied this number by 12 to project the annual volume of initiated disputes.

as described in this preamble section, the methodology and inputs for calculating the administrative fee in these proposed rules differ from those in the IDR Process Fees proposed rules. In the IDR Process Fees proposed rules, the Departments calculated the proposed administrative fee by dividing projected annual expenditures of \$70 million by approximately 450,000 full administrative fees paid on 225,000 closed disputes.

As discussed further in sections II.E.3.e. and II.E.3.f. of these rules, the reduced administrative fee for both parties in low-dollar disputes would be 50 percent of the full administrative fee

(or \$75) per party per dispute, and the reduced administrative fee for non-initiating parties in ineligible disputes would be 20 percent of the full administrative fee (or \$30) per party per dispute. These fee estimates, as set forth in Table 5, are based on the best available data, the Departments' projected expenditures as of the publication of these proposed rules, and the assumptions that the administrative fee of \$150 per party per dispute in the IDR Process Fees proposed rules is finalized and applicable starting January 1, 2024. These projections may change between the publication of the proposed and final rules based on more recent

data available at that time; thus, the Departments propose to finalize an administrative fee amount that follows the methodology proposed here, as finalized, using the updated data, if applicable. In the event one or more of the policies proposed in these rules are not finalized or the departmental eligibility review is not anticipated to be invoked, the Departments would recalculate the proposed administrative fee amount to reflect relevant changes to the proposed policies when finalizing the administrative fee amount.

BILLING CODE 6325–63–P; 4830–01–P; 4510–29–P; 4120–01–P

TABLE 5: Proposed Administrative Fee Amounts for Disputes Initiated On or After January 1, 2025

Type of Dispute	Proposed Fee Charged per Party per Dispute	
Standard Dispute, Eligible for Federal IDR Process <i>Initiating party does not attest that the highest offer (or aggregate offers for the dispute, whether the dispute is for one item or service, a bundled arrangement, or multiple items and services submitted as part of a batched dispute) made during open negotiation for such dispute by either party was less than the amount of the standard administrative fee and the dispute is determined eligible for the Federal IDR process</i>	Initiating Party	100 percent of the administrative fee; anticipated to be \$150
	Non-initiating Party	100 percent of the administrative fee; anticipated to be \$150
Standard Dispute, Ineligible for Federal IDR Process <i>Initiating party does not attest that the highest offer (or aggregate offers for the dispute, whether the dispute is for one item or service, a bundled arrangement, or multiple items and services submitted as part of a batched dispute) made during open negotiation for such dispute by either party was less than the amount of the standard administrative fee and the dispute is determined ineligible for the Federal IDR process</i>	Initiating Party	100 percent of the administrative fee; anticipated to be \$150
	Non-initiating Party	20 percent of the administrative fee; anticipated to be \$30
Low-Dollar Dispute, Eligible for Federal IDR Process <i>Initiating party attests that the highest offer (or aggregate offers for the dispute, whether the dispute is for one item or service, a bundled arrangement, or multiple items and services submitted as part of a batched dispute) made during open negotiation for such dispute by either party was less than the amount of the standard administrative fee and the dispute is determined eligible for the Federal IDR process</i>	Initiating Party	50 percent of the administrative fee; anticipated to be \$75
	Non-initiating Party	50 percent of the administrative fee; anticipated to be \$75
Low-Dollar Dispute, Ineligible for Federal IDR Process <i>Initiating party attests that the highest offer (or aggregate offers for the dispute, whether the dispute is for one item or service, a bundled arrangement, or multiple items and services submitted as part of a batched dispute) made during open negotiation for such dispute by either party was less than the amount of the standard administrative fee and the dispute is determined ineligible for the Federal IDR process</i>	Initiating Party	50 percent of the administrative fee; anticipated to be \$75
	Non-initiating Party	20 percent of the administrative fee; anticipated to be \$30

and proposed administrative fee amounts, including the reduced administrative fee amounts, as well as the proposed implementation date of the proposed administrative fee.

b. Time of Collection of Certified IDR Entity Fee and Administrative Fee

i. Time of Collection of Certified IDR Entity Fee

The Departments propose to amend 26 CFR 54.9816–8(d)(1)(i), 29 CFR 2590.716–8(d)(1)(i), and 45 CFR 149.510(d)(1)(i) to reflect that each party to a dispute that either the certified IDR entity or the Departments determine is eligible for the Federal IDR process must pay to the certified IDR entity the predetermined certified IDR entity fee no later than the time the parties submit their offers, as described in proposed 26 CFR 54.9816–8(c)(5)(i), 29 CFR 2590.716–8(c)(5)(i), and 45 CFR 149.510(c)(5)(i).

The Departments also propose to codify in 26 CFR 54.9816–8(d)(1)(iii), 29 CFR 2590.716–8(d)(1)(iii), and 45 CFR 149.510(d)(1)(iii) the current practice established in section 10.2 of the Federal IDR Process Guidance for Certified IDR Entities¹⁷⁴ that the certified IDR entity must retain the certified IDR entity fee described in 26 CFR 54.9816–8(d)(1)(i), 29 CFR 2590.716–8(d)(1)(i), and 45 CFR 149.510(d)(1)(i) paid by the party whose offer was not selected (the non-prevailing party, as defined in proposed 26 CFR 54.9816–8(c)(5)(ii)(A)(2), 29 CFR 2590.716–8(c)(5)(ii)(A)(2), and 45 CFR 149.510(c)(5)(ii)(A)(2)), consistent with the No Surprises Act.¹⁷⁵ The Departments further propose to move the existing requirement in current paragraph 26 CFR 54.9816–8T(d)(1)(ii), 29 CFR 2590.716–8(d)(1)(ii), and 45 CFR 149.510(d)(1)(ii), which requires the certified IDR entity to return the fee paid by the prevailing party within 30 business days following the date of the certified IDR entity's payment determination, to 26 CFR 54.9816–8(d)(1)(iii), 29 CFR 2590.716–8(d)(1)(iii), and 45 CFR 149.510(d)(1)(iii). Further, the Departments propose that in the event of a batched dispute in which each party prevails in an equal number of determinations, the certified IDR entity fee would be split evenly between the parties. In that case, the certified IDR entity would be required to return

half of the fee paid by each party within 30 business days following the date of the certified IDR entity's payment determination.

Additionally, the Departments propose to add 26 CFR 54.9816–8(d)(1)(iv), 29 CFR 2590.716–8(d)(1)(iv), and 45 CFR 149.510(d)(1)(iv) to provide that when the parties reach an agreement on an out-of-network rate for qualified IDR items or services, as described in proposed 26 CFR 54.9816–8(c)(3)(i), 29 CFR 2590.716–8(c)(3)(i), and 45 CFR 149.510(c)(3)(i), or agree to withdraw a dispute under the circumstances set forth at proposed 26 CFR 54.9816–8(c)(3)(ii), 29 CFR 2590.716–8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii), for a dispute that has already been assigned to a certified IDR entity and determined eligible for the Federal IDR process but for which the certified IDR entity has not made a payment determination, the certified IDR entity must return half of each party's certified IDR entity fee within 30 business days of the agreement or withdrawal, unless directed otherwise by both parties. This proposed new paragraph would relocate the similar requirement when parties reach an agreement, currently captured in 26 CFR 54.9816–8T(c)(2)(ii) and (e)(2)(viii), 29 CFR 2590.716–8(c)(2)(ii) and (e)(2)(viii), and 45 CFR 149.510(c)(2)(ii) and (e)(2)(viii), which require the certified IDR entity to return half of each party's certified IDR entity fee within 30 business days of an agreement, and codifies the Departments' interpretation that a withdrawal of a dispute should be treated similarly to a settlement. Similar to when parties settle prior to an eligibility determination and therefore do not need to pay the certified IDR entity fee because the certified IDR entity did not make an eligibility and/or payment determination, when a dispute is withdrawn prior to an eligibility determination, the Departments are of the view that the parties similarly should not be required to pay the fee because the certified IDR entity again did not make an eligibility and/or payment determination. Accordingly, because the certified IDR entity fee is only assessed for disputes that are determined eligible for the Federal IDR process, the Departments clarify that the certified IDR entity fee would not be assessed for a dispute that is withdrawn or settled before the Departments or the certified IDR entity, as applicable, make a determination on the eligibility of the dispute for the Federal IDR process. However, because the obligation to pay the certified IDR entity fee applies to all eligible disputes,

both parties would still be required to pay the certified IDR entity fee if the dispute is withdrawn or settled after the dispute is determined eligible but before the certified IDR entity makes a payment determination.

Finally, the Departments propose to add 26 CFR 54.9816–8(d)(1)(v), 29 CFR 2590.716–8(d)(1)(v), and 45 CFR 149.510(d)(1)(v) to provide that when the parties reach an agreement on an out-of-network rate or agree to withdraw the dispute for which there is a final selection of the certified IDR entity but that has not yet had a final eligibility determination, unless directed otherwise by both parties, the certified IDR entity would be required to return each party's full certified IDR entity fee within 30 business days of the date both parties notify the certified IDR entity that they have agreed on an out-of-network rate or agreed to withdraw the dispute. The purpose of this proposal is to codify the responsibilities of the parties and certified IDR entities when the parties agree to settle or withdraw the dispute, but the dispute has not yet been determined eligible for the Federal IDR process. Similar to the proposal regarding settlements and withdrawals for eligible disputes, because the certified IDR entity fee is only assessed for disputes that are determined eligible for the Federal IDR process, the certified IDR entity fee would not be assessed for a dispute that is withdrawn or settled before the Departments or the certified IDR entity, as applicable, determine the eligibility of the dispute for the Federal IDR process.

The Departments seek comment on these proposals including the treatment of a withdrawal of a dispute similar to a settlement.

ii. Time of Collection of Administrative Fee

The Departments are also proposing multiple changes to the timing of the collection of the administrative fee in proposed 26 CFR 54.9816–8(d)(2)(i)(A), 29 CFR 2590.716–8(d)(2)(i)(A), and 45 CFR 149.510(d)(2)(i)(A). The Departments propose to require the initiating party to pay the administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity pursuant to proposed 26 CFR 54.9816–8(c)(1)(iii), 29 CFR 2590.716–8(c)(1)(iii), and 45 CFR 149.510(c)(1)(iii). The Departments further propose that the non-initiating party must pay the administrative fee within 2 business days of the date of notice that an eligibility determination for the Federal IDR process has been reached by either the certified IDR entity or the Departments, if the

¹⁷⁴ Centers for Medicare & Medicaid Services (Mar. 2023). *Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR Entities*. <https://www.cms.gov/files/document/federal-idr-guidance-idr-entities-march-2023.pdf>.

¹⁷⁵ Section 9816(c)(5)(F)(i) of the Code, section 716(c)(5)(F)(i) of ERISA, and section 2799A–1(c)(5)(F)(i) of the PHS Act.

departmental eligibility review applies as proposed in 26 CFR 54.9816–8(c)(2)(ii), 29 CFR 2590.716–8(c)(2)(ii), and 45 CFR 149.510(c)(2)(ii).

As discussed in section II.E.3.f. of this preamble, the Departments propose that the non-initiating party would pay a reduced administrative fee for disputes that are determined ineligible for the Federal IDR process; therefore, eligibility would need to be determined before the non-initiating party is charged the administrative fee. The Departments are of the view that 2 business days to pay the administrative fee would be an appropriate amount of time from the date of preliminary selection of the certified IDR entity (for initiating parties) and from the date of notice of an eligibility determination (for non-initiating parties), because it balances the need for the parties to have adequate notice of the fee being due and adequate time to pay the fee with the need to continue to move the Federal IDR process forward and provide parties with timelier payment determinations.

Although the Departments considered requiring both parties to pay the administrative fee within the same 2-business-day period, failure of the initiating party to pay the administrative fee would result in dispute dismissal as discussed in section II.E.3.d. of this preamble, and neither party would owe the administrative fee for such a dispute. Additionally, the Departments are of the view that it is appropriate to align the non-initiating party's deadline to pay the administrative fee with the date of the eligibility determination because, as proposed in these rules and described in section II.E.3.f. of this preamble, the non-initiating party's administrative fee amount would be determined based on the eligibility of the dispute.

The Departments are of the view that this timing would better ensure that the financial costs to the Departments to administer the Federal IDR process align with the assessed administrative fees. Specifically, as explained in section II.E.3.f. of this preamble, the Departments are of the view that requiring non-initiating parties to pay a reduced administrative fee if the dispute is ineligible would be appropriate because it would take into account the benefits that non-initiating parties receive from having access to the Federal IDR process. Currently, for administrative efficiency, the Departments' guidance allows certified IDR entities the discretion to delay collection of the administrative fee until

a party submits its offer,¹⁷⁶ which is the same time that each party is required to pay the certified IDR entity fee described in 26 CFR 54.9816–8T(d)(1), 29 CFR 2590.716–8(d)(1), and 45 CFR 149.510(d)(1). Amending the timing for administrative fee collection would accelerate dispute processing and ensure that the costs of using the Federal IDR process are being allocated to all parties accessing the process, regardless of whether their disputes are eligible or ineligible.

Furthermore, the Departments propose at 26 CFR 54.9816–8(d)(2)(i)(B), 29 CFR 2590.716–8(d)(2)(i)(B), and 45 CFR 149.510(d)(2)(i)(B) that when the parties reach an agreement on an out-of-network rate for qualified IDR items or services or agree to withdraw the dispute after the dispute is initiated, the administrative fee would not be returned to the parties if preliminary selection of the certified IDR entity has occurred, as described in 26 CFR 54.9816–8(c)(1)(i), 29 CFR 2590.716–8(c)(1)(i), and 45 CFR 149.510(c)(1)(i). This new paragraph would relocate the similar requirement when parties reach an agreement, currently captured in 26 CFR 54.9816–8T(c)(2)(ii), 29 CFR 2590.716–8(c)(2)(ii), and 45 CFR 149.510(c)(2)(ii), which provides that the administrative fee will not be returned to the parties in the event of an agreement, and extends those requirements in the event of a dispute withdrawal. The Departments are of the view that these proposed policies would help ensure that disputing parties are appropriately incentivized to settle disputes through open negotiation before initiating the Federal IDR process. The Departments expect that submission of ineligible disputes would decrease because of this financial incentive combined with the proposed changes to open negotiation, discussed in section II.D. of this preamble, requiring the initiating party to attest that the item or service under dispute is a qualified IDR item or service and to identify the basis for the attestation, which would necessitate the initiating party actively evaluating eligibility before initiating the Federal IDR process.

The Departments also propose in this paragraph that the administrative fee would still be required to be paid if the parties have not yet paid it at the time of settlement or withdrawal, unless the

dispute is closed for nonpayment of the administrative fee by the initiating party 2 business days after preliminary selection of the certified IDR entity. This proposal aligns with the current regulation at 26 CFR 54.9816–8T(d)(2)(i), 29 CFR 2590.716–8(d)(2)(i), and 45 CFR 149.510(d)(2)(i) providing that the administrative fee is non-refundable, as discussed in the October 2021 interim final rules.¹⁷⁷ As stated in the October 2021 interim final rules, the Departments will have incurred expenditures to administer the Federal IDR process even in instances in which the parties reach an agreement before the certified IDR entity makes a payment determination. Thus, the Departments are proposing to codify the requirement that parties must pay the administrative fee for these disputes.

Requiring the initiating party to pay the administrative fee within 2 business days of the date the certified IDR entity is preliminarily selected, which would occur before a dispute's eligibility determination is made, would provide an incentive to initiating parties to reduce the number of ineligible disputes submitted and ensure that the financial burden for administering the Federal IDR process is shared across the parties accessing the process. Consequently, the Departments anticipate that fewer ineligible disputes would be submitted, and all disputes in which a certified IDR entity is preliminarily selected would contribute to the funds available to administer the Federal IDR process, regardless of eligibility. The Departments are of the view that this would improve overall efficiency in the Federal IDR process and potentially enable the Departments to lower the administrative fee at a future date in notice and comment rulemaking, as the costs of carrying out the Federal IDR process would be more equally allocated across a larger proportion of submitted disputes.

The Departments seek comment on these proposals.

c. Manner of Administrative Fee Collection

The Departments propose to amend 26 CFR 54.9816–8(d)(2)(i), 29 CFR 2590.716–8(d)(2)(i), and 45 CFR 149.510(d)(2)(i) to require each party participating in the Federal IDR process to pay the administrative fee directly to the Departments, instead of to the certified IDR entity for remittance to the Departments, as is currently required. The purpose of this proposal would be to improve dispute processing times and reduce certified IDR entities'

¹⁷⁶ See U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury. (Oct. 2022). *Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR Entities*. <https://www.cms.gov/files/document/federal-independent-dispute-resolution-guidance-disputing-parties.pdf>.

¹⁷⁷ 86 FR 56001.

administrative burden. To support the transition to this proposed approach of directly collecting the administrative fee and to improve the operation of current processes, the Departments also propose to make conforming amendments to 26 CFR 54.9816–8(e)(2)(vi) and (ix), 29 CFR 2590.716–8(e)(2)(vi) and (ix), and 45 CFR 149.510(e)(2)(vi) and (ix) to reflect that certified IDR entities must maintain appropriate safeguards, controls, and procedures for any administrative fees they may be in possession of before the effective date of the proposed change to the manner of administrative fee collection, if finalized.

The October 2021 interim final rules established that each disputing party's administrative fee was due upon selection of the certified IDR entity and payable to the certified IDR entity.¹⁷⁸ The Departments explained that allowing the certified IDR entity to collect the administrative fee on behalf of the Departments could increase efficiency, streamline the Federal IDR process, and allow for more convenient payment for the disputing parties and the Departments.¹⁷⁹ However, there are many disputes in the Federal IDR process for which no fee has been collected for the work associated with processing the dispute, and the Departments are now of the view that collection of the administrative fee by the Departments directly rather than the certified IDR entities would be more efficient. The Departments are also of the view that, in light of the proposal to collect the administrative fee earlier in the process as proposed in these rules, collection of the administrative fee by the Departments would significantly reduce the burden on certified IDR entities because they would not have to collect fees at two different points in time, track collection of both fees, and then remit payment of the administrative fee to the Departments, as would be required if the proposal to change the administrative fee timing was finalized but the manner of collection was unchanged. Additionally, enabling the Departments to directly collect the administrative fee from the disputing parties may improve collection of the fee, in part through Federal debt collection mechanisms as outlined in section II.E.3.d. of this preamble. Finally, since these proposed rules would require parties to submit open negotiation notices, open negotiation notice responses, notices of initiation, and notice of initiation responses through the Federal IDR portal, as discussed in section II.D. of

this preamble, the Departments would be in the best position to determine the appropriate time to bill and collect the administrative fee from the parties given the Departments' access to this information.

The Departments seek comment on this proposal. Additionally, the Departments seek comment on restricting the manner of payment of administrative and certified IDR entity fees to only electronic payments, including electronic funds transferred from a bank account, rather than allowing payment by check.

d. Application of Federal IDR Process Requirements in Circumstances Involving a Failure To Pay Certified IDR Entity Fees or Administrative Fees

To further streamline dispute processing, these proposed rules outline certain consequences that would apply for failure to timely pay the certified IDR entity fee, the administrative fee, or both fees. Specifically, the Departments propose in paragraph 26 CFR 54.9816–8(d)(1)(ii), 29 CFR 2590.716–8(d)(1)(ii), and 45 CFR 149.510(d)(1)(ii) that if either party fails to pay the certified IDR entity fee by the time the offer is due, that party's offer would not be considered received. The Departments also propose that if a party fails to submit an offer or a party's offer is not considered received due to nonpayment of the certified IDR entity fee, the non-prevailing party would continue to be responsible for payment of the certified IDR entity fee. This means that a certified IDR entity would be able to take all steps consistent with applicable law to collect any certified IDR entity fee owed to it.

The Departments do not propose to change the requirement that each party to a dispute for which a certified IDR entity is selected must pay a non-refundable administrative fee to participate in the Federal IDR process.¹⁸⁰ Further, the Departments do not propose to change the requirement that the party whose offer is not selected by the certified IDR entity is ultimately responsible for payment of the certified IDR entity fee.¹⁸¹

Additionally, the Departments propose to add new proposed paragraph 26 CFR 54.9816–8(d)(2)(i)(C), 29 CFR 2590.716–8(d)(2)(i)(C), and 45 CFR 149.510(d)(2)(i)(C) setting forth that if the initiating party fails to pay the administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity under

paragraph (c)(1)(iii), the dispute would be closed due to nonpayment and neither party would be responsible for the administrative fee. If a dispute is closed for nonpayment of the administrative fee by the initiating party, the Departments would not impose an obligation to pay the administrative fee on either party, since the dispute was terminated before substantial work was undertaken to process it. The Departments also propose in new paragraph (d)(2)(i)(C) that if the non-initiating party fails to pay the administrative fee within 2 business days of an eligibility determination, that party's offer would not be considered received. Even if the non-initiating party fails to submit an offer or the non-initiating party's offer is not considered received due to nonpayment of the administrative fee in accordance with paragraph (d)(2)(i)(A), the non-initiating party would continue to be responsible for payment of the administrative fee. In addition, if the dispute is determined to be ineligible for the Federal IDR process, the non-initiating party would continue to be responsible for payment of the reduced administrative fees discussed in section II.E.3. of this preamble.

Further, the Departments propose to provide in 26 CFR 54.9816–8(d)(2)(i)(D), 29 CFR 2590.716–8(d)(2)(i)(D), and 45 CFR 149.510(d)(2)(i)(D) that any party that fails to timely pay the administrative fee owed in accordance with paragraph (d)(2)(i)(A) of this section is still obligated to pay the administrative fee otherwise due and owing, and that failure to pay the administrative fee would result in a debt owed to the Federal Government, after netting any amounts owed by the Federal Government in accordance with 45 CFR 156.1215, as applicable.¹⁸² The debt would then be collected pursuant to applicable debt collection authorities, including those that prescribe government-wide standards for administrative collection, compromise, disclosure of debt information to credit reporting agencies, referral of claims to private collection contractors for resolution, and referral to the Department of Justice for litigation.

¹⁸² HHS intends to propose in notice and comment rulemaking in the near future to amend 45 CFR 156.1215 to provide that administrative fees for utilizing the No Surprises Act Federal IDR process for health insurance issuers that participate in financial programs under the ACA would be subject to netting as part of HHS' integrated monthly payment and collections cycle. The netting proposals at 45 CFR 156.1215 would only apply to those issuers and their affiliates operating under the same TIN that participate in the financial programs under the ACA.

¹⁷⁸ 86 FR 56001.

¹⁷⁹ *Id.*

¹⁸⁰ See 26 CFR 54.9816–8T(d)(2)(i), 29 CFR 2590.716–8(d)(2)(i), and 45 CFR 149.510(d)(2)(i).

¹⁸¹ See *id.*

Additionally, the Departments propose that the party to the dispute that incurs the debt would be determined by the TIN or NPI associated with the plan, issuer, provider, facility, or provider of air ambulance services that is a party to the dispute, which may not be the entity that filed the dispute. This means that when a plan that is a party to a dispute utilizes a TPA or other representative, it is the plan that would incur the administrative fee debt, not the TPA or representative. Similarly, if a provider or facility engages a revenue cycle management company or other representative, the provider or facility would be responsible for the administrative fee debt, not the revenue cycle management company or other representative. A TPA, revenue cycle management company, or other representative would still be allowed to manage or initiate the Federal IDR process on behalf of a disputing party, including remitting the administrative fee amount on behalf of the party to the dispute.

The Departments are of the view that codifying the consequences of failure to pay the certified IDR entity fees and administrative fees would increase transparency and reduce the incidence of nonpayment. The Departments seek comment on these proposals.

e. Administrative Fee Structure for Disputing Parties in Low-Dollar Disputes

The Departments are proposing a framework to reduce the administrative fee for parties in low-dollar disputes to promote equitable access across the spectrum of parties seeking to initiate the Federal IDR process, such as providers in rural communities, small practices, specialties that regularly bill for services that have low-dollar costs, and issuers with a smaller pool of claims to absorb the impact of a standard administrative fee assessed for low-dollar disputes.

The Departments propose to add 26 CFR 54.9816–8(d)(2)(iii)(A) through (C), 29 CFR 2590.716–8(d)(2)(iii)(A) through (C), and 45 CFR 149.510(d)(2)(iii)(A) through (C) to establish a framework for reducing the administrative fee in certain situations. The Departments propose in 26 CFR 54.9816–8(d)(2)(iii)(A), 29 CFR 2590.716–8(d)(2)(iii)(A), and 45 CFR 149.510(d)(2)(iii)(A) to charge both parties a reduced administrative fee when the initiating party attests that the highest offer made during open negotiation by either party was less than the predetermined threshold proposed in these rules. The Departments propose that in order for both parties to be

charged a reduced administrative fee for a dispute, the highest offer (or aggregate offers for a dispute, whether the dispute is for one item or service, a bundled payment arrangement, or multiple items and services submitted as part of a batched dispute) made during open negotiation for such dispute by either party must be less than the amount of the full administrative fee. As such, the Departments propose that the threshold that would apply for disputes initiated on or after January 1, 2025 would equal the amount of the standard administrative fee as proposed in section II.E.3.a. of this preamble, which is proposed to be \$150 for disputes initiated on or after January 1, 2025.

Further, the Departments propose in 26 CFR 54.9816–8(d)(2)(iii)(A), 29 CFR 2590.716–8(d)(2)(iii)(A), and 45 CFR 149.510(d)(2)(iii)(A) that the reduced administrative fee amount for these low-dollar disputes would be 50 percent of the administrative fee amount, equating to \$75 per party per dispute for disputes initiated on or after January 1, 2025, if the proposed administrative fee amount of \$150 per party per dispute is finalized. To determine the amount of the reduced administrative fee, the Departments evaluated various factors pertaining to low-dollar disputes. This discussion appears in section II.E.3.f. of this preamble.

As discussed in section II.E.2. of this preamble, interested parties have expressed concerns that disputes over relatively low-dollar claims, such as radiology claims, are being priced out of the Federal IDR process due to difficulties with batching items and services of sufficient value to make the Federal IDR process feasible. While the Departments anticipate that the new batching provisions proposed in these rules and discussed in section II.E.2. of this preamble would make the Federal IDR process more accessible to many parties, the Departments also want to consider other mechanisms to ensure that the Federal IDR process is financially accessible to a greater number of parties, including parties from rural communities, smaller organizations, and parties disputing services related to specialties that bill for low-dollar services. These parties may have more claims for low-dollar services than other types of parties due to the nature of their practice, which may result in fewer disputes that meet the batching requirements, making batching claims impractical for such parties. Even though the Departments recognize that disputes vary in complexity, resolving a dispute generally costs the Departments the same amount regardless of whether the

dispute involves low-dollar or high-dollar items or services. Accordingly, the Departments are proposing this administrative fee structure to further the goal of financial accessibility while ensuring that the Departments can collect sufficient funds to cover the costs of carrying out the Federal IDR process. If either or both parties to the dispute attest to satisfying the requirements for a reduced administrative fee but the Departments determine that either or both parties did not act in good faith in their submissions or responses, the Departments may decline to charge a reduced administrative fee. The Departments solicit comments on situations in which it would be appropriate for the Departments to decline to charge a party the reduced administrative fee, such as if the initiating party incorrectly attests that no offer submitted during open negotiation exceeded the threshold, and the Departments also solicit comments on additional approaches the Departments should consider to mitigate potential abuse of the proposed reduced administrative fee structure.

Under these proposed rules, a party initiating a dispute in the Federal IDR portal using the notice of IDR initiation form discussed in section II.D.2.a. of this preamble would be required to attest in the Federal IDR portal that the highest offer (including the cumulative total of all line items for batched disputes) made during open negotiation by either party was less than the predetermined threshold, which the Departments propose would equal the amount of the full administrative fee (\$150 per party for disputes initiated on or after January 1, 2025, as discussed in section II.E.3.a. of this preamble). If the initiating party attests that the highest offer made during open negotiation by either party was less than the threshold, the administrative fee amount charged to both parties may be the reduced administrative fee for low-dollar disputes of 50 percent of the administrative fee. If the initiating party does not attest that the highest offer (or aggregate offers for a dispute, whether the dispute is for one item or service, a bundled payment arrangement, or multiple items and services submitted as part of a batched dispute) made during open negotiation by either party was less than the threshold, both parties may be charged the full amount of the proposed administrative fee.

The Departments seek comment on the proposed administrative fee structure for low-dollar disputes, including any guardrails that may be necessary to prevent potential abuse.

Specifically, the Departments seek comment on capping the offers of parties to a low-dollar dispute when the reduced administrative fee for low-dollar disputes applies, such that these parties would be prevented from submitting an offer above the low-dollar dispute threshold amount to ensure that parties requesting to pay the reduced administrative fee actually have disputes that are considered to be low-dollar. The Departments also seek comment on whether the offer cap should be set at the same value as the threshold, or whether the offer cap should be higher than the threshold to allow for some increase between offers made during open negotiation and offers made during the Federal IDR process.

f. Administrative Fee Structure for Non-Initiating Parties in Ineligible Disputes

The Departments are proposing a framework to more equitably allocate costs between disputing parties while also incentivizing non-initiating parties to be responsive throughout the Federal IDR process, especially with respect to challenging the eligibility of a dispute. The Departments propose in 26 CFR 54.9816–8(d)(2)(iii)(B), 29 CFR 2590.716–8(d)(2)(iii)(B), and 45 CFR 149.510(d)(2)(iii)(B) to charge a non-initiating party a reduced administrative fee when either the certified IDR entity or the Departments determine the entire dispute is ineligible for the Federal IDR process. The Departments also propose in 26 CFR 54.9816–8(d)(2)(iii)(B), 29 CFR 2590.716–8(d)(2)(iii)(B), and 45 CFR 149.510(d)(2)(iii)(B) that the reduced administrative fee amount for non-initiating parties in ineligible disputes would be 20 percent of the full administrative fee amount (proposed in section II.E.3.a. of this preamble), equating to \$30 per non-initiating party per dispute if the administrative fee is finalized as proposed.

For the reasons discussed in section II.D.1. of this preamble, implementing an efficient Federal IDR process requires both parties to be active participants in the process. As described in the “Contested Dispute Eligibility” section of the *Initial Report on the Federal Independent Dispute Resolution (IDR) Process, April 15–September 30, 2022*,¹⁸³ submission of ineligible and incomplete disputes delays processing of disputes. The Departments are of the view that charging a reduced

administrative fee to the non-initiating party for an ineligible dispute would more fairly allocate the costs to the Departments associated with ineligible disputes by assigning the majority of those costs to the party best suited to prevent submission of such disputes—the initiating party. If the Departments determine either or both parties have not acted in good faith in their submissions or responses, the Departments may decline to charge a reduced administrative fee. The Departments solicit comments on situations in which the Departments should decline to charge the non-initiating party a reduced administrative fee for an ineligible dispute, such as if the Departments obtain evidence that the non-initiating party withheld key information during open negotiation or initiation that the dispute was ineligible, and the Departments also solicit comments on additional approaches the Departments should consider to mitigate potential abuse of the proposed reduced administrative fee structure.

Additionally, the No Surprises Act requires the administrative fee to be assessed to each party, but does not require the fee amount assessed to each party to be equal.¹⁸⁴ While the non-initiating party did not actively choose to bring the dispute to the Federal IDR process, it would nonetheless utilize the features of the Federal IDR process proposed in these proposed rules, such as open negotiation and the Federal IDR Registry. However, the Departments are of the view that payment of a reduced administrative fee amount for non-initiating parties is appropriate when disputes are not eligible for the Federal IDR process.

The Departments propose that this reduction would only be applied when the entire dispute is determined ineligible for the Federal IDR process. For example, if a batched dispute were determined to be partially ineligible (that is, some line items were eligible and some were ineligible), the non-initiating party may still be required to pay the full administrative fee amount, because the eligible line item(s) of the dispute would continue to move through the Federal IDR process.

To develop the proposed administrative fee amounts for low-dollar disputes and ineligible disputes, the Departments considered several factors. Specifically, compared to ineligible disputes, the Departments are of the view that charging a higher

reduced administrative fee amount for both parties in low-dollar disputes would be appropriate because low-dollar disputes generally proceed further in the Federal IDR process and result in either a payment determination or a negotiated settlement, and the additional Federal IDR process steps utilized by the parties incur additional expenses. However, non-initiating parties in ineligible disputes utilize fewer Federal IDR process steps because the dispute is closed before reaching a payment determination. In the event a low-dollar dispute is ineligible, the non-initiating party may be assessed the lower of the reduced administrative fee amounts, which would be the ineligible dispute reduced administrative fee amount. The Departments are of the view that this would be an equitable structure for both initiating and non-initiating parties and would help the Departments ensure that the total amount of administrative fees for each year is estimated to be equal to the amount of expenditures estimated to be made by the Departments to carry out the Federal IDR process, in compliance with the requirements of the No Surprises Act.

To determine the projected amounts of the reduced administrative fees, the Departments evaluated various factors based on the data available to the Departments on both ineligible and low-dollar disputes, including:

- Reduction of follow-up required for ineligible disputes;
- Lower utilization of the Federal IDR portal for disputes that are closed as ineligible before a payment determination; and
- The proportion of total disputes that are ineligible or low-dollar.

After evaluating these factors, the Departments balanced the need to collect an administrative fee from all parties to disputes that utilize the Federal IDR portal with the need to equitably allocate burden across the parties, as well as the need to enable greater access to the Federal IDR process, and determined that assessing a reduced administrative fee amount of 50 percent of the full administrative fee for both parties in a low-dollar dispute and 20 percent of the full administrative fee for the non-initiating party in an ineligible dispute would be appropriate.

The Departments seek comment on this proposal, including whether the amount of the reduced administrative fee for non-initiating parties in ineligible disputes should be the same as the amount of the reduced administrative fee for both parties in low-dollar disputes discussed in section II.E.3.e. of this preamble.

¹⁸³ See U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury, *Initial Report on the Federal Independent Dispute Resolution (IDR) Process, April 15–September 30, 2022*, <https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf>.

¹⁸⁴ See section 9816(c)(8)(A) of the Code, section 716(c)(8)(A) of ERISA, and section 2799A–1(c)(8)(A) of the PHS Act.

4. Payment Determination

a. Submission of Offers Deadline

Sections 9816(c)(5)(B) and 9817(b)(5)(B) of the Code, sections 716(c)(5)(B) and 717(b)(5)(B) of ERISA, and sections 2799A–1(c)(5)(B) and 2799A–2(b)(5)(B) of the PHS Act set forth that not later than 10 days after the date of selection of the certified IDR entity with respect to a determination for a qualified IDR item or service, the plan or issuer and the provider, facility, or provider of air ambulance services must each submit to the certified IDR entity an offer for a payment amount for such qualified IDR item or service. Under the October 2021 interim final rules, the Departments established that the offer must be submitted not later than 10 business days after the selection of the certified IDR entity. The Departments specified that parties to the Federal IDR process must also submit information requested by the certified IDR entity relating to the offer.

To establish that the submission of offer is due from the provider, facility, or provider of air ambulance services and plan or issuer not later than 10 business days after the date of final selection of the certified IDR entity, as discussed in section II.E.1.a.ii. of this preamble, the Departments propose to redesignate 26 CFR 54.9816–8(c)(4), 29 CFR 2590.716–8(c)(4), and 45 CFR 149.510(c)(4) as 26 CFR 54.9816–8(c)(5), 29 CFR 2590.716–8(c)(5), and 45 CFR 149.510(c)(5) and amend redesignated 26 CFR 54.9816–8(c)(5)(i), 29 CFR 2590.716–8(c)(5)(i), and 45 CFR 149.510(c)(5)(i). This proposed amendment would establish that the time period for submission of offers would commence when the Departments notify the parties that the certified IDR entity has attested it has no conflicts of interest, or if the Departments have granted an extension to the eligibility determination timeframe described at proposed 26 CFR 54.9816–8(g)(1)(ii)(A), 29 CFR 2590.716–8(g)(1)(ii)(A), and 45 CFR 149.510(g)(1)(ii)(A) due to extenuating circumstances, when an eligibility determination has been made.

b. Payment Determination and Notification Deadline

Sections 9816(c)(5)(A) and 9817(b)(5)(A) of the Code, sections 716(c)(5)(A) and 717(b)(5)(A) of ERISA, and sections 2799A–1(c)(5)(A) and 2799A–2(b)(5)(B) of the PHS Act set forth that not later than 30 days after the date of selection of the certified IDR entity with respect to a determination for a qualified IDR item or service, the certified IDR entity will select one of the

submitted offers to be the amount of payment for such item or service and will notify the provider or facility and the plan or issuer of the offer selected. Under the October 2021 interim final rules, the Departments established that the certified IDR entity must select an offer no later than 30 business days after the selection of the certified IDR entity and set forth other requirements for certified IDR entities when rendering payment determinations.

These rules propose to redesignate 26 CFR 54.9816–8(c)(4), 29 CFR 2590.716–8(c)(4), and 45 CFR 149.510(c)(4) as 26 CFR 54.9816–8(c)(5), 29 CFR 2590.716–8(c)(5), and 45 CFR 149.510(c)(5), respectively, and the proposal described in this section reflects that redesignation. With regard to the requirements for payment determination and notification, at redesignated 26 CFR 54.9816–8(c)(5)(ii), 29 CFR 2590.716–8(c)(5)(ii), and 45 CFR 149.510(c)(5)(ii), the Departments propose several amendments to align with other proposed updates to regulatory text, to make technical amendments, and to codify existing subregulatory guidance. The Departments propose to amend the regulatory text at 26 CFR 54.9816–8(c)(5)(ii), 29 CFR 2590.716–8(c)(5)(ii), and 45 CFR 149.510(c)(5)(ii) to reflect that the payment determination and notification deadline would be based on the date of final selection of the certified IDR entity, under proposed paragraph 26 CFR 54.9816–8(c)(1)(iv)(C), 29 CFR 2590.716–8(c)(1)(iv)(C), and 5 CFR 149.510(c)(1)(iv)(C), which is described further in section II.E.1.a.ii. of this preamble. Similar to the proposed amendment to the submission of offers deadline, this proposed amendment would align the sections of regulatory text and specify that these time periods would not commence at the date of preliminary selection of the certified IDR entity (before the certified IDR entity attests it has no conflicts of interest), but rather would be based on the date of final selection of the certified IDR entity. Additionally, if the Departments grant an extension to the eligibility determination timeframe described at proposed 26 CFR 54.9816–8(g)(1)(ii)(A), 29 CFR 2590.716–8(g)(1)(ii)(A), and 45 CFR 149.510(g)(1)(ii)(A) for extenuating circumstances, the submission of offers deadline would be based on the date of eligibility determination. This would create consistency across the timeframes for the Federal IDR process described in these rules and improve implementation of the Federal IDR process.

Further, the Departments propose technical amendments to update the cross references in paragraphs 26 CFR

54.9816–8(c)(5)(ii)(A) and (B), 29 CFR 2590.716–8(c)(5)(ii)(A) and (B), and 45 CFR 149.510(c)(5)(ii)(A) and (B) to reflect the proposed redesignation of paragraph 26 CFR 54.9816–8(c)(5), 29 CFR 2590.716–8(c)(5), and 45 CFR 149.510(c)(5). Within these paragraphs, reference to paragraphs (c)(4)(i) and (c)(4)(iii) would be updated to paragraphs (c)(5)(i) and (c)(5)(iii), respectively, and reference to paragraphs (c)(4)(ii)(A) and (c)(4)(vi) would be updated to paragraphs (c)(5)(ii)(A) and (c)(5)(vi), respectively.

Finally, the Departments propose to codify definitions for the prevailing and non-prevailing parties, which were described in the Calendar Year 2022 Fee Guidance for the Independent Dispute Resolution Process and in the October 2021 interim final rules. The Departments propose to add paragraphs 26 CFR 54.9816–8(c)(5)(ii)(A)(1) and (2), 29 CFR 2590.716–8(c)(5)(ii)(A)(1) and (2), and 45 CFR 149.510(c)(5)(ii)(A)(1) and (2), which would establish the definitions of prevailing and non-prevailing party in the case of single determinations or batched determinations. The Departments propose that a prevailing party, in the case of single determinations, would be the party whose offer is selected by the certified IDR entity. In the case of batched determinations, the prevailing party would be the party with the most determinations in its favor. The Departments propose that the non-prevailing party, in the case of single determinations, would be the party whose offer is not selected by the certified IDR entity and would be responsible for paying the certified IDR entity fee. In the case of batched determinations, the party with the fewest determinations in its favor is considered the non-prevailing party and would be responsible for paying the certified IDR entity fee. Codifying these definitions, already used by the certified IDR entities, would increase the clarity and consistency of regulatory requirements related to payment determinations and improve the parties' understanding of certified IDR entity determinations.

The Departments solicit comment on the proposals related to payment determination and notification.

5. Extension of Time Periods for Extenuating Circumstances

Under section 9816(c)(9) of the Code, section 716(c)(9) of ERISA, and section 2799A–1(c)(9) of the PHS Act, and as explained in the October 2021 interim final rules and subregulatory guidance issued by the Departments, the time periods required under the No Surprises

Act and 26 CFR 54.9816–8T, 29 CFR 2590.716–8, and 45 CFR 149.510 (other than the timing of the payments to prevailing parties) may be modified in the case of extenuating circumstances at the Departments' discretion.

Under current regulations,¹⁸⁵ the Departments may extend time periods on a case-by-case basis if the extension is necessary to address delays due to matters beyond the control of the parties or for good cause, such as due to a natural disaster that prevents certified IDR entities, providers, facilities, providers of air ambulance services, plans, or issuers from complying with an applicable time period. In addition, the parties must attest that prompt action will be taken to ensure that a payment determination is made as soon as administratively practicable under the circumstances. As the October 2021 interim final rules explain, parties may request an extension by submitting a Request for Extension due to Extenuating Circumstances through the Federal IDR portal, including an explanation about the extenuating circumstances and why the extension is needed.¹⁸⁶ However, requesting an extension does not toll any of the Federal IDR process timeframes unless and until an extension is granted.

Therefore, under this authority, the Departments propose, in accordance with sections 9816(c)(9) of the Code, section 716(c)(9) of ERISA, and section 2799A–1(c)(9) of the PHS Act, to amend and add new provisions to 26 CFR 54.9816–8(g), 29 CFR 2590.716–8(g), and 45 CFR 149.510(g). The Departments are proposing to amend 26 CFR 54.9816–8T(g), 29 CFR 2590.716–8(g), and 45 CFR 149.510(g) to combine the information in existing paragraphs (g)(1)(i) and (g)(1)(ii) into paragraph (g)(1)(i) and to establish at paragraph (g)(1)(i) that the Departments, or at the request of a certified IDR entity or a party, would determine whether an extension is necessary because the parties or certified IDR entity cannot meet applicable timeframes due to matters beyond the control of the certified IDR entity or one or both parties, or for other good cause. Under these proposed rules, the Departments would provide an extension of the time periods if they identify unforeseen or good cause delays on a case-by-case basis, as opposed to solely relying on one of the parties to submit an extension request. The Departments may detect these issues before either party would and could immediately grant the

necessary extension without having to wait for the submission of a formal request. Further, these proposed changes would create greater flexibility for certified IDR entities. For example, a certified IDR entity may receive a high volume of disputes that could lead to the certified IDR entity being unable to resolve payment determinations within the 30-business-day period. With the proposed changes to 26 CFR 54.9816–8(g)(1)(i), 29 CFR 2590.716–8(g)(1)(i), and 45 CFR 149.510(g)(1)(i), the certified IDR entity could submit an extension request for the Departments' consideration. Often, the certified IDR entity may be best positioned to identify issues that warrant such an extension on a case-by-case basis.

The Departments also propose to establish at 26 CFR 54.9816–8(g)(1)(ii), 29 CFR 2590.716–8(g)(1)(ii), and 45 CFR 149.510(g)(1)(ii) a generally applicable extension of time periods when the Departments determine that such extension is necessary due to extenuating circumstances that contribute to systematic delays in processing disputes under the Federal IDR process, such as a high volume of disputes or Federal IDR portal system failures. The Departments would post a public notice about any generally applicable extensions of time periods. For example, this proposed flexibility would be used, in addition to the generally applicable permission to toll timeframes during pending requests for additional information, to provide extensions when the volume of disputes initiated exceeds the certified IDR entities' capacity to complete eligibility determinations within the 5-business-day timeframe proposed in these rules, and to provide extensions when systematic failures within the Federal IDR portal impact the parties' and or certified IDR entities' ability to comply with any of the required timeframes in the Federal IDR process.

Under extenuating circumstances caused by an unforeseen high volume of disputes, the Departments would grant certified IDR entities an extension of the eligibility determination timeframe. The amount of time provided in such an extension would be determined by the Departments based on the volume of disputes and the number of active certified IDR entities at the time the extension is granted. An extension of the eligibility determination deadline, if granted by the Departments, would not alter the length of the subsequent timeframes in the Federal IDR process. Rather, the extended eligibility deadline would be a starting point for the other established IDR deadlines. Accordingly, the submission of an offer would be due

10 business days after the extended eligibility determination timeframe and the payment determination would be due 30 business days after the extended eligibility determination timeframe, in accordance with the requirements established in statute and regulation.

For example, if while monitoring IDR initiation data, the Departments detect a high volume of disputes initiated during the month of June and anticipate that the volume increase would prevent the certified IDR entities from reaching a payment determination within 30 business days of final selection of the certified IDR entity, as required by regulation, the Departments would post a public notice indicating a 30-business-day extension of the eligibility timeframe for all disputes in which the certified IDR entity was selected on June 1 through July 1. Rather than the 5-business-day eligibility determination deadline, certified IDR entities would have 30 business days to review eligibility on disputes initiated within this time period. In this example, a certified IDR entity was selected for a dispute on June 5 and attested to having no conflict of interest with respect to the dispute on June 6. The Departments would provide notice to the disputing parties that the certified IDR entity was selected on June 7, which would be the date of final selection of the certified IDR entity. The certified IDR entity would timely communicate the eligibility determination for the dispute by June 20, under the extension granted by the Departments. The date of eligibility determination (June 20) would become day 0 for calculating the remaining deadlines in the timeframe for the IDR process. As such, the submission of offer would be due from the disputing parties 10 business days (July 5) after the eligibility determination, and the payment determination would be due from the certified IDR entity 30 business days (August 2) after the eligibility determination.

Under a second scenario, when a systematic failure of the Federal IDR portal impacts parties' or certified IDR entities' ability to comply with one or more of the required Federal IDR process timeframes, the Departments would grant the parties and/or the certified IDR entities an extension to the timeframe(s) which the Departments determine relevant. An extension under these circumstances would not alter the duration of the subsequent timeframes within the Federal IDR process, but, similar to the extension of eligibility determinations, would update the start dates of the subsequent timeframes. For example, if a systems failure crashed the

¹⁸⁵ 26 CFR 54.9816–8T(g)(1), 29 CFR 2590.716–8(g)(1), and 45 CFR 149.510(g)(1).

¹⁸⁶ 86 FR 56009 through 56010.

Federal IDR portal on June 1 and 2, the Departments could grant a general extension across all the Federal IDR process timeframes and apply an additional 2 business days to each relevant deadline on active disputes in the portal. In this example, if a non-initiating party's deadline to submit the notice of IDR initiation response occurred during the portal outage, they would receive a 2-business-day extension beginning the day that the systems failure is rectified. The party's new deadline for submitting the notice of IDR initiation response would be June 6.

Under these proposed changes the Departments would extend the time periods under the Federal IDR process without requiring a case-by-case analysis of individual extension requests. The Departments are of the view that granting certain extensions in this manner would provide protection for parties engaged in the Federal IDR process from the impact of systematic processing delays and ensure that unforeseen circumstances do not unfairly disadvantage a party or hinder its ability to comply with the Federal IDR process timeframes. This would also provide more transparency into the timing it would take for a dispute to be processed.

The Departments seek comment on these proposals.

F. Federal IDR Process Registration of Group Health Plans, Health Insurance Issuers, and Federal Employees Health Benefits Carriers

The proposed addition of 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530 would require that plans and issuers subject to the Federal IDR process submit certain information to the Departments through a registry. As explained later in section IV., OPM's regulations at 5 CFR 890.114 would require Federal Employees Health Benefits (FEHB) Program carriers to submit certain information through this registry. Upon submission of this information, each plan, issuer, or FEHB carrier would receive an IDR registration number ("registration number"). This registration number would make it easier for parties initiating disputes to acquire the information needed to ensure those disputes are eligible for the Federal IDR process. The registration number would help parties distinguish between different types of coverage (such as distinguishing between insurance coverage offered by an issuer, a self-insured group health plan for which an issuer serves as a TPA, or coverage offered by a FEHB carrier). The registry would be searchable, and

parties would have access to the relevant registration number through the disclosure described in proposed 26 CFR 54.9816–6(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d), the notice described in proposed 26 CFR 54.9816–8(b)(1)(ii), 29 CFR 2590.716–8(b)(1)(ii), and 45 CFR 149.510(b)(1)(ii), and the response notice in proposed 26 CFR 54.9816–8(b)(1)(iii), 29 CFR 2590.716–8(b)(1)(iii), and 45 CFR 149.510(b)(1)(iii). Specifically, plans, issuers, and FEHB carriers would be required to provide the following information upon registration: (1) the legal business name (if any) of the group health plan, issuer, or FEHB carrier and, if applicable, the legal business name of the group health plan sponsor; (2) whether the plan or coverage is a self- or fully-insured group health plan subject to ERISA, individual health insurance coverage, a plan offered by a FEHB carrier, a self- or fully-insured non-Federal governmental plan, or a self- or fully-insured church plan; (3) the State(s) in which the plan or coverage is subject to a specified State law for any items or services to which the protections against balance billing apply; (4) the State(s) in which the plan or coverage is subject to an All Payer Model Agreement under section 1115A of the Social Security Act for any items or services to which the protections against balance billing apply; (5) for self-insured group health plans not otherwise subject to State law, any State(s) in which the group health plan has properly effectuated an election to opt in to a specified State law, if that State allows a plan not otherwise subject to the State law to opt in; and, for FEHB plans that adopt a specified State law pursuant to their FEHB carrier's contract terms, any State(s) in which they have made such an adoption; (6) contact information, including a telephone number and email address, for the appropriate person or office to initiate open negotiations for purposes of determining an amount of payment (including cost sharing) for such item or service; (7) the 14-digit Health Insurance Oversight System (HIOS) identifier, or, if the 14-digit HIOS identifier has not been assigned, the 5-digit HIOS identifier, or if no HIOS identifier is available, the plan's or the plan sponsor's Employer Identification Number (EIN) and the plan's plan number (PN), if a PN is available; or for FEHB carriers, the applicable contract number(s) and plan code(s); (8) any additional information needed to identify the plan or issuer and the applicable Federal and State requirements for determining

appropriate out-of-network payment rates for items or services to which the protections against balance billing apply, as specified by the Departments in guidance, or such additional information needed with respect to FEHB carriers as specified by OPM in guidance; and (9) any additional information needed for purposes of administrative fee collection, as specified by the Departments in guidance, or such additional information needed with respect to FEHB carriers as specified by OPM in guidance.

The Departments would gather the registration information in a centralized IDR registry, which the Departments would make available through the Federal IDR portal to parties seeking to initiate an open negotiation or a dispute. The Departments solicit comment on whether to also make the registry available to the public.

Plans and issuers with coverage subject to the Federal IDR process on the effective date of the final rules would be required to register within 30 business days after the effective date of the final rules, if finalized, while plans and issuers that begin offering coverage subject to the Federal IDR process after the effective date of the final rules, if finalized, would be required to complete their initial registration on the date that they begin offering such coverage. In the event that the registry becomes available after the effective date of the final rule, plans and issuers would be required to register 30 business days after the registry becomes available. Registered plans and issuers would be required to update the information associated with their Federal IDR registration number through the Federal IDR portal within 30 business days of any change to the information reported in the registry and to confirm accuracy annually during the fourth quarter of each calendar year. A group health plan's or health insurance issuer's initial registration and subsequent updates to its registration information could be completed and submitted by a third party with authority to act on behalf of the group health plan or health insurance issuer. However, if a group health plan or health insurance issuer chooses to enter into such an agreement with a third party, the plan or issuer would retain responsibility for compliance with the proposed registration requirements.

The Departments solicit comment on whether plans and issuers with coverage subject to the Federal IDR process on the effective date of the final rules would be able to register by 30 business days after the effective date of the final

rules or would need additional time to register. The Departments also solicit comment on the potential impact on providers, facilities, and providers of air ambulance services if plans and issuers are permitted additional time to register.

In addition, the Departments are aware that plans and issuers often engage TPAs or other service providers to manage payment disputes subject to the Federal IDR process on their behalf. Accordingly, to reflect this existing industry practice, the Departments propose that the aforementioned requirements with respect to the registry under proposed 26 CFR 54.9816–9(b)(1)–(3), 29 CFR 2590.716–9(b)(1)–(3), and 45 CFR 149.530(b)(1)–(3) may be performed by a TPA or service provider with authority to act on behalf of the group health plan or health insurance issuer offering group or individual health insurance coverage subject to the Federal IDR process. The Departments propose that if the registration requirements are performed by such TPA or service provider, the group health plan or health insurance issuer offering group or individual health insurance coverage must require that such TPA or service provider clearly delineate each group health plan or health insurance issuer offering group or individual health insurance coverage for which the TPA or service provider has authority to act. Even where a third party performs the registration requirements, these proposed rules would still require that each group health plan or health insurance issuer offering group or individual health insurance coverage subject to the Federal IDR process be assigned a unique registration number. The Departments also propose to make clear that if such third party fails to provide the information in compliance with proposed 26 CFR 54.9816–9(b)(1)–(3), 29 CFR 2590.716–9(b)(1)–(3), and 45 CFR 149.530(b)(1)–(3), the plan or issuer would be in violation of the requirements of this section. The Departments solicit comments on this approach and whether there are any additional clarifications or flexibilities needed to ensure that the registry includes all relevant information for all parties that engage in the Federal IDR process.

Proposed 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530 are intended to address concerns that providers, facilities, and providers of air ambulance services shared with the Departments about initiating both open negotiation and the Federal IDR process. Initiating parties, particularly those that are providers, facilities, and providers of air ambulance services, report that they

are often missing or cannot locate key information needed for open negotiation and the Federal IDR process despite the disclosure requirements established in sections 26 CFR 54.9816–6T(d)(1), 29 CFR 2590.716–6(d)(1), and 45 CFR 149.140(d)(1). First, the parties report difficulty finding the appropriate contact information to initiate open negotiation and the Federal IDR process. Second, they report difficulty determining whether the out-of-network rate for applicable items or services is governed by State or Federal law, including whether a self-insured plan has opted into a specified State law in States that allow these opt-ins. Third, they assert that it can be difficult to differentiate between multiple group health plans offered by the same plan sponsor, as well as between a fully-insured plan offered by an issuer versus a self-insured group health plan administered by that issuer in its capacity as a TPA. Likewise, issuers and group health plan sponsors expressed concerns to the Departments that providers, facilities, and providers of air ambulance services sometimes initiate open negotiations or the Federal IDR process using incorrect contact information, or even initiate negotiations against the wrong plan or issuer. These communication difficulties present problems related to: (1) initiating open negotiation and the Federal IDR process with the correct party; (2) determining whether the items or services are eligible for the Federal IDR process; and (3) initiating correctly batched and bundled disputes that group together only items and services paid by the same plan or issuer.

Given these concerns, the Departments are proposing to create a single registry of plans and issuers subject to the Federal IDR process to foster better communication between disputing parties. These changes would benefit all parties by reducing the need for time-consuming and expensive follow-up by disputing parties, certified IDR entities, and the Departments to obtain necessary information.

The Departments recognize that plans and issuers have expressed concern about the burden of additional required disclosures. However, while plans and issuers would incur some additional administrative burden from providing plan and contact information through mandatory registration, the Departments are of the view that this approach also mitigates some administrative burden if the registry reduces the number of incorrectly submitted or incorrectly batched disputes.

The Departments seek to minimize the burden and ease compliance for plans

and issuers by avoiding the issuance of duplicate registration numbers for the same plan or a single registration number for multiple plans. OPM similarly seeks to resolve concerns as discussed above, minimize burden and ease compliance for FEHB carriers. To that end, the Departments seek comment on the best way to separately identify multiple group health plans offered by the same plan sponsor, or multiple FEHB plans offered by the same FEHB carrier, and whether plans, issuers, or FEHB carriers would need to register multiple points of contact in their submissions to the IDR registry.

To further minimize the reporting burden on plans, issuers, and FEHB carriers, the Departments are considering and solicit comment on whether to require plans, issuers, and FEHB carriers to register only after submitting or receiving their first open negotiation notice or only after receiving a certain number of disputes in a calendar year (for example, five disputes). Many group health plans are party to few, or no surprise billing disputes annually; excepting such parties from the registration requirement may minimize the regulatory burden on group health plans that receive few or no surprise billing disputes in a given year and could keep the registry size manageable. However, if registration is not universal, providers, facilities, and providers of air ambulance services may still experience difficulty accessing all information needed to initiate open negotiation and engage in the Federal IDR process with the subset of plans and issuers that would not be required to register.

The Departments expect that providers, facilities, and providers of air ambulance services would make decisions about how and whether to initiate batched disputes based on the information submitted to the registry. The Departments, therefore, are considering and solicit comment on appropriate measures to address circumstances in which a provider or facility initiates a batched dispute in good faith based on information submitted by a plan or issuer as part of its registration and this dispute is later determined to be incorrectly batched.

Finally, the Departments seek comment on this registration policy and what approaches should be adopted to ensure its accuracy, as well as whether submission of the offer as described in newly redesignated 26 CFR 54.9816–8(c)(5)(i), 29 CFR 2590.716–8(c)(5)(i), and 45 CFR 149.510(c)(5)(i) should be restricted until completion of the proposed registration.

G. Transparency Regarding In-Network and Out-of-Network Deductibles and Out-of-Pocket Limitation

In addition to the challenges discussed previously, some interested parties have stated that it is difficult to know at the point of care whether a patient's plan or coverage is subject to Federal or State surprise billing protections. In general, section 9816(e) of the Code, section 716(e) of ERISA, and section 2799A–1(e) of the PHS Act, as added by section 107 of division BB of the CAA, require a group health plan or a health insurance issuer offering group or individual health insurance coverage and providing or covering any benefit with respect to items or services to include, in clear writing, on any physical or electronic plan or insurance ID card issued to participants, beneficiaries, or enrollees, any applicable deductibles, any applicable out-of-pocket maximum limitations, and a telephone number and website address for individuals to seek consumer assistance information, such as information related to in-network hospitals and urgent care facilities. The Departments are considering, under the general rulemaking authority granted to the Departments to establish the Federal IDR process under section 9816(c)(2)(A) of the Code, section 716(c)(2)(A) of ERISA, and section 2799A–1(c)(2)(A) of the PHS Act, whether requiring that each plan or insurance card include information about whether the individual's plan or coverage is subject to Federal or State surprise billing protections would facilitate information sharing with respect to the Federal IDR process. The Departments acknowledge that the ID cards may not be able to clarify the applicability of the Federal IDR process in all contexts, because in some States the Federal protections will apply for some items, services, and providers, while the State protections will apply for others. The Departments seek comment on this potential approach, including whether ID cards should display the plan or coverage type (such as, self-insured or fully-insured ERISA plan, non-Federal governmental plan, church plan, FEHB plan, or individual health insurance coverage), as well as whether a symbol or code could be included on cards that would indicate the applicable regulatory authority of the plan or coverage (that is, State or Federal entity, or both).

H. Applicability

1. Applicability Dates

These proposed rules would modify and add to certain provisions of the July 2021 and October 2021 interim final

rules. Those interim final rules generally became applicable for plan years (in the individual market, policy years) beginning on or after January 1, 2022.

The provision proposed in 26 CFR 54.9816–3, 29 CFR 2590.716–3, and 45 CFR 149.30 to add the definition of bundled payment arrangement would apply beginning on the effective date of the final rules. These proposed rules would codify the existing definition set forth in guidance and would not require providers, facilities, providers of air ambulance services, plans, issuers, or certified IDR entities to modify existing processes or their own portals or systems to align with the proposed definition. Therefore, it would be appropriate for this definition to become applicable immediately upon the effective date of the final rules, if finalized.

The provision in proposed new 26 CFR 54.9816–6A, 29 CFR 2590.716–6A, and 45 CFR 149.100 that plans and issuers communicate information using CARCs and RARCs, as specified in guidance, would apply beginning on the effective date of the final rules, if finalized. The Departments would issue future guidance on the use of CARCs and RARCs in both electronic transactions and formats outside the purview of the HIPAA transaction standards, including paper remittance advice, to implement this proposed regulatory requirement. Should this proposal be finalized, the Departments recognize that plans and issuers would need time to make systems changes and other modifications to operationalize the use of CARCs and RARCs and are considering an approach under which the final rules would establish the implementation timeframe for the use of CARCs and RARCs following the issuance of guidance. For example, the final rules could specify that the requirement to use a specified CARC or RARC applies beginning on the date that is a certain timeframe, such as 6 months or 1 year, after the issuance of guidance. Alternatively, the final rules could provide that guidance issued by the Departments would establish an interval of not less than, for example, 6 months between when guidance is issued and when plans and issuers must begin using a specified CARC or RARC. This would balance plans' and issuers' interest in certainty in a minimum implementation timeframe while allowing for flexibility where the Departments determine necessary. The Departments seek comments on these potential approaches, including what timeframe would provide plans and issuers sufficient time to comply.

The proposed modifications to the regulations at 26 CFR 54.9816–6(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d) addressing information to be shared about the QPA would apply to disclosures required to be provided on or after the effective date of the final rules, if finalized. The Departments note that many of these proposed changes are simply corrections or clarifications that would not substantially affect current plan or issuer operations. While these disclosures would be required to include some new content—namely a statement that a provider, facility, or provider of air ambulance services must notify the Departments when initiating open negotiation, the legal business name of the plan and plan sponsor (if applicable) and issuer, and the registration number assigned under these proposed rules—the Departments do not anticipate significant operational burden for plans and issuers to modify existing processes to include this information. The proposed regulatory text makes clear that plans and issuers would not be required to include a statement about notifying the Departments to initiate open negotiation until the open negotiation notice can be submitted through the Federal IDR portal. Further, plans and issuers would not be required to include their assigned registration number until the Federal IDR registry becomes available and the plan or issuer is registered.

The proposed modifications to the Federal IDR process that would apply to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the final rules, if finalized, include:

- The requirements for batched qualified IDR items and services in 26 CFR 54.9816–8(a)(2)(i), 29 CFR 2590.716–8(a)(2)(i) and 45 CFR 149.510(a)(2)(i);
- The provisions regarding the open negotiation notice, open negotiation response notice, notice of IDR initiation, and notice of IDR initiation response in 26 CFR 54.9816–8(b), 29 CFR 2590.716–8(b) and 45 CFR 149.510(b);
- The proposed rules governing the selection of a certified IDR entity, the Federal IDR process eligibility review, the authority to continue negotiations or withdraw, and the treatment of batched and bundled qualified IDR items and services in 26 CFR 54.9816–8(b) and (c)(1) through (c)(4), 29 CFR 2590.716–8(b) and (c)(1) through (c)(4), and 45 CFR 149.510(b) and (c)(1) through (c)(4); and
- Modifications made to the deadline for the submission of offers and payment determination and notification

in 26 CFR 54.9816–8(c)(5)(i) and (ii), 29 CFR 2590.716–8(c)(5)(i) and (ii), and 45 CFR 149.510(c)(5)(i) and (ii); and

- Modifications made to the suspension of certain subsequent IDR requests and subsequent submission of requests submitted in 26 CFR 54.9816–8(c)(5)(vii)(B) and (C), 29 CFR 2590.716–8(c)(5)(vii)(B) and (C), and 45 CFR 149.510(c)(5)(vii)(B) and (C).

The Departments recognize that each of these proposed changes would require providers, facilities, providers of air ambulance services, plans, issuers, and certified IDR entities to modify existing processes and their own portals or systems to align with the proposed requirements. For example, some certified IDR entities may need to update their own proprietary portals used to facilitate their eligibility and payment determinations to align with the new batching requirements. Further, the Departments would need to design and implement system changes to the Federal IDR portal, such as allowing the disputing parties to submit new and updated notices through the Federal IDR portal and updating the system's collection of newly permissible batched disputes. This proposed applicability date is intended to ensure the Departments, disputing parties, and certified IDR entities have sufficient time to understand the proposed changes to the Federal IDR process and modify current operations.

The proposed modifications to the regulations at 26 CFR 54.9816–8(d), 29 CFR 2590.716–8(d), and 45 CFR 149.510(d) addressing the time and manner of payment and collection of the administrative and certified IDR entity fees, the procedures in the event that either party fails to timely pay the administrative or certified IDR entity fee, and the framework for establishing the administrative and certified IDR entity fee structures would apply to disputes initiated on or after January 1, 2025. Similar to the proposed open negotiation, IDR initiation, and batched determination requirements, the Departments would need sufficient time to modify current operations so that the Departments could charge and collect the administrative fees directly from the parties, which are currently collected by the certified IDR entities and subsequently remitted to the Departments. The Departments would also need to update their payment systems and the Federal IDR portal to implement the proposed consequences when either party fails to pay the certified IDR entity fee or the administrative fee, such as the proposals to close a dispute when the initiating party fails to pay the administrative fee

on time and to prohibit the non-initiating party from submitting an offer when the non-initiating party fails to pay the administrative fee or certified IDR entity fee in accordance with the proposed timeframes.

The proposed changes at 26 CFR 54.9816–8(e)(2)(vi), (viii), and (ix), 29 CFR 2590.716–8(e)(2)(vi), (viii), and (ix), and 45 CFR 149.510(e)(2)(vi), (viii), and (ix) regarding the certified IDR entity's controls to prevent and detect improper financial activities, and procedures to retain the certified IDR entity fee and administrative fee are minor in nature, and therefore these proposed rules would be applicable upon the effective date of the final rules, if finalized.

The proposed changes at 26 CFR 54.9816–8(g), 29 CFR 2590.716–8(g), and 45 CFR 149.510(g) regarding the extension of time periods for extenuating circumstances would be applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the final rules, if finalized.

Until the relevant applicability date for the requirements of 26 CFR 54.9816–8, 29 CFR 2590.716–8, and 45 CFR 149.510, plans, issuers, providers, facilities, providers of air ambulance services, and certified IDR entities are required to continue to comply with the corresponding section of 26 CFR 54.9816–8, 29 CFR 2590.716–8, and 45 CFR 149.510, contained in the CFR as of October 25, 2022. In order to ensure compliance with these proposed requirements, the Departments would generally use existing processes for enforcing the relevant provisions of the Code, ERISA, and PHS Act that apply to group health plans and health insurance issuers, including the provisions added by the No Surprises Act.¹⁸⁷ The Departments intend to monitor for non-compliance with these proposed requirements when applicable, if finalized.

Finally, provisions that would establish the Federal IDR registry, and the associated requirements at proposed 26 CFR 54.9816–9, 29 CFR 2590.716–9,

¹⁸⁷ See Section 504 of ERISA (providing DOL with authority to determine whether any person has violated or is about to violate any provision of ERISA or any regulation or order thereunder, including with regard to group health plans); section 2723 of the PHS Act and 45 CFR 150.101 *et seq.* (setting forth HHS's enforcement procedures related to the provisions of title XXVII of the PHS Act, including bases for initiating investigations and performing market conduct examinations). For an overview of applicable enforcement mechanisms, see also Staman, Jennifer (2020). "Federal Private Health Insurance Market Reforms: Legal Framework and Enforcement," Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/R/R46637>.

and 45 CFR 145.530 would become applicable on the effective date of the final rules, if finalized. Pursuant to the establishment of the registry, the requirements in proposed new 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 145.530 would require that each plan or issuer subject to the Federal IDR process complete its initial registration in the newly established Federal IDR registry by the later of the date that is 30 business days after the registry becomes available or the date the group health plan or health insurance issuer begins offering group or individual health insurance coverage.

The Departments seek comment on whether disputing parties and certified IDR entities would need additional time to implement the proposed modifications after the final rules are published, if finalized.

2. Applicability of Surprise Billing Protections to Ground Ambulance Services

The Departments have received questions about how the surprise billing protections under the No Surprises Act apply to ground ambulance services. In particular, the Departments understand that some plans and issuers have construed a statement in the preamble to the July 2021 interim final rules addressing when a participant, beneficiary, or enrollee is in a condition to receive notice and provide consent to waive surprise billing protections for post-stabilization services¹⁸⁸ to mean that the No Surprises Act surprise billing protections apply to post-stabilization inter-facility ground ambulance transports. The Departments do not interpret the No Surprises Act's surprise billing provisions to apply to emergency or non-emergency ground ambulance services.¹⁸⁹ This includes transport by ground ambulance after a participant, beneficiary, or enrollee has been stabilized and needs to be

¹⁸⁸ The preamble to the July 2021 interim final rules states, "In contrast to situations where a participant, beneficiary, or enrollee is able to travel using nonmedical transportation or nonemergency medical transportation following stabilization, in the event that the individual requires medical transportation to travel, including transportation by either ground or air ambulance vehicle, the individual is not in a condition to receive notice or provide consent. Therefore, the surprise billing protections continue to apply to post-stabilization services provided in connection with the visit for which the individual received emergency services." 86 FR 36872, 36881 (July 13, 2021).

¹⁸⁹ Beginning in 2025, the President's Fiscal Year 2024 budget proposal extends surprise billing protections to ground ambulance services across the commercial market. See U.S. Department of Health and Human Services, Fiscal Year 2024 Budget in Brief, (2023), p.99, available at <https://www.hhs.gov/sites/default/files/fy-2024-budget-in-brief.pdf>.

transferred to another facility for continued observation or treatment.¹⁹⁰ Instead, Congress enacted section 117 of the No Surprises Act, which requires the Departments 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 advisory committee must submit a report that includes recommendations for the disclosure of charges and fees for ground ambulance services and insurance coverage, consumer protections and enforcement authorities of the Departments and States, and the prevention of balance billing to consumers.¹⁹¹

III. Severability

It is the Departments' intent that if any provision of these proposed rules, if finalized, is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, these rules shall be construed so as to continue to give maximum effect to these rules as permitted by law, unless the holding shall be one of utter invalidity or unenforceability. In the event a provision is found to be utterly invalid or unenforceable, the provision shall be severable from these proposed rules as finalized, as well as the interim final rules and final rules they amend and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

According to the statute,¹⁹² the Departments must establish a Federal IDR process that plans and issuers and nonparticipating providers and facilities may utilize to resolve certain disputes regarding out-of-network rates under section 9816 of the Code, section 716 of ERISA, and section 2799A-1 of the PHS Act, including the time, manner, and

amount each party to a determination must pay to participate in the Federal IDR process. Further, under section 9816(a)(2)(B)(ii) of the Code, section 716(a)(2)(B)(ii) of ERISA, and section 2799A-1(a)(2)(B)(ii) of the PHS Act, the Departments have authority to establish through rulemaking the information that a plan or issuer must share with a provider or facility when determining the QPA, including the form and manner of such disclosures. Under section 9816(c)(9) of the Code, section 716(c)(9) of ERISA, and section 2799A-1(c)(9) of the PHS Act, the Departments also may, at their discretion, modify any deadline or other timing requirement of the Federal IDR process (except for the timing of payment following a payment determination) in cases of extenuating circumstances, as specified by the Departments, or to ensure that all claims that are subject to the 90-calendar-day cooling-off period submitted to the Federal IDR process are in fact eligible for the Federal IDR process.

For the reasons described in section II. of this preamble, the Departments are of the view that their authority to implement each of these aspects in the proposed regulation is well-supported in law and practice and should be upheld in any legal challenge. The Departments are also of the view that the exercise of their authority reflects sound policy. However, if any portion of these proposed rules is declared invalid, the Departments intend that the various aspects related to the Federal IDR process be severable. For example, if a court were to find unlawful (1) the requirement to use CARC and RARCs, (2) the standards for the open negotiation period, (3) the provision for the treatment of batched determinations, (4) the provision for departmental eligibility review, (5) the administrative fee requirements, or (6) the provision of extensions of timeframes under extenuating circumstances, or some combination thereof, the Departments still would intend the remaining features of the policy to stand. Further, the Departments also intend for parts of certain provisions in these rules to be severable. For example, if a court were to find unlawful (1) the policy of batching qualified IDR items and services furnished to a single patient on the same or consecutive dates of service and billed on the same claim form (single patient encounter), (2) the policy of batching qualified IDR items and services billed under the same service code or a comparable code under a different procedural coding system, or (3) the policy of batching anesthesiology, radiology, pathology,

and laboratory qualified IDR items and services under service codes belonging to the same Category I CPT code section, or some combination thereof, the Departments still would intend the remaining features of the policy to stand.

While the proposed policies in combination in these proposed rules would ameliorate different difficulties in the Federal IDR process and result in a more efficient and transparent process for the disputing parties and certified IDR entities, the Departments intend for each of the proposed policies to function independently and be severable from another. The Departments have added severability clauses to these proposed rules to emphasize the Departments' intent that, to the extent a reviewing court holds that any provision of the final rules is unlawful, the remaining rules should take effect and be given the maximum effect permitted by law. The Departments have also added severability clauses to these proposed rules to emphasize the Departments' intent that the provisions in 26 CFR 54.9816-6A, 54.9816-6, 54.9816-8, and 54.9816-9; 29 CFR 2590.716-6A, 2590.716-6, 2590.716-8, and 2590.716-9; and 45 CFR 149.100, 149.140, 149.510 and 149.530 are intended to be severable from one another.

The proposed severability provisions in these rules, if finalized, would not conflict with the proposed severability provisions in the IDR Process Fees proposed rules, if those provisions are finalized. In the IDR Process Fees proposed rules the Departments proposed severability provisions in new proposed paragraphs 26 CFR 54.9816-8(d)(3)(i) and (ii), 29 CFR 2590.716-8(d)(3)(i) and (ii), and 45 CFR 149.510(d)(3)(i) and (ii). Those proposed paragraphs state that if any of the administrative fee or certified IDR entity fee proposals in the IDR Process Fees proposed rules, as finalized, are held to be unlawful by a court, the remaining rules should take effect and be given the maximum effect permitted by law.

If the severability provisions proposed in the IDR Process Fees proposed rules are finalized and subsequently, the severability provisions proposed in these rules in new proposed paragraphs 26 CFR 54.9816-8(i)(1) and (2), 29 CFR 2590.716-8(i)(1) and (2), and 45 CFR 149.510(i)(1) and (2) are also finalized, the Departments would remove the severability provisions proposed in the IDR Process Fees proposed rules at 26 CFR 54.9816-8(d)(3)(i) and (ii), 29 CFR 2590.716-8(d)(3)(i) and (ii), and 45 CFR 149.510(d)(3)(i) and (ii). The purpose for this proposed approach would be to

¹⁹⁰ In contrast, if a plan or issuer provides or covers benefits for air ambulance services (such as inter-facility air ambulance transports), those services are subject to the No Surprises Act surprise billing protections. See FAQs about Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 55, Q7 (Aug. 19, 2022), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ehsa/our-activities/resource-center/faqs/aca-part-55.pdf> and <https://www.cms.gov/files/document/faqs-part-55.pdf>.

¹⁹¹ For more information about the Advisory Committee on Ground Ambulance and Patient Billing, see <https://www.cms.gov/regulations-guidance/advisory-committees/advisory-committee-ground-ambulance-and-patient-billing-gapb>.

¹⁹² Sections 9816(c)(2)(A) and 9817(b)(2)(A) of the Code, sections 716(c)(2)(A) and 717(b)(2)(A) of ERISA, and sections 2799A-1(c)(2)(A) and 2799A-2(b)(2)(A) of the PHS Act.

simplify the Federal IDR process regulations and have one regulation section for the severability provisions applicable to the entire Federal IDR process, as proposed 26 CFR 54.9816–8(i)(1) and (2), 29 CFR 2590.716–8(i)(1) and (2), and 45 CFR 149.510(i)(1) and (2).

IV. Overview of the Proposed Rules—Office of Personnel Management

OPM proposes to amend existing 5 CFR 890.114(a) to include references to the Departments' regulations.¹⁹³ OPM has the responsibility of administering the Federal Employees Health Benefits (FEHB) Program. This responsibility includes maintaining oversight and enforcement authority for FEHB plans, which are Federal governmental plans. In the July and October 2021 interim final rules, OPM adopted the Departments' regulations that implement the sections of the Code, ERISA, and the PHS Act that are referenced in 5 U.S.C. 8902(p). Generally, under 5 U.S.C. 8902(p), each FEHB contract must require a carrier to comply with requirements described in the Code, ERISA, and PHS Act in the same manner as they apply to a group health plan or health insurance issuer.

Subject to OPM regulations and contract provisions, FEHB carriers must comply with the specified provisions of the Departments' regulations. The proposed amendments to 5 CFR 890.114 would allow for continued conformity, oversight, and enforcement. Specifically, through 5 CFR 890.114 and its proposed amendments, FEHB carriers and their plans would be required to comply with all provisions of these proposed rules. Among other things, FEHB carriers would be required to:

- Comply with the proposed rules' new requirements relating to the disclosure of information that FEHB carriers must include along with the initial payment or notice of denial of payment for certain items and services subject to the surprise billing protections in the No Surprises Act;
- Communicate information by using CARCs and RARCs when providing any paper or electronic remittance advice to an entity that does not have a contractual relationship with the FEHB carrier;

- Comply with amended requirements related to the open negotiation period preceding the Federal IDR process, the initiation of the Federal IDR process, the Federal IDR dispute eligibility review, and the payment and collection of administrative fees;

- Comply with amended requirements related to the extension of timeframes due to extenuating circumstances, batched items and services, and bundled payment arrangements; and

- Register in the Federal IDR portal established by the Departments and provide the required data elements as applicable to FEHB carriers.

V. Economic Impact and Paperwork Burden

A. Summary—Departments of Health and Human Services and Labor

These proposed rules would add new 26 CFR 54.9816–6A, 29 CFR 2590.716–6A, and 45 CFR 149.100 requiring plans and issuers to use CARCs and RARCs, as specified in guidance issued by the Departments, or as required under any applicable, adopted standards and operating rules under 45 CFR part 162, on both electronic and paper remittance advice, to communicate information related to whether a claim for an item or service furnished by an entity that does not have a direct or indirect contractual relationship with the plan or issuer for the furnishing of such item or service under the plan or coverage is subject to the provisions of 26 CFR 54.9816 and 54.9817; 29 CFR 2590.716 and 2590.717; or 45 CFR part 149, subpart B, E, or F. The Departments further propose amendments to existing regulations to specify that plans and issuers must, in the case of air ambulance services, disclose the QPA and certain information about the QPA when cost sharing is calculated using the QPA. These proposed changes would reflect that the term “recognized amount” is not used with respect to air ambulance services and make technical corrections to address omissions where providers of air ambulances were not listed alongside other providers and facilities in the current regulatory text.

The Departments also propose to revise the regulation addressing information to be shared about the QPA to make clear these disclosures are required when the recognized amount (or for air ambulance services, the amount on which cost sharing is based) is the QPA or the amount billed by the provider, facility, or provider of air ambulance services.

The Departments also propose amendments to the content of the statement required under the regulations regarding the information to be shared about the QPA. Specifically, the Departments propose that the required statement specify that the 30-day period for open negotiation is 30 business days; reference providers of air ambulance services (in addition to providers and facilities); specify that a party wishing to initiate open negotiation must provide the required notice within 30 business days of receiving an initial payment or notice of denial of payment; and include language notifying the provider, facility, or provider of air ambulance services that they must notify the Departments and the plan or issuer to initiate the open negotiation period.¹⁹⁴ The Departments also propose to require plans and issuers to disclose the legal business name of the plan (if any) or issuer; the legal business name of the plan sponsor (if applicable); and the registration number assigned under proposed 26 CFR 54.9816–9, 29 CFR 2590.716–9, or 45 CFR 149.530, as applicable, if the plan or issuer is registered with the Federal IDR registry.

These proposed rules also would require the party initiating open negotiations to provide an open negotiation notice and supporting documentation to the other party and the Departments via the Federal IDR portal to initiate the open negotiation period. The Departments also propose to require several new content requirements for the open negotiation notice. Furthermore, these proposed rules would require the party in receipt of the open negotiation notice to provide a response to the open negotiation notice, with specified content, and supporting documentation to the other party and the Departments no later than the 15th business day of the 30-business-day open negotiation period.

In addition, the Departments propose to amend the notice of IDR initiation content requirements to require the initiating party to submit certain additional information in the notice of IDR initiation. The Departments also propose that the non-initiating party must submit a written response to the notice of IDR initiation to the initiating party and to the Departments within 3 business days after the date of IDR initiation. These proposed rules would require the notice of IDR initiation

¹⁹³ OPM also proposes a technical correction in 5 CFR 890.114 that would add a cross-reference to 26 CFR 54.9817–2, which concerns the independent dispute resolution process for air ambulance services. The addition of this cross-reference is necessary because 5 CFR 890.114 also cites to parallel provisions at 29 CFR 2590.717–2 and 45 CFR 149.520.

¹⁹⁴ For a description of the proposal to require parties to notify the Departments when they initiate open negotiation, see section II.D.1. of this preamble.

response to include an attestation that the item or service that is the subject of the dispute is a qualified IDR item or service or an assertion that the item or service is not a qualified IDR item or service, and an explanation and documentation to support the assertion. Furthermore, the Departments propose that the non-initiating party would also be required to indicate in the notice of IDR initiation response whether they agree or object to the initiating party's preferred certified IDR entity and provide a statement designating an alternative preferred certified IDR entity if the non-initiating party objects to the initiating party's preferred certified IDR entity.

These proposed rules would require parties furnishing the open negotiation notice, open negotiation response notice, notice of IDR initiation, and notice of IDR initiation response to provide the notices and supporting documentation to the other party and the Departments on the same day via the Federal IDR portal.

The Departments propose that if the party last in receipt of either the notice of IDR initiation response or the notice of certified IDR entity selection received the notice on the third business day after the date of IDR initiation, the Departments would provide the party 2 additional business days to agree or object to other party's alternative preferred certified IDR entity selection. The Departments propose that if the party agrees with the other party's alternative preferred certified IDR entity and notifies the Departments of such agreement, or if the party fails to notify the Departments of its objection by the fifth business day after the date of IDR initiation, the Departments would select the alternative preferred certified IDR entity as the certified IDR entity for the dispute. The Departments propose that if the party notifies the Departments of its objection to the alternative preferred certified IDR entity by the fifth business day after the date of IDR initiation, the Departments would proceed with random selection of the certified IDR entity.

Furthermore, the Departments propose to specify that the date of preliminary selection of the certified IDR entity would be 3 business days after the date of IDR initiation if the parties jointly selected a certified IDR entity, or 6 business days after the date of IDR initiation if the parties fail to agree and jointly select a certified IDR entity, and the Departments randomly select a certified IDR entity. These proposed rules would establish that if a selected certified IDR entity attests to having a conflict of interest, the

Departments would randomly select another certified IDR entity, and the date of final selection of the certified IDR entity would be the date the Departments provide notice to the parties that the new certified IDR entity has attested that it meets the conflict-of-interest requirements.

The Departments propose to establish several requirements regarding eligibility determinations. Specifically, the Departments propose that after the selected certified IDR entity attests that it meets the conflict-of-interest requirements, the selected certified IDR entity must review the information provided in the notice of IDR initiation and notice of IDR initiation response, as well as any additional information requested and received, and make an eligibility determination no later than 5 business days after the date of final selection of the certified IDR entity.

These proposed rules would also establish a departmental eligibility review when the Departments, in their discretion, determine that application of the departmental eligibility review is necessary to facilitate timely payment determinations or the effective processing of disputes under the Federal IDR process. When the departmental eligibility review is in effect, the Departments would make eligibility determinations, as opposed to the certified IDR entities. The Departments propose to provide reasonable notice before the Departments invoke the departmental eligibility review and before ceasing to use the departmental eligibility review.

The Departments further propose to establish a process for disputes to be withdrawn from the Federal IDR process. Specifically, the Departments propose that a dispute may be withdrawn from the Federal IDR process if: (1) the initiating party provides notification through the Federal IDR portal to the Secretary and the certified IDR entity (if selected) that both parties agree to withdraw the dispute from the Federal IDR process, with signatures from authorized signatories for both parties; (2) the initiating party provides a standard withdrawal request notice to the Departments, the certified IDR entity (if selected), and the non-initiating party and the non-initiating party notifies the Secretary, certified IDR entity (if selected), and initiating party of its agreement to withdraw the dispute within 5 business days of the initiating party's request (or the non-initiating party fails to respond within 5 business days of the initiating party's request); (3) the certified IDR entity or the Departments cannot determine eligibility because both parties are

unresponsive to any requests for additional information to determine eligibility; or (4) the certified IDR entity cannot make a payment determination because both parties have failed to submit an offer as described in section II.E.4. of this preamble.

The Departments also propose to amend the batching policies for the Federal IDR process to increase efficiency and create a workable framework for disputing parties and certified IDR entities. Specifically, the Departments propose to allow qualified IDR items and services to be batched if: (1) the items and services were furnished to a single patient during a patient encounter on one or more consecutive dates of service and billed on the same claim form (single patient encounter); (2) the items and services were furnished to one or more patients and were billed under the same service code, or a comparable code under a different procedural code system; or (3) anesthesiology, radiology, pathology, and laboratory qualified IDR items and services were furnished under service codes belonging to the same Category I CPT code range, as specified in guidance by the Departments. These proposed rules would also require that no more than 25 qualified IDR items and services may be considered jointly as part of one payment determination for the purposes of batched determinations.

The Departments further propose several changes to the collection of the administrative fee. First, in addition to proposing new administrative fee amounts and a revised methodology for calculating such amounts, the Departments propose that the initiating party must pay the administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity. The Departments also propose that the non-initiating party must pay the administrative fee within 2 business days of notice of an eligibility determination by either the certified IDR entity or the Departments, as applicable. Third, the Departments propose to collect the administrative fee directly from the disputing parties. Fourth, the Departments propose to clarify how the Federal IDR process applies when either party fails to timely pay the fees associated with the Federal IDR process. Finally, the Departments propose to charge the disputing parties a reduced administrative fee for low-dollar disputes and to charge the non-initiating party a reduced administrative fee when either the certified IDR entity or the Departments determine the dispute is not eligible for the Federal IDR process.

The Departments also propose to clarify the extenuating circumstances in which the time periods, other than under current 26 CFR 54.9816–8T(c)(4)(ix), 29 CFR 2590.716–8(c)(4)(ix), and 45 CFR 149.510(c)(4)(ix), may be extended. Specifically, the Departments propose that such extenuating circumstances include circumstances that contribute to systematic delays in processing disputes under the Federal IDR process, such as an unforeseen volume of disputes or Federal IDR portal system failures. The Departments also propose that when the Departments determine that the parties or certified IDR entities cannot meet applicable timeframes due to systemic delays in processing disputes, the Departments would post a public notice regarding any extension of time periods due to such extenuating circumstances. These proposed rules would also establish that such extenuating circumstances would include, for a specific dispute, when the Departments determine that the parties or certified IDR entity cannot meet applicable timeframes due to matters beyond the control of one or both parties or the certified IDR entity, or for other good cause. Further, the Departments propose that a certified IDR entity may submit a request for an extension due to extenuating circumstances to the Departments through the Federal IDR portal.

Finally, the Departments propose requiring plans and issuers that are subject to the Federal IDR process to register with the Federal IDR portal and submit certain information to the Departments. Under these proposed rules, initial registration would be required to be completed by the later of 30 business days after the effective date of the final rule or if plans and issuers begin offering coverage subject to the Federal IDR process after the effective date of the final rule, they would be required to complete their initial registration on the date the plan or issuer begins offering coverage subject to the Federal IDR process.

The Departments have examined the effects of these proposed rules as required by Executive Order 13563 (76 FR 3821, January 21, 2011, Improving Regulation and Regulatory Review); Executive Order 12866 (58 FR 51735, October 4, 1993, Regulatory Planning and Review); the Regulatory Flexibility Act (Pub. L. 96–354, enacted September 19, 1980, Pub. L. 96–354); section 1102(b) of the Social Security Act (42 U.S.C. 1302(b)); section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995, Pub. L. 104–4); and

Executive Order 13132 (64 FR 43255, August 10, 1999, Federalism).

B. Executive Orders 12866, 13563, and 14094—Departments of Health and Human Services and Labor

Executive Orders 12866, 13563, and 14094 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 14094 entitled “Modernizing Regulatory Review” amends section 3(f)(1) of Executive Order 12866 (Regulatory Planning and Review). The amended section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule: (1) having an annual effect on the economy of \$200 million or more in any 1 year (adjusted every 3 years by the Administrator of OMB’s Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in this Executive Order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

A regulatory impact analysis (RIA) must be prepared for rules deemed significant under section 3(f)(1). Based on the Departments’ estimates, OMB’s OIRA has determined these rules are significant under section 3(f)(1). Therefore, the Departments have prepared an RIA that to the best of their ability presents the costs and benefits of these rules. OMB has reviewed these proposed regulations, and the Departments have provided the following assessment of their impact.

C. Need for Regulatory Action—Departments of Health and Human Services and Labor

As discussed in section II.B. of this preamble, gaps in communication between plans and issuers and

providers, facilities, and providers of air ambulance services have resulted in confusion around issues such as whether an item or service is eligible for resolution in the Federal IDR process; how cost sharing and out-of-network rates must be determined (that is, through an All-Payer Model Agreement, specified State law, or Federal rules); how and with whom to initiate open negotiations; and which eligible items and services can be batched or bundled into one dispute. Additionally, a higher-than-expected number of disputes have been submitted to the Federal IDR process for resolution, with many found to be ineligible,¹⁹⁵ contributing to inefficiencies in resolving disputes in the Federal IDR process.

These proposed rules would require plans and issuers to use CARCs and RARCs, as specified in guidance issued by the Departments, or as required under any applicable, adopted standards and operating rules under 45 CFR part 162, to communicate information related to whether a claim for an item or service furnished by an entity that does not have a direct or indirect contractual relationship with the plan or issuer for the furnishing of the item or service under the plan or coverage is subject to the provisions of 26 CFR 54.9816 and 54.9817; 29 CFR 2590.716 and 2590.717; or 45 CFR part 149, subparts B, E, or F.

The July 2021 interim final rules require plans and issuers to disclose the QPA and certain other information regarding the QPA for an item or service furnished by a provider, facility, or provider of air ambulance services, and specific information regarding the initiation of the Federal IDR process. These requirements were later amended by the August 2022 final rules. As discussed in section II.C. of this preamble, the Departments propose to amend regulations at 26 CFR 54.9816–6T(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d) to specify that plans and issuers must disclose the QPA and certain information about the QPA not only when the recognized amount (or for air ambulance services, the amount on which cost sharing is based) is the QPA but also when the recognized amount is the amount billed by the provider, facility, or provider of air ambulance services as these items and

¹⁹⁵ In the first full year of Federal IDR process operations, approximately 37 percent of disputes were determined ineligible for the Federal IDR process. See U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury, *Federal Independent Dispute Resolution Process—Status Update*, April 27, 2023. <https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf>.

services would also be eligible for the Federal IDR process (provided all other eligibility criteria are satisfied).

In addition, the Departments propose amendments to the statement required to be provided by plans and issuers regarding the initiation of open negotiation and availability of the Federal IDR process. The Departments also propose amendments to the content of the statement to refer to providers of air ambulance services (as well as providers and facilities), and to specify that the open negotiation period is counted in business days and that a party wishing to initiate open negotiation must provide the required notice within 30 business days of receiving an initial payment or notice of denial of payment. Furthermore, the Departments propose that the statement must also note that the provider, facility, or provider of air ambulance services must notify the Departments, as applicable, to initiate open negotiations. To ensure payment disputes are directed to the correct parties, the Departments propose requiring plans and issuers to disclose the legal business name of the plan (if any) or issuer; the legal business name of the plan sponsor (if applicable); and the registration number to be assigned under 26 CFR 54.9816–9, 29 CFR 2590.716–9, or 45 CFR 149.530, as applicable, if the plan or issuer is registered with the Federal IDR registry.

As discussed in section II.D.1. of this preamble, interested parties generally report that disputing parties are not negotiating with each other during the required open negotiation period to the extent expected by the Departments. To encourage effective use of the open negotiation period, the Departments propose to require the party initiating open negotiations to use a standardized open negotiation notice form, which includes an enumerated list of information, and to send supporting documentation to the other party and the Departments to initiate the open negotiation period. Furthermore, the party in receipt of the open negotiation notice would be required to provide a response to the open negotiation notice to the other party and the Departments no later than the 15th business day of the 30-business-day open negotiation period. The Departments are of the view that this proposal would create more certainty regarding whether and when the initiating party began open negotiations by ensuring that start and end dates are documented in the Federal IDR portal. This proposal also may reduce the number of ineligible disputes initiated by requiring the

exchange of eligibility information during open negotiation.

As discussed in section II.D.2. of this preamble, to accelerate dispute processing and reduce the burden on certified IDR entities, the Departments propose to require the initiating party to provide an enumerated list of additional information in the notice of IDR initiation, including the claim number, an attestation that the item or service under dispute is a qualified IDR item or service and the basis on which the party believes it is so, and a statement describing the elements of the claim that serve as the basis for initiating the Federal IDR process. Similarly, the Departments propose to require the non-initiating party to provide a response to the notice of IDR initiation that must also include an enumerated list of information, including an agreement to the preferred certified IDR entity identified in the notice of IDR initiation or an alternate preferred certified IDR entity selection, an attestation that the item or service under dispute is a qualified IDR item or service, and for each item or service that the non-initiating party asserts is not a qualified IDR item or service, an explanation and documentation to support the assertion. The Departments are of the view that these additional elements would assist in determining if the item or service is a qualified IDR item or service that is eligible for the Federal IDR process, allow for a streamlined process to track the initiation of the Federal IDR process, enhance communication among the parties, and facilitate a more efficient Federal IDR process.

As discussed in section II.E.1.a. of this preamble, since the implementation of the Federal IDR process, the Departments have identified potential areas to improve upon and provide additional clarity with respect to the process for selecting a certified IDR entity. In the Departments' experience implementing this process, when a non-initiating party waits until the third business day after the date of IDR initiation to select an alternative preferred certified IDR entity, the initiating party lacks sufficient time to agree or object to the alternative preferred certified IDR entity. To provide the parties sufficient opportunity to agree or object to the alternative preferred certified IDR entity, the Departments propose to amend the process for selecting a certified IDR entity when the parties fail to jointly agree on a certified IDR entity. Specifically, the Departments propose that if the party last in receipt of either the notice of IDR initiation response or the notice of certified IDR entity

selection received the notice on the third business day after the date of IDR initiation and did not agree to the other party's alternative preferred certified IDR entity by the end of third business day after the date of IDR initiation, the Departments would provide the party 2 additional business days to agree or object to other party's preferred certified IDR entity selection.

To provide clarity and to codify the process and timeframes for selecting a certified IDR entity, the certified IDR entity's conflict-of-interest review, and the date the certified IDR entity selection is considered finally selected, the Departments propose to establish a process that includes both preliminary selection of the certified IDR entity and final selection of the certified IDR entity. The Departments are of the view that the conflict-of-interest review by the certified IDR entity should not cut into the time periods for either the disputing parties to submit their offers or for the certified IDR entity to make a payment determination. For this reason, the Departments propose requirements that would provide for a certified IDR entity conflict-of-interest review process that must be conducted before a preliminary selection of the certified IDR entity is considered to be a final selected certified IDR entity. Under these proposed rules, final selection of the certified IDR entity would trigger the timeframes for conducting an eligibility review, accepting offers of an out-of-network payment amount, and making a payment determination.

As discussed in section II.E.1.b. of this preamble, eligibility determinations have proven to be complex, time-consuming, resource-intensive, and often uncompensated activities that impede timely payment determinations. To support eligibility determinations during a period of systemic delay or other extenuating circumstances, the Departments propose to implement a departmental eligibility review. When this departmental eligibility review is in effect, the Departments would make eligibility determinations instead of the certified IDR entities. The Departments are of the view that these changes are necessary to ensure certified IDR entities are able to spend the majority of their time and resources on making payment determinations for eligible IDR items and services, prevent certified IDR entities from temporarily suspending their acceptance of new disputes, ensure participation in the Federal IDR process remains financially sustainable for certified IDR entities, and prevent disparate outcomes.

As discussed in section II.E.1.d.ii. of this preamble, the Departments have identified potential areas to improve upon and provide additional clarity with respect to the process for disputes to be withdrawn from the Federal IDR process. Currently, there is no clear uniform process for parties, the certified IDR entity, or the Departments to withdraw a dispute from the Federal IDR process. To establish a process for withdrawals, the Departments propose four conditions in which a dispute may be withdrawn from the Federal IDR process by the initiating party, the Departments, or the certified IDR entity before a payment determination is made. Specifically, the Departments propose that a dispute may be withdrawn from the Federal IDR process if: (1) the initiating party provides notification through the Federal IDR portal to the Departments and the certified IDR entity (if selected) that both parties agree to withdraw the dispute from the Federal IDR process, with signatures from authorized signatories for both parties; (2) the initiating party provides a standard withdrawal request notice to the Departments, the certified IDR entity (if selected), and the non-initiating party, and the non-initiating party notifies the Secretary, certified IDR entity (if selected), and initiating party of its agreement to withdraw within 5 business days of the initiating party's request (or the non-initiating party fails to respond within 5 business days of the initiating party's request); (3) the certified IDR entity or the Departments cannot determine eligibility because both parties to the dispute are unresponsive to any requests for additional information to determine eligibility; or (4) the certified IDR entity cannot make a payment determination because both parties to the dispute have failed to submit an offer as described in section II.E.4. of this preamble. The Departments are of the view that these proposals would strike a balance between fairness to the disputing parties and efficiency of the Federal IDR process by generally requiring mutual agreement by the disputing parties to withdraw the dispute and providing that a dispute would be withdrawn in the event the parties are nonresponsive within the required timeframes.

As discussed in section II.E.2. of this preamble, in response to the Departments' experiences with batched determinations and operationalizing the Federal IDR process, as well as consideration of interested parties' feedback, the Departments propose batching policies for the Federal IDR

process to increase efficiency and create a workable framework for disputing parties and certified IDR entities. The Departments propose to implement batching provisions that would allow parties the flexibility to batch qualified IDR items and services (or "line items") that relate to the treatment of similar conditions, with necessary limitations to encourage efficiency. Specifically, the policy would allow all qualified IDR items and services within the following groupings to be batched together: (1) the items and services were furnished to a single patient during a patient encounter on one or more consecutive dates of service and billed on the same claim form (single patient encounter); (2) the items and services were furnished to one or more patients and billed under the same service code, or a comparable code under a different procedural code system; or (3) anesthesiology, radiology, pathology, and laboratory qualified IDR items and services were furnished under service codes belonging to the same Category I CPT code range, as specified in guidance by the Departments. The Departments are of the view that this approach would appropriately balance several objectives of the Federal IDR process, including: encouraging efficiency (including minimizing costs) within the Federal IDR process without unreasonably impeding payers' or providers' access to the Federal IDR process and considering relative costs and administrative burden; providing a framework to expedite processing of the backlog of Federal IDR disputes by simplifying the Federal IDR process while avoiding creating new operational complexities; and ensuring that items and services included in batched determinations have a clear organizing principle that makes for logical and consistent payment determinations across certified IDR entities in order to reduce the chance of disparate outcomes. The Departments also propose to codify the definition of a bundled payment arrangement, as currently set forth in guidance, at proposed 26 CFR 54.9816-3, 29 CFR 2590.716-3, and 45 CFR 149.30.

As discussed in section II.E.3. of this preamble, to implement a fair and efficient Federal IDR process, the Departments propose to amend the certified IDR entity and administrative fee provisions of the Federal IDR process to align financial incentives for disputing parties with the efforts associated with administering the Federal IDR process. The Departments propose to amend the provisions related to the time and manner of fee collection,

such that an initiating party would be required to pay the non-refundable administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity, and a non-initiating party would be required to pay the non-refundable administrative fee within 2 business days of being notified of an eligibility determination. The Departments also propose to add flexibility to the process by removing the requirement that certified IDR entities, rather than the Departments, must collect the administrative fee, and propose to directly collect the administrative fee from the parties. The Departments further propose to revise how the Federal IDR process applies when either party fails to timely pay the fees associated with the Federal IDR process. The Departments also propose charging the disputing parties a reduced administrative fee for low-dollar disputes and charging a non-initiating party a reduced administrative fee when either the certified IDR entity or the Departments determine the dispute is not eligible for the Federal IDR process. The Departments are of the view that these fee collection changes would ensure that disputing parties pay an administrative fee to participate in the Federal IDR process even if the dispute is determined to be ineligible, remove the operational burden from certified IDR entities of processing administrative fees and remitting them to the Departments, improve accessibility of the Federal IDR process for certain types of parties, more fairly allocate the costs associated with ineligible disputes, and help reduce the need for future increases to the administrative fee.

As discussed in section II.E.5. of this preamble, the Departments are proposing to codify a generally applicable extension of time periods when the Departments determine that such extension is necessary due to extenuating circumstances that contribute to systematic delays in processing disputes under the Federal IDR process, such as a high volume of disputes or Federal IDR portal system failures. This would allow the Departments to extend the time periods under the Federal IDR process without requiring a case-by-case analysis of individual extension requests. The Departments are of the view that granting certain extensions in this manner would provide protection for parties engaged in the Federal IDR process from the impact of systematic processing delays and ensure that unforeseen circumstances do not unfairly disadvantage a party or hinder its ability to comply with the Federal

IDR process timeframes. This would also provide more transparency into the timing it would take for a dispute to be processed.

As discussed in section II.F. of this preamble, the Departments propose requiring plans and issuers subject to the Federal IDR process to register with the Departments and provide general information on the application of the Federal IDR process to items or services covered by the plan or coverage. Providers, facilities, and providers of air ambulance services report that when they initiate open negotiations prior to initiating the Federal IDR process, it is often difficult to identify the plan or issuer with which they are seeking to initiate a dispute, determine the correct

contact information for initiating open negotiation or a dispute, and delineate between different group health plans offered by the same plan sponsor. To address these issues, the Departments propose to make available a registry containing this information, which would help providers, facilities, and providers of air ambulance services initiate open negotiations and the Federal IDR process with all required information by resolving the aforementioned information-sharing issues between parties.

D. Summary of Impacts and Accounting Table—Departments of Health and Human Services and Labor

The expected benefits and costs of these proposed rules are summarized in

Table 6 and discussed in this section of the preamble. In accordance with OMB Circular A–4, Table 6 depicts an accounting statement summarizing the Departments' assessment of the benefits and costs associated with this regulatory action. The Departments are unable to quantify all benefits and costs of these proposed rules but have sought, where possible, to describe these non-quantified impacts. The effects in Table 6 reflect non-quantified impacts and estimated direct monetary costs resulting from the provisions of these proposed rules.

BILLING CODE 6325–63–P; 4830–01–P; 4510–29–P; 4120–01–P

TABLE 6: Accounting Table

Accounting Statement				
Benefits:				
Non-Quantified:				
• Reduce wasted effort on inappropriately initiated disputes for certified IDR entities as well as both initiating and non-initiating parties by providing information necessary for dispute initiation in a centralized registry, thus minimizing: (1) open negotiations and/or disputes initiated against the wrong party; (2) disputes over items or services that are actually subject to a specified State law or All-Payer Model Agreement; and (3) incorrectly batched disputes. • Increase efficiency (including minimizing costs) within the Federal IDR process without unreasonably impeding payers' or providers' access to the Federal IDR process considering potential administrative burden by revising the batching policies in order to reduce the chance of disparate outcomes.				
Costs:	Estimate	Year Dollar	Discount Rate	Period Covered
Annualized	\$205.01 million	2023	7 percent	2024-2028
Monetized (\$/Year)	\$206.83 million	2023	3 percent	2024-2028
Quantified Costs:				
• Costs to issuers and TPAs of approximately \$1,549,606 to make annual changes, beginning in 2024, to their information technology (IT) systems to accommodate the use of CARCs and RARCs related to the No Surprises Act in accordance with guidance issued by the Departments or as required under any applicable adopted standards and operating rules under 45 CFR part 162. • Costs to issuers and TPAs of approximately \$505,567 to make a one-time change in 2024 to their IT systems to change the currently required QPA notification to incorporate the proposed information described in the proposed new 26 CFR 54.9816-6T(d)(1)(v), 29 CFR 2590.716-6(d)(1)(v), and 45 CFR 149.140(d)(1)(v). • Costs to providers, facilities, and providers of air ambulance services of approximately \$22,039,500 in 2024 and \$44,079,000 annually beginning in 2025 to submit additional information in the open negotiation notice to the Departments and the other party for an estimated 560,000 disputes entering open negotiations annually. • Costs to issuers and TPAs of approximately \$22,039,500 in 2024 and \$44,079,000 annually beginning in 2025 to create and submit open negotiation notice responses to the Departments and the other party for an estimated 560,000 disputes entering open negotiations annually. • Costs to providers, facilities, and providers of air ambulance services of approximately \$16,529,625 in 2024 and \$33,059,250 annually beginning in 2025 to submit more information through notices of IDR initiation to the Departments and the other party for an estimated 420,000 disputes initiated annually. • Costs to issuers and TPAs of approximately \$16,529,623 in 2024 and \$33,059,250 annually beginning in 2025 to submit notice of IDR initiation responses to the Departments and the other party for an estimated 420,000 disputes initiated annually. • Costs to the Departments of approximately \$11,000,000 for a one-time system build in the Federal IDR portal in 2024 to operationalize the proposals in these rules related to submission and exchange of open negotiation, initiation, and certified IDR entity selection notices and information between parties, and the departmental eligibility review. • Increase in costs of \$418,621 annually beginning in 2025 for plans, issuers, providers, and facilities to submit the notice of certified IDR entity selection form. • If the departmental eligibility review is in effect, ongoing operations and maintenance costs of \$463,320 annually beginning in 2025. • If the departmental eligibility review is in effect, costs to the Departments of approximately \$17,199,000 in 2024 and \$41,277,600 per year beginning in 2025 for regulatory analysis, outreach, quality assurance, administrative activities, and close coordination among multiple parties related to making eligibility determinations. • Costs to initiating parties of approximately \$372,120 in 2024 and \$744,240 annually beginning in 2025 associated with submitting notices of withdrawal request. • Costs to non-initiating parties of approximately \$83,076 in 2024 and \$166,152 annually beginning in 2025 associated with submitting notices of withdrawal response.				

- Costs to the Departments of approximately \$3,000,000 for system and operations development related to administrative fee collection in fiscal year (FY) 2024, and ongoing operations and maintenance costs of approximately \$2,500,000 in FY 2025, \$1,250,000 in FY 2026, \$1,000,000 in FY 2027, and \$1,000,000 in FY 2028.

- Annual reduction of \$9,257 in reporting and administrative fee processing costs for certified IDR entities associated with collection of the administrative fee by the Departments in lieu of the certified IDR entities beginning in 2025.

- Costs to the parties of approximately \$36,198,000 annually beginning in 2025 associated with the administrative fee proposals in these proposed rules.

- Costs to certified IDR entities of approximately \$99 in 2024 and \$198 annually beginning in 2025 associated with submitting requests for extensions.

- Costs to the Departments of approximately \$3,000,000 in 2024 and \$150,000 annually beginning in 2025 for system and operations development related to the Federal IDR registry.

- One-time costs to issuers and TPAs in 2024 of approximately \$1,575,693 to submit information to register for a permanent IDR registration number, and annual costs beginning in 2025 of approximately \$94,252 to update this information in a timely manner.

- Costs to interested parties of \$3,307,080 to review and interpret these rules in 2024.

Not Quantified:

- The use of CARCs and RARCs, in accordance with guidance issued by the Departments or as required under any applicable adopted standards and operating rules under 45 CFR part 162, would potentially reduce costs to certified IDR entities by reducing the number of ineligible payment disputes submitted to the Federal IDR process, and would also potentially reduce administrative costs incurred by parties related to initiating and responding to ineligible payment disputes.

- If the departmental eligibility review is in effect, the Departments would be making eligibility determinations for disputes that are ineligible for the Federal IDR process, which would incur a higher level of burden than if the departmental eligibility review is not in effect.

- The broader batching rules would increase the costs to the Departments in 2024 to implement the necessary system updates.

Intermediate effects, leading to benefits and costs:

- Provide standardized information, via CARCs and RARCs, to providers, facilities, and providers of air ambulance services to increase their understanding of whether and how the No Surprises Act applies to claims for out-of-network items and services and determine whether disputes are eligible for the Federal IDR process or are subject to a specified State law or an All-Payer Model Agreement that determines the out-of-network payment amount.

- Improve information sharing among the disputing parties and the Departments and create increased certainty regarding when open negotiations and Federal IDR process initiation begin by: (1) requiring a disputing party to provide an open negotiation notice and supporting documentation to the other party and the Departments to initiate the open negotiation period; (2) requiring a response from the party in receipt of the open negotiation notice; and (3) requiring the non-initiating party to furnish a response to the notice of IDR initiation.

- Increase access to the Federal IDR process and increase equity across the parties using the Federal IDR process, regardless of eligibility, by requiring payment of the administrative fee by the initiating party within 2 business days of the date of preliminary selection of the certified IDR entity and by the non-initiating party within 2 business days of notice of an eligibility determination.

- Streamline the process and increase transparency by clarifying how the Federal IDR process applies when either party fails to timely pay the fees associated with the Federal IDR process.

- Improve accessibility to the Federal IDR process for some disputing parties by reducing the administrative fee for low-dollar disputes.

- Provide a framework to expedite processing of the backlog of Federal IDR disputes by simplifying the Federal IDR process, and ensure items and services included in batched determinations have a clear organizing principle that makes for logical and consistent payment determinations across certified IDR entities by revising the batching policies in order to reduce the chance of disparate outcomes.

- Reduction in the number of ineligible disputes by approximately 50 to 75 percent due to the provisions in these proposed rules.

1. Benefits

These rules seek to maximize benefits to providers, facilities, providers of air

ambulance services, plans, and issuers and to reduce burdens on certified IDR entities. The Departments invite comment regarding the assumptions

made in this section and any additional benefits that would be associated with the proposals in these rules. The Departments also seek comment from individuals from minority and underserved communities, and providers who serve these individuals, to help address the benefits that would be associated with these proposed rules related to these communities specifically.

a. Use of Claim Adjustment Reason Codes and Remittance Advice Remark Codes

The proposed new 26 CFR 54.9816–6A, 29 CFR 2590.716–6A, and 45 CFR 149.100, which would require plans and issuers to use CARCs and RARCs to convey information related to the No Surprises Act as specified in guidance issued by the Departments or as required under any applicable adopted standards and operating rules under 45 CFR part 162, on electronic and paper remittance advice, would help to ensure plans and issuers provide information to providers, facilities, and providers of air ambulance services in a standardized manner and in standardized language so that they may understand whether and how the No Surprises Act applies to claims for out-of-network items and services and determine whether disputes are eligible for the Federal IDR process or subject to a specified State law or All-Payer Model Agreement for purposes of determining the out-of-network rate. Additionally, the use of CARCs and RARCs would further reduce the potential for the communication issues discussed in section II.B. of this preamble, and would help providers, facilities, and providers of air ambulance services identify items and services that are not subject to the No Surprises Act's balance billing protections and thus identify items and services that are not eligible for the Federal IDR process.

By ensuring that a plan or issuer communicates information related to whether a claim for an item or service furnished by an entity that does not have a direct or indirect contractual relationship with the plan or issuer for the furnishing of the item or service under the plan or coverage is subject to the prohibitions on balance billing in the No Surprises Act, the proposed CARC and RARC requirements would reduce the number of ineligible payment disputes submitted to the Federal IDR process, as further described in section V.D.1.l. of this preamble. The potential reduction in ineligible Federal IDR disputes could result in faster payment determinations, which in turn would result in providers,

facilities, and providers of air ambulance services receiving reimbursements sooner.

b. Information To Be Shared About the QPA (26 CFR 54.9816–6T, 29 CFR 2590.716–6, and 45 CFR 149.140)

These proposed rules would revise 26 CFR 54.9816–6T(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d) to specify that plans and issuers must disclose the QPA and certain information about the QPA when cost sharing is calculated using the QPA or the billed amount (including for air ambulance services, for which the term “recognized amount” is inapplicable). These proposed revisions would provide greater clarity regarding when these disclosures must be provided.

Further, the proposed amendments at 26 CFR 54.9816–6, 29 CFR 2590.716–6, and 45 CFR 149.140 would require plans and issuers to disclose the legal business name (if any) of the plan or issuer; the legal business name of the plan sponsor (if applicable); the registration number assigned under 26 CFR 54.9816–9, 29 CFR 2590.716–9, or 45 CFR 149.530, as applicable, if the plan or issuer is registered with the Federal IDR registry. The proposed amendments would help ensure that payment disputes are directed to the appropriate parties, facilitate more productive open negotiations, and reduce the number of ineligible disputes ultimately submitted to the Federal IDR process (as further described in section V.D.1.l. of this preamble). Additionally, the required disclosure of the legal business name (if any) of the plan or issuer, the legal business name of the plan sponsor (if applicable), and the registration number would help providers, facilities, and providers of air ambulance services look up plans, plan sponsors, and issuers in the Federal IDR registry that would be established under these proposed rules.

c. Open Negotiation

The Departments propose to amend the open negotiation provisions at 26 CFR 54.9816–8(b)(1), 29 CFR 2590.716–8(b)(1), and 45 CFR 149.510(b)(1) to require the party initiating open negotiations to provide an open negotiation notice and supporting documentation to the other party and the Departments through the Federal IDR portal to initiate the open negotiation period. The Departments also propose to expand the required information on the open negotiation notice to include new elements. Furthermore, the Departments propose that the party in receipt of the open negotiation notice would be required to

provide a response to the open negotiation notice and supporting documentation to the other party and the Departments no later than the 15th business day of the 30-business-day open negotiation period. Both of these notice provisions require the parties to provide specific information detailed in the proposed regulatory text.

The Departments propose these changes to improve information sharing among the parties and the Departments. The Departments are of the view that this proposal would create more certainty regarding whether and when a party began open negotiations by recording start and end dates. Furthermore, this proposal may allow the parties to focus negotiations on items or services they believe would ultimately be eligible for the Federal IDR process. This proposal would also create an additional exchange of eligibility-related disclosures between the parties that may reduce the number of ineligible disputes submitted to the Federal IDR process, as further described in section V.D.1.l. of this preamble. While the Departments have issued guidance to clarify that the use of an issuer's proprietary open negotiation portal is not required by the parties, many issuers currently maintain their own open negotiation portals and encourage parties to submit notices through them. This proposal would benefit providers, facilities, and providers of air ambulance services by creating a centralized location in which they can exchange information for open negotiation, as opposed to using different portals and systems depending on the plan or issuer. These proposed requirements would reduce the number of platforms or vehicles the party submitting the open negotiation notice currently use to furnish the notices and supporting documentation to both the Departments and the other party.

d. Initiating the Federal IDR Process and Notice of IDR Initiation

The Departments propose changes to 26 CFR 54.9816–8(b)(2), 29 CFR 2590.716–8(b)(2), and 45 CFR 149.510(b)(2). Specifically, the Departments propose to require the initiating party to provide additional elements on the notice of IDR initiation, including expanded information to identify the disputing parties (as well as any third party representing a party) and additional information to identify the item or service subject to the dispute.

Similarly, the Departments propose to require the non-initiating party to provide a response to the notice of IDR initiation that must include an enumerated list of information with

additional disclosures, such as either a statement agreeing to the preferred certified IDR entity or an alternative preferred certified IDR entity, and an attestation as to the eligibility of the item or service that is the subject of the dispute. The Departments are of the view that these additional elements would assist in determining whether the item or services is eligible for the Federal IDR process, allow for a streamlined process to track dispute initiation, enhance communication among the parties, and facilitate a more efficient process of IDR initiation. Information about why the non-initiating party believes the dispute is ineligible for the Federal IDR process would assist the Departments or the certified IDR entity in its review of dispute eligibility, thereby streamlining the eligibility review process.

Additionally, by streamlining the submission of these notices through the Federal IDR portal, including the open negotiation notice and open negotiation response notice, the Departments may be able to use information that was submitted for one notice to pre-populate subsequent notices, reducing the burden of providing duplicative information. For instance, if a party that submitted the open negotiation notice through the Federal IDR portal decides to initiate the Federal IDR process after the open negotiation period has ended, the Departments anticipate that the Federal IDR portal may be able to pre-populate the fields in the notice of IDR initiation with the same information that was provided in the open negotiation notice. Furthermore, these proposed requirements would reduce the number of platforms or vehicles the initiating party must use in order to furnish the notice of IDR initiation and supporting documentation to both the Departments and the other party. This administrative streamlining would simplify the burden on initiating parties and would create greater efficiency.

e. Certified IDR Entity Selection

The Departments propose amending 26 CFR 54.9816–8(c)(1), 29 CFR 2590.716–8(c)(1), and 45 CFR 149.510(c)(1) regarding the process for certified IDR entity selection and submission of the notice of certified IDR entity selection. In the Departments' experience implementing the Federal IDR process, when a non-initiating party waits until the third business day after the date of IDR initiation to select an alternative preferred certified IDR entity, the initiating party lacks sufficient time to agree or object to the alternative preferred certified IDR entity. To provide the parties sufficient

opportunity to agree or object to an alternative preferred certified IDR entity, the Departments propose that if the party last in receipt of either the notice of IDR initiation response or the notice of certified IDR entity selection received the notice on the third business day after the date of IDR initiation and did not agree to the other party's alternative preferred certified IDR entity by the end of third business day after the date of IDR initiation, the Departments would provide the party 2 additional business days to agree or object to other party's alternative preferred certified IDR entity selection. Further, to provide clarity and to codify the process and timeframes for selecting a certified IDR entity, the certified IDR entity's conflict-of-interest review, and the date the certified IDR entity selection is considered finally selected, the Departments propose to establish a process that includes both preliminary selection of the certified IDR entity and final selection of the certified IDR entity. The Departments are of the view that the conflict-of-interest review by the certified IDR entity should not cut into the time periods for either the disputing parties to submit their offers or for the certified IDR entity to make a payment determination. For this reason, the Departments propose requirements that would provide for a certified IDR entity conflict-of-interest review process that must be conducted before a preliminary selection of the certified IDR entity is considered a final selected certified IDR entity. Under these proposed rules, the final selection of the certified IDR entity would trigger the timeframes for conducting an eligibility review, accepting offers of an out-of-network payment amount, and making a payment determination. The Departments are of the view that this proposal would streamline the exchange of information between parties, provide clarity on the dates that trigger the timeframes for offer submission and payment determinations, and relieve the time constraints on certified IDR entities by not having the conflict-of-interest review cut into the timeframe for payment determinations.

f. Federal IDR Process Eligibility Determinations

The Departments propose amending 26 CFR 54.9816–8(c), 29 CFR 2590.716–8(c), and 45 CFR 149.510(c) to make Federal IDR process eligibility determinations the responsibility of the Departments in certain circumstances. Under this proposal, when certain criteria are met as discussed in section II.E.1.b. of this preamble, the Departments would determine whether

the dispute is eligible and make the eligibility determination for the Federal IDR process (that is, departmental eligibility review). If the dispute is found to be eligible, the Departments would send it to the certified IDR entity to continue the Federal IDR process. If the dispute is found to be ineligible for the Federal IDR process, it would be closed.

When the Departments are conducting eligibility determinations, it would relieve the burden on certified IDR entities of this responsibility and help ensure that they can focus their time and resources on payment determinations in accordance with statutory timeframes.

g. Withdrawals

The Departments propose to add 26 CFR 54.9816–8(c)(3)(ii), 29 CFR 2590.716–8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii) to establish a process for disputes to be withdrawn from the Federal IDR process. First, these proposed rules would allow a dispute to be withdrawn from the Federal IDR process if the initiating party provides notification through the Federal IDR portal to the Departments and the certified IDR entity (if selected) that both parties agree to withdraw the dispute, with signatures from authorized signatories for both parties. These proposed rules would also establish that the initiating party could withdraw a dispute by submitting a standard withdrawal request notice to the Departments, the non-initiating party, and the certified IDR entity (if selected) through the Federal IDR portal. In this case, the non-initiating party would then be required to provide the standard withdrawal request response notice within 5 business days indicating agreement or objection to the request for withdrawal. If the non-initiating party fails to respond within 5 business days of the initiating party's request, the non-initiating party would be considered to have agreed to the dispute's withdrawal.

The Departments also propose to establish that the certified IDR entity or the Departments could withdraw a dispute from the Federal IDR process if the certified IDR entity or the Departments cannot determine eligibility because both parties are unresponsive to any requests for additional information to determine eligibility, or if the certified IDR entity cannot make a payment determination because both parties have failed to submit an offer as described in 26 CFR 54.9816–8(c)(5)(i), 29 CFR 2590.716–8(c)(5)(i), and 45 CFR 149.510(c)(5)(i). The Departments are of the view that these proposals would both create

fairness to the disputing parties and encourage efficiency of the Federal IDR process by generally requiring mutual agreement by the disputing parties to withdraw the dispute and providing that the dispute would be withdrawn in the event the parties are nonresponsive within the required timeframes. The Departments also are of the view that permitting the withdrawal of a dispute in such cases would decrease the number of payment determinations the certified IDR entity is required to adjudicate, improving efficiency of the Federal IDR process.

h. Treatment of Batched Items and Services

The Departments propose to amend the batching policies in response to the Departments' experiences with batched determinations and operationalizing the Federal IDR process, as well as consideration of interested parties' feedback regarding the Federal IDR process. Under this proposal, the Departments would allow parties the flexibility to batch qualified IDR items and services (or "line items") that relate to the treatment of similar conditions with necessary limitations to encourage efficiency. Specifically, the policy would allow all qualified IDR items and services to be batched by: (1) items and services furnished to a single patient during a patient encounter on one or more consecutive dates of service and billed on the same claim form (single patient encounter); (2) items and services were furnished to one or more patients and billed under the same service code, or a comparable code under a different procedural code system; or (3) anesthesiology, radiology, pathology, and laboratory IDR items and services furnished under service codes belonging to the same Category I CPT code range, as specified in guidance by the Departments, in order to address the unique circumstances of certain medical specialties and provider types.

As discussed in section II.E.2. of this preamble, the Departments are of the view this approach would encourage efficiency (including minimizing costs) within the Federal IDR process without unreasonably impeding payers' or providers' access to the Federal IDR process considering relative costs and administrative burden; provide a framework to expedite processing of the backlog of Federal IDR disputes by simplifying the Federal IDR process; and ensure that items and services included in batched determinations have a clear organizing principle that makes for logical and consistent payment determinations across certified

IDR entities to reduce the chance of disparate outcomes.

i. Administrative and Certified IDR Entity Fee Collection

i. Establishment of the Administrative Fee Amount and Methodology

First, the Departments propose revisions to the methodology for setting the administrative fee and propose new reduced administrative fee amounts. The revised methodology and amounts would account for the proposals in these proposed rules, such as the reduced administrative fees for ineligible disputes and low-dollar disputes discussed in sections II.E.3.e. and II.E.3.f. of this preamble, while still complying with the statutory requirement that the Departments set the administrative fee amount such that the total amount of fees paid for such year is estimated to be equal to the amount of expenditures estimated to be made by the Departments for such year in carrying out the Federal IDR process. These proposals would allow the Departments to administer the Federal IDR process and be responsive to the needs of the program by updating the methodology and administrative fee amounts in conjunction with policy and operational improvements to the process.

ii. Time of Collection of Administrative Fee and Certified IDR Entity Fee

Second, the Departments are proposing to amend the provisions related to the time of administrative fee collection such that an initiating party would be required to pay the non-refundable administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity, which occurs before an eligibility determination is complete, and the non-initiating party would be required to pay the non-refundable administrative fee within 2 business days of the non-initiating party receiving notice of an eligibility determination. Specifically, an initiating party would be expected to pay the administrative fee regardless of whether the dispute is determined eligible for the Federal IDR process. Because the administrative fees are currently non-refundable and under the current regulation and associated impact analysis, this benefit is unchanged. The Departments are of the view that the effect of this change in benefits experienced as a result of this proposal on disputing parties would be minimal.

Overall, the Departments are of the view that this proposal would promote the objective of costs of using the

Federal IDR process being proportionately borne by parties to both eligible and ineligible disputes.

iii. Manner of Administrative Fee Collection

Third, the Departments are proposing to directly collect the administrative fee from each party. Because the administrative fees are always non-refundable, the Departments are of the view that the impact of this proposed change would be minimal. The Departments anticipate that direct collection of the administrative fee by the Departments would reduce the burden on certified IDR entities, as it would remove the requirement that certified IDR entities collect this fee and later remit it to the Departments upon dispute closure. This burden is currently approved under OMB control number 1210-0169 and accounts for an average of 18 hours of clerical worker time annually per certified IDR entity, as discussed further in section V.F.7. of this preamble.¹⁹⁶ If this policy is finalized, the Departments anticipate this change would have minimal impact on the certified IDR entities, as certified IDR entities would continue to collect certified IDR entity fees from disputing parties.

iv. Application of Federal IDR Process Requirements in Circumstances Involving a Failure To Pay Certified IDR Entity Fees or Administrative Fees

Fourth, the Departments propose to clarify how the Federal IDR process applies when either party fails to timely pay the fees associated with the Federal IDR process. Specifically, the failure to pay the administrative fee by an initiating party would result in the closure of the dispute due to nonpayment, and failure to pay the certified IDR entity fee by an initiating party would result in the certified IDR entity not considering the initiating party's offer. Nonpayment of the certified IDR entity fee or administrative fee by a non-initiating party would result in the certified IDR entity not considering the non-initiating party's offer. The Departments are of the view that the impact of this change would be minimal. The purpose of this policy is to codify the sub-regulatory guidance that already exists and allow the closure of disputes in which the initiating party

¹⁹⁶ OMB Control Number: 1210-0169 (No Surprises Act: IDR Process). The burden is estimated as follows: (18 hours × \$39.56) = \$712.08 per certified IDR entity. A labor rate of \$39.56 is used for a clerical worker. The labor rates are applied in the following calculation: (13 × 18 hours × \$39.56) = \$9,257.

does not provide the appropriate administrative fee payment.

v. Administrative Fee Structure for Disputing Parties in Low-Dollar Disputes

Fifth, the Departments propose to charge both parties a reduced administrative fee when the initiating party attests that the highest offer (or aggregate offers for a dispute, whether the dispute is for one item or service, a bundled arrangement, or multiple items and services submitted as part of a batched dispute) made during open negotiation by either disputing party was less than the predetermined threshold. Because a reduction to the administrative fee would only be made in these limited situations, the Departments are of the view that the impact of this change would be minimal for most parties, particularly if the value of disputes increases as intended under the batching policies proposed in these rules, if finalized.

Furthermore, the Departments are of the view that this proposal would have a positive impact on some initiating parties, particularly small providers or providers in rural areas, that may not be able to efficiently access the Federal IDR process even under the batching policies proposed in these rules. Even though the Departments estimate in the Regulatory Flexibility Act analysis later in these proposed rules that there are approximately 66,000 small physicians¹⁹⁷ that may access the Federal IDR process, the Departments lack the data or ability to estimate how many providers would actually initiate the Federal IDR process and how many would or would not be able to efficiently initiate the process under the proposed batching policies in these rules and would therefore be impacted by the proposed reduced administrative fee for low-dollar disputes. The Departments seek comment on data sources or other resources to quantitatively estimate the benefits to this population and how to estimate the proportion of disputes that would be impacted by this policy.

vi. Administrative Fee Structure for Non-Initiating Parties in Ineligible Disputes

The Departments propose to charge the non-initiating party a reduced administrative fee when either the certified IDR entity or the Departments determine the entire dispute is not eligible for the Federal IDR process. Because a reduction to the administrative fee would be made only in this limited situation and one other situation (for low-dollar disputes), the Departments are of the view that the impact of this change would be minimal, particularly if the volume of ineligible disputes is reduced as anticipated due to the other policies proposed in these rules. The Departments are of the view that system improvements coupled with a reduced administrative fee in ineligible disputes may incentivize non-initiating parties to proactively raise and provide documentation to support eligibility challenges earlier in open negotiation or the Federal IDR process. This may result in a reduction in the volume of ineligible disputes (as further described in section V.D.1.l. of this preamble) and therefore reduce program administrative costs for the Departments overall. The Departments seek comment on the impact of a reduced administrative fee for non-initiating parties in ineligible disputes, including whether bad faith challenges to dispute eligibility may increase burden and whether modifications to the guidance for disputing parties are needed to prevent bad faith challenges to dispute eligibility.

j. Extension of Time Periods for Extenuating Circumstances

The Departments are proposing to amend 26 CFR 54.9816–8(g), 29 CFR 2590.716–8(g), and 45 CFR 149.510(g) to establish at paragraph (g)(1)(i) that the Departments, or at the request of a certified IDR entity or a party, would determine whether an extension is necessary because the parties or certified IDR entity cannot meet applicable timeframes due to matters beyond the control of the certified IDR entity or one or both parties, or for other good cause. Under these proposed rules, the Departments would provide an extension of the time periods if they identify unforeseen or good cause delays on a case-by-case basis, as opposed to solely relying on one of the parties to submit an extension request. The Departments may detect these issues before either party would, and could immediately grant the necessary

extension without having to wait for the submission of a formal request.

The Departments also propose to establish at 26 CFR 54.9816–8(g)(1)(ii), 29 CFR 2590.716–8(g)(1)(ii), and 45 CFR 149.510(g)(1)(ii) to codify a generally applicable extension of time periods when the Departments determine that such extension is necessary due to extenuating circumstances that contribute to systematic delays in processing disputes under the Federal IDR process, such as a high volume of disputes or Federal IDR portal system failures. The Departments would also post a public notice about any generally applicable extensions of time periods. Under these proposed changes, the Departments would extend the time periods under the Federal IDR process without requiring a case-by-case analysis of individual extension requests. The Departments are of the view that granting certain extensions in this manner would provide protection for parties engaged in the Federal IDR process from the impact of systematic processing delays and ensure that unforeseen circumstances do not unfairly disadvantage a party or hinder its ability to comply with the Federal IDR process timeframes. This would also provide more transparency into the time it would take for a dispute to be processed.

k. Registration of Group Health Plans and Health Insurance Issuers

Access to the IDR registry would provide a single, centralized place for initiating parties to find contact information for a plan or issuer, therefore reducing time spent by providers, facilities, and providers of air ambulance services when they initiate open negotiations. The registry would also help reduce wasted effort on inappropriately initiated disputes for certified IDR entities, as well as both initiating and non-initiating parties, by minimizing: (1) disputes initiated against the wrong party; (2) disputes over items or services that are subject to a specified State law or All-Payer Model Agreement; and (3) disputes that are incorrectly batched.

l. Reduction in Ineligible Disputes

The Departments anticipate that provisions of these proposed rules, in particular the proposed use of RARCs and CARCs, the proposed requirements in the open negotiation notice and response and the IDR initiation notice and response, the proposed modifications to batching requirements, the proposal to require the initiating party to pay the non-refundable administrative fee earlier in the

¹⁹⁷ Based on data from the NAICS Association for NAICS code 62111 (Offices of Physicians), the Departments estimate the percent of businesses within the industry of Offices of Physicians with less than \$16 million in annual sales. By this standard, the Departments estimate that 47.2 percent or 66,207 physicians are considered small under the SBA's size standards. See <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>.

initiation process, and the proposed registry for group health plans and health insurance issuers, would reduce the number of ineligible disputes initiated in the Federal IDR process each year. Preliminary internal data indicate that between June 2022 and May 2023, approximately 48,000 disputes were determined to be ineligible by certified IDR entities. Based on this data and the rates of ineligibility attributable to various reasons (for example, State jurisdiction over the dispute or the dispute being initiated against the wrong non-initiating party), the Departments estimate that a total decrease in ineligible disputes of approximately 50 to 75 percent, or 24,000 to 36,000 disputes, could result from the cumulative impact of these proposals each year. The Departments have calculated this estimated range to reflect that the proposals in these rules, while severable, may work in concert with one another to reduce ineligible disputes. Uncertainties in the reduction of ineligible disputes remain, and the Departments note that variables such as the number of disputes initiated have changed over time and may continue to fluctuate. Therefore, it is possible that the number of ineligible disputes ultimately prevented by the proposals in these rules could be outside of the range estimated in this paragraph.

2. Costs
- These proposed rules seek to minimize costs to providers, facilities, providers of air ambulance services, plans, and issuers. The Departments seek comments on the assumptions made in this section and any additional costs that would be incurred by affected parties associated with the proposals in these proposed rules. The Departments also seek comment from individuals from minority and underserved communities, and providers who serve these individuals, to help address the costs that would be associated with these proposed rules related to these communities specifically.
- a. Required Use of CARCs and RARCs
- Plans and issuers would incur costs to comply with the requirements of these proposed rules related to the use of CARCs and RARCs. Plans and issuers would be required to use CARCs and RARCs on both electronic and paper remittance advice, in accordance with guidance issued by the Departments or as required under any applicable, adopted standards and operating rules under 45 CFR part 162. This would be necessary when processing out-of-network claims¹⁹⁸ to communicate information related to whether a claim for an item or service furnished by an entity that does not have a direct or indirect contractual relationship with the plan or issuer for the furnishing of

the item or service under the plan or coverage is subject to the No Surprises Act’s surprise billing provisions.

The Departments estimate that 1,500 issuers¹⁹⁹ and 205 TPAs²⁰⁰ would incur costs to automate the process to include the appropriate CARCs and RARCs in the appropriate remittance documents and comply with the proposed provisions. The Departments anticipate that issuers and TPAs would need to make annual changes to their IT systems to accommodate additional No Surprises Act-related CARCs and RARCs that may be required by the Departments in future guidance, or as required under any applicable adopted standards and operating rules under 45 CFR part 162. The Departments estimate that each issuer or TPA would require a computer programmer 8 hours (at an hourly rate of \$98.84)²⁰¹ to make annual changes to their IT system to allow for the incorporation of newly developed No Surprises Act-related CARCs and RARCs into their remittance documents and an operations manager 1 hour (at an hourly rate of \$118.14) to annually verify accuracy and accessibility. The Departments estimate that each issuer or TPA would require a total of 9 hours annually, with an associated cost of \$909. For all issuers and TPAs, the Departments estimate an annual burden of 15,345 hours, with an associated total annual cost of \$1,549,606 beginning in 2024.

TABLE 7: Annual IT Costs for Issuers and TPAs Related to CARCs and RARCs

	Estimated Number of Issuers and TPAs	Hours per Issuer/TPA (Hours)	Total Annual (Hours)	Total Estimated Cost
Annual IT Changes	1,705	9.0	15,345	\$1,549,606

The Departments anticipate that most issuers and TPAs that are subject to HIPAA Administrative Simplification requirements currently use ERA and therefore are already required to use CARCs and RARCs in their ERAs to providers. However, the Departments recognize that some plans, issuers, and TPAs may not have the capacity to use more than one CARC and RARC per line

item or may not currently use CARCs and RARCs when providing paper remittances. These issuers and TPAs would incur a higher burden and cost associated with the proposed provisions, particularly to the extent that an issuer or TPA is required to use multiple CARCs and RARCs per line item. In addition, plans and issuers with narrow networks may incur increased

costs, as they would likely process more out-of-network claims to which this proposal would apply. The Departments anticipate that TPAs would, in general, pass on the costs to implement the use of CARCs and RARCs to plan sponsors, which in turn could be passed on to participants in the form of higher premiums or contributions.

¹⁹⁸ This requirement would not apply to claims submitted by a participant, beneficiary, or enrollee directly to the plan or issuer for items or services furnished by a nonparticipating provider or nonparticipating facility.

¹⁹⁹ Based on data from MLR annual report for the 2021 MLR reporting year. See <https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr>.

²⁰⁰ Non-issuer TPAs based on data derived from the 2016 benefit year reinsurance program contributions.

²⁰¹ Wage rate derived from the BLS May 2022 National Occupational Employment and Wage Estimates for Computer Programmer (occupation 15–1251). Mean hourly rate (\$49.42) has been increased by 100 percent to account for the cost of

fringe benefits and other indirect costs (\$49.42 * 100% = \$98.84).

The Departments seek comment on these estimates, the number of issuers or TPAs that do not currently have the ability to use CARCs and RARCs on paper remittance documents, what the burden and cost would be, and if any of those costs would be passed on to plan sponsors, to meet the requirements of this proposed provision. The Departments specifically seek comment on whether plans and issuers generally have the ability to use CARCs and RARCs in both paper and electronic remittance advice, or just electronic remittance advice. The Departments recognize that an issuer's or TPA's current IT structure could play a role in their ability to meet the requirements in the proposed provisions and the ability to apply more than one CARC and RARC combination on a single line item, if required in certain scenarios. The Departments seek comment on issuers' and TPAs' capability to implement new No Surprises Act-specific CARCs and RARCs and to use more than one CARC and RARC combination on a single line item if necessary; what barriers plans, issuers, and TPAs may face in developing and implementing this capability; and what associated burden and cost would be incurred to implement and operationalize this capability for both electronic and paper remittances.

In addition, the use of CARCs and RARCs on both electronic and paper remittance advice would potentially reduce costs to certified IDR entities by reducing the number of ineligible payment disputes submitted to the Federal IDR process, as further described in section V.D.1.l. of this preamble. It would also reduce administrative costs incurred by parties related to initiating and responding to ineligible payment disputes.

b. Information To Be Shared About the QPA

As detailed in section V.F.2. of this preamble, the Departments estimate that in the aggregate plans (or their TPAs) and issuers would incur a total one-time cost in 2024 of approximately \$505,567 to make changes to the currently required QPA notification to incorporate the additional information described in proposed amendments to paragraphs 26 CFR 54.9816–6(d)(1)(iv) and (v), 29 CFR 2590.716–6(d)(1)(iv) and (v), and 45 CFR 149.140(d)(1)(iv) and (v).

c. Open Negotiation

The Departments propose to amend the open negotiation provisions to require the party initiating open negotiations to provide an open negotiation notice and supporting

documentation to the other party and the Departments through the Federal IDR portal to initiate the open negotiation period. The Departments propose to expand the required information on the open negotiation notice to include new elements. Furthermore, the party in receipt of the open negotiation notice would be required to provide a response to the open negotiation notice within the first 15 business days of 30-business-day open negotiation period.

To implement this proposal and other proposals in these proposed rules impacting the submission of information to the Federal IDR portal (including the proposals pertaining to the notice of IDR initiation and notice of IDR initiation response forms, the notice of certified IDR entity selection form, and the departmental eligibility review), the Departments would need to implement system changes to the Federal IDR portal to ensure parties are able to submit the open negotiation notice through the portal to the other party and the Departments, and to allow for a response from the non-initiating party. The Departments estimate that their costs to implement all portal system changes described in these proposed rules would be approximately \$11,000,000 in fiscal year 2024. While some plans or issuers have created their own proprietary portals to facilitate open negotiations, providers, facilities, and providers of air ambulance services are not required to use them, and the Departments are of the view that there would be significant efficiencies in having one central location where providers, facilities, and providers of air ambulance services could initiate open negotiations across all plans and issuers.

The Departments estimate that these proposed rules would increase burden and create burden for the parties submitting the open negotiation notice and the proposed open negotiation response notice.²⁰² The total burden associated with these new requirements for parties would be 420,000 hours at a cost of \$44,079,000 in 2024 and 840,000 hours at a cost of \$88,158,000 annually beginning in 2025. The burden associated with this information collection is discussed further in section V.F.3. of this preamble.

The Departments seek comment on these costs and any other burdens interested parties foresee resulting from this proposal.

d. Initiating the Federal IDR Process and Notice of IDR Initiation

The Departments are proposing changes impacting the process for initiating the Federal IDR process and the notice of IDR initiation. The cost associated with updates to the Federal IDR portal for IDR initiation are described in the previous section V.D.2.c. regarding open negotiation costs. The Departments are proposing these changes to accelerate dispute processing and reduce the burden on certified IDR entities. Specifically, the Departments propose to require the initiating party to provide additional information and supporting documentation on the notice of IDR initiation. The Departments also propose to require the non-initiating party to provide a response to the notice of IDR initiation within 3 business days of the date of IDR initiation that must include an enumerated list of information with additional disclosures, including a statement agreeing to the preferred certified IDR entity or providing an alternative preferred certified IDR entity, information regarding the eligibility of the item or service subject to the dispute, and supporting documentation. These proposals would increase the administrative burden for parties as they add information requirements that parties must submit at the initiation of the Federal IDR process. The Departments estimate that the total combined burden associated with the new requirements for all parties would be 315,000 hours at a cost of \$33,059,250 in 2024 and 630,000 hours at a cost of \$66,118,500 annually beginning in 2025. The burden associated with this information collection is discussed further in section V.F.4.a. of this preamble.

e. Certified IDR Entity Selection

The Departments propose to amend the process for the preliminary selection of the certified IDR entity and the submission of the notice of certified IDR entity selection. Specifically, under these proposed rules, the Departments propose that the non-initiating party must agree or object to the preferred certified IDR entity in the notice of IDR initiation response within 3 business days after the date of IDR initiation as discussed in section II.D.2.b. of this preamble. Due to this proposed change, the initiating party would only be required to submit the notice of certified IDR entity selection if the non-initiating party submits an alternative preferred certified IDR entity in the notice of IDR initiation response. The initiating party

²⁰² OMB Control Number: 1210–0169 (No Surprises Act: IDR Process).

would submit its notice agreeing or objecting to the non-initiating's alternative preferred certified IDR entity through the Federal IDR portal. The non-initiating party would only be required to submit the notice of certified IDR entity selection if the initiating party provides an alternative preferred certified IDR entity in the notice of certified IDR entity selection within the 3-business-day period following the date of IDR initiation. As such, the burden associated with this collection would be increased by approximately \$418,621 and is described further in section V.F.4.b. of this preamble.

f. Federal IDR Eligibility Determinations

The Departments propose amending 26 CFR 54.9816–8(c)(1)(v), 29 CFR 2590.716–8(c)(1)(v), and 45 CFR 149.510(c)(1)(v) to make Federal IDR process eligibility determinations the responsibility of the Departments in certain circumstances, at the discretion of the Departments. Under this proposal to invoke a departmental eligibility review when certain criteria are met as discussed in section II.E.1.b. of this preamble, following IDR initiation, the Departments would evaluate whether the dispute is eligible for the Federal IDR process and make an eligibility determination. If the dispute is found to be eligible, the Departments would send it to the certified IDR entity to continue the Federal IDR process. If the dispute is found to be ineligible for the Federal IDR process, it would be closed.

By assuming the responsibility for Federal IDR process eligibility determinations, the Departments would incur costs that have thus far been incurred primarily by certified IDR entities. Therefore, it is important to note that these costs generally represent a transfer of costs (from certified IDR entities to the Departments) rather than actual new costs associated with the Federal IDR process. It is equally important to note that the Departments cannot quantify the full extent of these costs as they are now being incurred by certified IDR entities, and the Departments are not privy to their finances. As such, these estimates should be considered as the Departments' best approximations based on limited information.

These costs would vary depending on whether the departmental eligibility review for Federal IDR process eligibility determinations is in effect or not and may also vary considerably based on Federal IDR process dispute volume. When the departmental eligibility review is not in effect, the Departments would incur fewer costs, as they would not be responsible for

Federal IDR process eligibility determinations. The Departments estimate that they would incur a one-time "startup" cost for system and operations development in the first year beginning when these proposed rules are finalized and go into effect, which is included in the cost of the overall Federal IDR portal build described in section V.D.2.c. of this preamble, and ongoing operations and maintenance costs of \$463,320 annually thereafter. When the departmental eligibility review is in effect, the Departments would be making eligibility determinations for disputes submitted to the Federal IDR process, which would incur a much higher level of burden, including responsibilities such as regulatory analysis, outreach, quality assurance, administrative activities, and close coordination among multiple parties. The Departments estimate that this would cost approximately \$17,199,000 in 2024 and \$41,277,600 per year beginning in 2025. The Departments wish to reiterate the draft nature of these estimates and their strong dependency on Federal IDR process volume, which is highly challenging to predict. As such, the Departments encourage comment and feedback.

g. Withdrawals

The Departments propose to add 26 CFR 54.9816–8(c)(3)(ii), 29 CFR 2590.716–8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii) to establish a process for disputes to be withdrawn from the Federal IDR process. If the withdrawal is not agreed upon by both parties, these proposed rules would require the initiating party to submit a withdrawal request to the Departments and the non-initiating party through the Federal IDR portal. The non-initiating party would then be required to provide a response within 5 business days indicating agreement or objection to the request for withdrawal. If the non-initiating party fails to respond within 5 business days of the initiating party's request, the non-initiating party would be considered to have agreed to the dispute's withdrawal. This new collection would result in a cost to the parties of \$455,196 in 2024 (\$372,120 for initiating parties and \$83,076 for non-initiating parties) and \$910,392 (\$744,240 for initiating parties and \$166,152 for non-initiating parties) annually beginning in 2025, as discussed further in section V.F.6. of this preamble.

h. Treatment of Batched Items and Services

The Departments propose to amend the batching policies in response to the

Departments' experiences with batched determinations and operationalizing the Federal IDR process, as well as consideration of interested parties' feedback regarding the Federal IDR process. Under this proposal, the Departments would allow parties the flexibility to batch qualified IDR items and services (or "line items") that relate to the treatment of a similar condition with necessary limitations to encourage efficiency. Specifically, the policy would allow all qualified IDR items and services to be batched by: (1) items and services furnished to a single patient during a patient encounter on one or more consecutive dates of service and billed on the same claim form (single patient encounter); (2) items and services furnished to one or more patients and billed under the same service code, or a comparable code under a different procedural code system; or (3) anesthesiology, radiology, pathology, and laboratory IDR items and services furnished under service codes belonging to the same Category I CPT code range, as specified in guidance by the Departments, in order to address the unique circumstances of certain medical specialties and provider types.

To implement this proposal, the Departments would need to implement system changes to the Federal IDR portal to ensure that the ability to batch under the new rules is operationalized. The total cost to implement system changes associated with submitting information through the portal, including those related to batching, is described in the open negotiation cost section of these proposed rules (section V.D.2.c. of this preamble). While the Federal IDR portal currently has batching capabilities, these proposed rules would allow for additional permissible mechanisms of batching which would need to be collected and captured in the Federal IDR portal.

i. Administrative Fee Collection

i. Establishment of the Administrative Fee Amount and Methodology

The Departments propose revisions to the methodology for setting the administrative fee and propose new reduced administrative fee amounts. If the IDR Process Fees proposed rules are finalized as proposed, the administrative fee in effect in calendar year 2024 would be \$150 per party per dispute.²⁰³ Based on internal Federal IDR process data and estimating the impact of *TMA IV*'s vacatur of the

²⁰³ Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges proposed rules, 88 FR 65888 (September 26, 2023).

batching regulations at 26 CFR 54.9816–8T(c)(3)(i)(C), 29 CFR 2590–716–8(c)(3)(i)(C), and 45 CFR

149.510(c)(3)(i)(C), the Departments estimate that approximately 225,000 disputes are closed per year. Therefore, if the administrative fee as proposed in the IDR Process Fees proposed rule, if finalized, were to remain applicable, disputing parties would pay approximately \$67,500,000 in administrative fees annually (225,000 disputes × 2 parties per dispute × \$150 per party).

In these proposed rules, the Departments are proposing an administrative fee of \$150 per party per dispute, a reduced administrative fee of \$75 for both parties in low-dollar disputes, and a reduced administrative fee of \$30 for non-initiating parties in ineligible disputes for disputes initiated on or after January 1, 2025. The Departments are also proposing to collect the administrative fee directly from the parties closer to the time of initiation rather than the time a dispute is closed.

The Departments project a total of 420,000 disputes would be initiated annually based on internal data, which includes 65,520 disputes for which both parties would pay the reduced administrative fee for low-dollar disputes, 18,480 disputes for which the initiating party would pay the reduced administrative fee for low-dollar disputes and the non-initiating party would pay the reduced administrative fee for ineligible disputes, 73,920 disputes for which the initiating party would pay the full administrative fee and the non-initiating party would pay the reduced administrative fee for ineligible disputes, and 262,080 disputes for which both parties would pay the full administrative fee. Thus, based on this data and assuming the number of disputes remains stable year over year and the administrative fee amounts are not subsequently changed through notice and comment rulemaking, the Departments estimate that disputing parties would pay approximately \$103,698,000 in administrative fees annually beginning in 2025.²⁰⁴ Therefore, the costs associated with this proposal would be approximately \$36,198,000 annually beginning in 2025 (\$103,698,000 if this proposal is finalized – \$67,500,000 if

the baseline condition under the IDR Process Fees proposed rules, if finalized, were to continue).

The Departments seek comment on these estimates and assumptions.

ii. Time of Collection of Administrative Fee and Certified IDR Entity Fee

The Departments are proposing to amend the provisions related to the time of administrative fee collection such that an initiating party would be required to pay the non-refundable administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity, and the non-initiating party would be required to pay the non-refundable administrative fee within 2 business days after a notice of an eligibility determination. Because initiating parties are not required to pay the administrative fee until offer submission under current guidance, some initiating parties fail to pay this fee for ineligible disputes. Although the Departments anticipate that this proposal would result in all initiating parties paying their administrative fee because the administrative fees are always non-refundable and incurred when preliminary selection of the certified IDR entity is complete, the Departments are of the view that the impact of this proposed change would be minimal on initiating parties, as compared to the existing regulation, associated burden analysis, and approved Paperwork Reduction Act Supporting Statement, which provide for all administrative fees to be non-refundable and to be paid in every dispute submitted. Under these proposed rules, if an initiating party fails to pay the required administrative fee within 2 business days of preliminary selection of the certified IDR entity, the dispute would be closed and neither disputing party would owe the administrative fee; thus, a dispute opened by an initiating party that fails to timely pay the administrative fee is treated as a provisional dispute that does not proceed through the full Federal IDR process. Further, the Departments anticipate that this proposal would result in almost all non-initiating parties paying their administrative fee because of associated penalties for nonpayment, including that their offer would not be considered received, the non-initiating party would still be responsible for paying the administrative fee, and the unpaid administrative fee would be subject to Federal debt collection procedures.

Currently, approximately 40 percent of non-initiating parties do not pay the administrative fee. Under these proposed changes, the Departments

estimate a total of 420,000 disputes would be initiated annually. However, the Departments are of the view that extrapolating a 40 percent cost increase to non-initiating parties would not be appropriate. Specifically, the combination of policies proposed in these rules, including attestation of eligibility during open negotiation and requiring the initiating party to pay the administrative fee at preliminary selection of the certified IDR entity, are designed to reduce the number of ineligible disputes submitted (as further described in section V.D.1.l. of this preamble), which are the disputes for which parties are often not paying the associated administrative fees. This proposal would be implemented in tandem with the requirements that non-initiating parties respond to the notice of IDR initiation, and the estimated amount of time for the non-initiating party to submit payment would be included in the estimated amount of time for the non-initiating party to submit the notice of IDR initiation response proposed in these rules. This amount of time is discussed further in section V.F.4.a. of this preamble.

The Departments are of the view that, if these proposed rules are finalized, initiating parties would submit fewer ineligible disputes, which would decrease the expenses incurred by the Departments and certified IDR entities to review eligibility information. In addition, parties would pay the required administrative fees in a higher percentage of disputes. However, at the same time, there would be fewer disputes to review, so fewer administrative fees would be collected. Overall, the Departments are of the view that this proposal would ensure that the costs of using the Federal IDR process are being equitably allocated to both eligible and ineligible disputes.

iii. Manner of Administrative Fee Collection

The proposal for the Departments to directly collect the administrative fee from disputing parties would increase the activities required to be accounted for in the administrative fee, as the Departments' costs associated with this collection would need to be included in that fee. The Departments estimate that there would be an implementation cost of approximately \$3,000,000 for system and operations development related to administrative fee collection in FY 2024, and ongoing operations and maintenance costs of approximately \$2,500,000 in FY 2025, \$1,250,000 in FY 2026, \$1,000,000 in FY 2027, and \$1,000,000 in FY 2028. Because the Federal IDR process is intended to be

²⁰⁴ This is calculated as follows: (65,520 disputes × 2 parties per dispute × \$75 per party) + {18,480 disputes × [(1 party per dispute × \$75 per party) + (1 party per dispute × \$30 per party)]} + {73,920 disputes × [(1 party per dispute × \$150 per party) + (1 party per dispute × \$30 per party)]} + {262,080 disputes × 2 parties per dispute × \$150 per party} = \$103,698,000.

self-sustaining, once the administrative fee calculation is adjusted, there would be no financial impact to the Federal Government. Although the Departments are of the view that requiring disputing parties to pay the administrative fee directly to the Departments, instead of to certified IDR entities, would not impose an additional administrative burden on disputing parties, the Departments acknowledge that any increased fee that could potentially result from this proposal could impact disputing parties. The Departments seek comment on these assumptions, including any burden increase associated with this process and whether that potential burden would be offset by a reduction of the administrative fee based on a higher collection rate of the administrative fee from disputing parties.

iv. Application of Federal IDR Process Requirements in Circumstances Involving a Failure To Pay Certified IDR Entity Fees or Administrative Fees

The Departments propose to clarify how the Federal IDR process applies when either party fails to timely pay the fees associated with the Federal IDR process. Specifically, the failure to pay the administrative fee by an initiating party would result in the closure of the dispute, and nonpayment of the certified IDR entity fee by the initiating party would result in the certified IDR entity not considering the initiating party's offer. Nonpayment of the certified IDR entity or administrative fee by a non-initiating party would result in the certified IDR entity not considering the non-initiating party's offer. The Departments are of the view that the impact of this change would be minimal for the parties, as the purpose of this policy is to clarify the sub-regulatory guidance that already exists and allow closure of disputes in which the initiating party does not provide the appropriate administrative fee payment. Further, the Departments are of the view that it would take a *de minimis* amount of time for the initiating and non-initiating parties to include their taxpayer identification numbers, which would be required to link debts owed by the disputing parties to the Departments, on the notice of IDR initiation and the notice of IDR initiation response.

v. Administrative Fee Structure for Disputing Parties in Low-Dollar Disputes

The Departments propose to charge the parties a reduced administrative fee when the initiating party attests that the highest offer made during open

negotiation by either party was less than the predetermined threshold as discussed further in section II.E.3.e. of this preamble. Because a reduction of the administrative fee would be applied to both parties when a low-dollar dispute is initiated, the Departments are of the view that the impact of this change would be minimal for most parties when combined with the proposal to expand batching, because these policies combined would result in fewer single low-dollar disputes being initiated. Furthermore, this proposal would reduce costs for certain parties to participate in the process, namely parties that provide low-dollar items or services and are unable to batch a sufficient number of items and services together to benefit from the batching proposals in these rules.

This proposal would require initiating parties to attest (for example, by checking a box) in the Federal IDR portal that no offer made by either party during open negotiation exceeded a predetermined threshold. The Departments are of the view that this action would only take a *de minimis* amount of time for the initiating party to complete, perhaps a minute, and therefore would result in negligible costs. This amount of time is minimal and is captured in the total time it takes to initiate the dispute—2.25 hours, as discussed further in the PRA package for the Federal IDR process (OMB control number: 1210-0169). This proposal may also increase the burden on the Federal Government due to the costs to complete system updates to account for this proposal, but the Departments anticipate that these costs would be incurred in tandem with changes to the other system build costs discussed in these proposed rules; thus, those costs are included in the cost estimates for the proposed changes related to open negotiation in section V.D.2.c. of this preamble. Furthermore, the Departments are of the view that the benefit of making the Federal IDR process more accessible to all types of providers, such as providers of low-dollar services, outweighs the limited costs to HHS to modify its system build.

vi. Administrative Fee Structure for Non-Initiating Parties in Ineligible Disputes

Additionally, the Departments propose to charge the non-initiating party a reduced administrative fee when either the certified IDR entity or the Departments determine the entire dispute is not eligible for the Federal IDR process. Because a reduction of the administrative fee would be applied to the non-initiating party when a dispute

is ineligible for the Federal IDR process, the Departments are of the view that the impact of this change would be minimal for two reasons. First, under the current process, certified IDR entities often do not collect the administrative fee in these disputes; however, non-paying parties have been on notice that this fee was due even if they did not pay at the appropriate time. Second, policies such as requiring an attestation of eligibility during open negotiation and requiring the initiating party to pay the administrative fee at preliminary selection of the certified IDR entity are designed to reduce the number of ineligible disputes (as further described in section V.D.1.l. of this preamble) such that non-initiating parties would be assessed an administrative fee in fewer ineligible disputes. Because this process may incentivize non-initiating parties to timely challenge dispute eligibility during open negotiation, this may better capture the costs associated with the parties.

Further, the burden on disputing parties is dependent on whether the administrative fee is increased or decreased, which is a byproduct of estimated total annual expenditures by the Departments. In the event of a substantial change in payment of the administrative fee based on the volume of ineligible disputes or associated expenditures, which would impact the calculation of the administrative fee, the parties may incur an increased or decreased administrative fee to cover the costs to carry out the Federal IDR process. The Departments seek comment on potential impacts to disputing parties and certified IDR entities of any change in burden from this policy, including any modifications to internal operating procedures that may be required to implement this fee structure.

j. Extension of Time Periods for Extenuating Circumstances

The Departments propose to establish that the Departments, or at the request of a certified IDR entity or a party, would determine whether an extension is necessary because the parties or certified IDR entity cannot meet applicable timeframes due to matters beyond the control of the certified IDR entity or one or both parties, or for other good cause. The process for requesting an extension due to extenuating circumstances would remain the same as when this process was established in the October 2021 interim final rules, and entities would continue to submit the Request for Extension due to Extenuating Circumstances form through the Federal IDR portal.

However, based on the proposed changes to this policy, the Departments estimate that the number of respondents would increase due to the addition of certified IDR entities, thus slightly increasing the total burden associated with this collection. The Departments estimate that the costs associated with certified IDR entity requests for the extension would be \$99 in 2024 and \$197.80 annually beginning in 2025. This cost is explained in further detail in section V.F.8. of this preamble.

k. Registration of Group Health Plans and Health Insurance Issuers

Establishing the Federal IDR registry would impose a cost on the Departments by requiring them to develop and build the registry. The Departments anticipate incurring a cost of approximately \$3,000,000 to develop and build the Federal IDR registry in FY 2024, with annual ongoing costs to maintain the registry of \$150,000 on average thereafter. Additionally, enrolling in the Federal IDR registry would impose a cost on issuers and plans by requiring them to submit information to the Departments. These costs amount to \$1,573,693 in 2024 and \$94,252 annually beginning in 2025 and are further described in section V.F.9. of this preamble.

3. Uncertainties

While the Departments are of the view that the majority of issuers and TPAs have the capability to use single CARC and RARC combinations on ERA transactions, the Departments are uncertain about the current level of use within the industry and whether issuers and TPAs have the capability to incorporate this information on paper remittance advice. Further, the Departments are uncertain about the current capability or percentage of issuers and TPAs that have the ability to use multiple CARC and RARC combinations for individual line items, including on electronic and paper remittance advice; what barriers and challenges issuers and TPAs would face to implement and operationalize this capability; and whether substantial system changes would need to be implemented to effectuate this proposed policy.

It is unclear whether the Federal IDR process would experience the same operating conditions, such as the number of ineligible disputes submitted or the number of disputes that would be closed for nonpayment of the administrative fee, if all or some of the policies proposed in these proposed rules are finalized and implemented. While these factors would have a direct

impact on the expenditures made by the Departments to carry out the Federal IDR process, it is difficult to project the impact that may result to the administrative fee amount charged to the parties. It is also uncertain how many disputes would be considered low-dollar disputes in the future, which would impact how many parties would be charged the proposed reduced administrative fee for low-dollar disputes, and it is uncertain how many disputes would be determined ineligible if the proposals in these rules are finalized, which would impact how many non-initiating parties would be charged the proposed reduced administrative fee for ineligible disputes.

Furthermore, it is unclear if or when the proposed departmental eligibility review, which would allow the Departments to make eligibility determinations rather than certified IDR entities, may need to be invoked. The departmental eligibility review would impact dispute processing times and overall certified IDR entity operations; further, these factors may impact what percentage of disputes are settled or withdrawn after initiation but before offer submission.

The economies of scale that may be realized by batching qualified IDR items and services are uncertain, including whether there would be a reduction in the amount of fees each party has to pay since parties would generally be allowed to batch more items and services in a single dispute than under the vacated provisions (discussed in section II.E.2. of this preamble). The specific provisions of the batching proposal may have differing effects on the trends in dispute initiation overall. For example, the increased flexibility to batch based on a single patient encounter may increase initiation of batched disputes, while the proposed cap on the number of line items within a batch may require parties that previously submitted batches with a high number of line items to divide the claims across multiple batched disputes. Further, the Departments are of the view that the increased batching flexibilities in concert with the reduced administrative fee for low-dollar disputes, if finalized, could lead to an increase in disputes initiated, since these policies may result in the Federal IDR process becoming more accessible to providers and payers. For these reasons, the Departments recognize the uncertainty in estimating the potential impact on the number of disputes submitted, and thus the fees collected, due to the proposed batching provisions. Further, it is uncertain if

increased batching would lead to decreased collection of funds by the Departments if fewer administrative fees are paid.

It is uncertain how much time would be needed for plans, issuers, carriers, and TPAs to collect the registration information that they would be required to provide under these proposed rules. Furthermore, it is unclear how many group health plans would choose to self-register for the proposed IDR registry, rather than relying on a TPA or other third party to register on their behalf. If a significant number of group health plans self-register, this may increase the burden to industry as well as the operational burden to the Departments to create and maintain the registry.

Although the Departments have analyzed the last 12 months of Federal IDR process data available to inform their projections, it is uncertain if the trends in this data will remain applicable for two reasons. First, the Federal IDR process is still in an early phase of implementation and has not yet achieved the stabilization that occurs with long-term uptake of the process. Initially, the Departments estimated that approximately 22,000 disputes would be submitted to the process each year;²⁰⁵ uptake of the process, however, has rapidly outpaced that estimate as dispute initiations have grown exponentially since implementation, and analysis has revealed an estimated number closer to 420,000 annual disputes²⁰⁶ would have been more accurate.

Second, although each of the proposed provisions could be implemented separately and is severable, when reviewed holistically, implementation of these proposed policies would create comingled impacts, including on the number and type of disputes initiated, such that it is uncertain what the overall collective impact of these proposed policies would be. For example, although the Departments project a 50 to 75 percent decrease in the number of ineligible disputes as discussed further in section V.D.1.l. of this preamble, other policies such as expanded batching and the reduced administrative fee for low-

²⁰⁵ In the regulatory impact analysis of the October 2021 interim final rules, the Departments estimated that 17,333 disputes involving non-air ambulance services and 4,899 disputes involving air ambulance services would be submitted to the Federal IDR process during the first year of implementation, totaling 22,232 anticipated disputes.

²⁰⁶ Federal Independent Dispute Resolution Process—Status Update. Centers for Medicare & Medicaid Services. April 27, 2023. <https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf>.

dollar disputes are anticipated to increase access to the Federal IDR process, such that the total number of disputes initiated yearly may increase overall. Additionally, the proposed framework for administrative fees that, if finalized, would result in a reduced administrative fee for some disputing parties when a dispute is ineligible or low-dollar complicates the analysis of what types of disputes would be initiated under these proposed rules. Further, the policies designed to increase communication between the disputing parties, such as the registry, open negotiation, and dispute initiation provisions, are anticipated to reduce the number of ineligible disputes initiated and increase the number of disputes resolved through open negotiation. However, the Departments are uncertain whether additional parties will utilize the Federal IDR process due to these process improvements, which would ultimately bring more disputes into the process.

Overall, some of the proposed policies may reduce the number of disputes while others may increase the number of disputes initiated. Additionally, whether there will be a reduction in costs to the disputing parties is also uncertain under these collective proposals. For example, a provider that previously felt that the nature of their practice made it infeasible to initiate a dispute due to financial concerns may find the Federal IDR process more financially accessible under the proposed reduced administrative fee framework, thus incurring the associated cost and administrative fees and increasing the annual dispute number.

4. Regulatory Review Cost Estimation

If regulations impose administrative costs on entities, such as the time needed to read and interpret rules, regulatory agencies should estimate the total cost associated with regulatory review. Based on comments received for the July 2021 interim final rules and October 2021 interim final rules, the Departments estimate that more than 2,100 entities will review these proposed rules, including 1,500 issuers, 205 TPAs, and at least 395 other interested parties (for example, State insurance departments, State legislatures, industry associations, advocacy organizations, and providers and provider organizations). The Departments acknowledge that this assumption may understate or overstate the number of entities that will review these proposed rules.

Using the mean hourly wage rate from the Bureau of Labor Statistics for a

Lawyer (Code 23–1011) to account for average labor costs (including a 100 percent increase for the cost of fringe benefits and other indirect costs), the Departments estimate that the cost of reviewing these proposed rules would be \$157.48 per hour.²⁰⁷ The Departments estimate, based on an average reading speed of 200 to 250 words per minute, that it would take each reviewing entity approximately 10 hours to review these proposed rules, with an associated cost of approximately \$1,574.80 (10 hours × \$157.48 per hour). Therefore, the Departments estimate that the total burden to review these proposed rules will be approximately 21,000 hours (2,100 reviewers × 10 hours per reviewer), with an associated cost of approximately \$3,307,080 (2,100 reviewers × \$1,574.80 per reviewer).

The Departments welcome comments on this approach to estimating the total burden and cost for interested parties to read and interpret these proposed rules.

E. Regulatory Alternatives— Departments of Health and Human Services and Labor

In developing these proposed rules, the Departments considered various alternative approaches.

1. Required Use of CARCs and RARCs

The Departments considered applying the proposed requirement to use CARCs and RARCs under new 26 CFR 54.9816–6A, 29 CFR 2590.716–6A, and 45 CFR 149.100 only to claims subject to the surprise billing protections of the No Surprises Act. However, the Departments have become aware that providers, facilities, and providers of air ambulance services have sought to initiate open negotiations or the Federal IDR process for a sizeable number of claims that are not subject to the No Surprises Act. Therefore, the Departments have concluded that it would be helpful for plans and issuers to communicate information regarding the applicability of the No Surprises Act for all out-of-network claims, and that a narrower application would be less impactful. Thus, the proposed approach may reduce the number of ineligible claims submitted, as further described in section V.D.1.l. of this preamble.

The Departments considered specifying in regulation which CARCs and RARCs must be used, rather than providing this information in guidance. The Departments are working to understand and address the current

backlog of disputes slowing down the Federal IDR process. The Departments have concluded that retaining the flexibility to identify the CARCs and RARCs to be used in specified scenarios in guidance rather than through notice and comment rulemaking would provide greater ability to quickly address communication gaps that are contributing to this backlog and future implementation challenges, as the Departments better understand these gaps. This also mirrors the current approach for required CARC and RARC code combinations that must be used by HIPAA-covered entities in business scenarios, as specified in guidance.

The Departments also considered continuing to support the voluntary use of No Surprises Act-specific RARCs. The Departments recognize the additional burden that requiring certain RARCs may place on small entities that may have fewer dedicated IT and coding staff. However, since the RARC Committee approved a set of RARCs for optional use, effective March 1, 2022, providers, facilities, and providers of air ambulance services and plans and issuers have continued to report communication challenges and to request more standardized mechanisms for communicating information. The Departments concluded that requiring certain CARCs and RARCs in specific circumstances, as well as continuing to permit the use of voluntary RARCs at the discretion of plans and issuers, would provide a more effective means of standardizing communication and better achieve a number of aims, including improving information flow between plans and issuers and providers, facilities, and providers of air ambulance services and consequently reducing the submission of ineligible claims to the Federal IDR process.

2. Open Negotiation Provision Changes (26 CFR 54.9816–8(b)(1), 29 CFR 2590.716–8(b)(1), and 45 CFR 149.510(b)(1))

The Departments propose to amend the open negotiation provisions at 26 CFR 54.9816–8(b)(1)(i), 29 CFR 2590.716–8(b)(1)(i), and 45 CFR 149.510(b)(1)(i) to require the party initiating open negotiations to provide an open negotiation notice and supporting documentation to the other party and the Departments to initiate the open negotiation period. Furthermore, the party in receipt of the open negotiation notice would be required to provide a response to the open negotiation notice to the other party and the Departments no later than the 15th business day of the 30-business-day open negotiation period.

²⁰⁷ Centers for Medicare & Medicaid Services. (May 1, 2022). *May 2022 National Occupational Employment and Wage Estimates*. https://www.bls.gov/oes/current/oes_nat.htm.

The Departments considered alternative ways for the party initiating open negotiation to notify the Departments of the initiation of open negotiations instead of submitting the notice through the Federal IDR portal. The Departments considered having the party submitting the open negotiation notice notify the Departments via mail or email but decided that the portal would provide a more logical place for the notice to be provided, as this is where Federal IDR process information is stored. The Departments also considered taking no action and maintaining the current process in which parties initiating open negotiation do not inform the Departments directly of the initiation of open negotiations. However, the Departments are of the view that these changes are necessary to make it explicitly clear to the Departments when open negotiations are initiated in order to best track the flow of Federal IDR process dispute initiations. The Departments are of the view that these proposals would create more certainty regarding whether and when the party initiating open negotiation begins open negotiations by ensuring that start and end dates are documented in the Federal IDR portal, which is the official place of record for the Federal IDR process. Further, the Departments acknowledge the additional burden that small entities may face in meeting the requirements of the Federal IDR process since they may not have dedicated staff to perform all the functions necessary to meet the requirements. However, the Departments are of the view that the proposed policy to centralize the submission of open negotiation notices through the Federal IDR portal would alleviate burden on small entities as it would reduce the number of channels they previously submit these notices through.

The Departments also considered alternatives to requiring the party in receipt of the open negotiation notice to provide a response to the open negotiation notice within the 30-business-day open negotiation period. The Departments considered maintaining the status quo of not requiring this response, but are of the view that creating this requirement would be the better alternative, because this proposal would create an additional exchange of eligibility-related disclosures between the parties and foster better communication between the parties to improve the Federal IDR process.

The Departments also propose to require that the open negotiation notice contain additional specific information

and be in a specific format as discussed in section II.D.1.c. of this preamble. The Departments further propose to require that the open negotiation response notice must be provided, using the standard form developed by the Departments, no later than the 15th business day of the 30-business-day open negotiation period, and the party in receipt of the open negotiation notice must provide the open negotiation response notice through the Federal IDR portal resulting in receipt by the party initiating open negotiation and the Departments on the same day. The Departments considered maintaining the status quo and not requiring the additional information, the specific format, or timing, but determined that this proposal would create an additional exchange of information necessary to help the Federal IDR process be successful, allow certified IDR entities to make more informed decisions, and improve communication between the parties.

3. Changes to the Initiation of the Federal IDR Process and the Notice of IDR Initiation (26 CFR 54.9816–8(b)(2), 29 CFR 2590.716–8(b)(2), and 45 CFR 149.510(b)(2))

The Departments propose to amend the IDR initiation provisions of 26 CFR 54.9816–8(b)(2), 29 CFR 2590.716–8(b)(2), and 45 CFR 149.510(b)(2) to accelerate dispute processing and reduce the burden on certified IDR entities. Specifically, the Departments propose to require the initiating party to provide an enumerated list of additional information on the notice of IDR initiation, including a statement describing the aspects of the claim, such as patient acuity or level of training, any payment discussed by the parties during open negotiation, whether the reasons for initiating the Federal IDR process are different from the aspects of the claim discussed during the open negotiation period, and an explanation of why the party is initiating the Federal IDR process.

Similarly, the Departments propose to require the non-initiating party to provide a response to the notice of IDR initiation, within 3 business days after the date of IDR initiation, that must include an enumerated list of information, including an agreement or disagreement that the dispute is eligible for the Federal IDR process, supporting documentation if the non-initiating party believes a dispute is not eligible, and an agreement to the preferred certified IDR entity identified in the notice of IDR initiation or an alternate preferred certified IDR entity selection.

The Departments propose to require these notices to be provided to the other party and the Departments electronically through the Federal IDR portal.

The Departments considered alternatives to these notices and the information they are required to contain, including contemplating notices that contained less required information. Recognizing the increased administrative burden of providing this additional information within the specified timeframe, particularly for small entities that may regularly engage with the IDR process and may not have staff dedicated to perform this function, the Departments also considered maintaining the status quo, but instead determined that these notices are necessary to address processing and communication issues caused by the lack of information. These new requirements would provide information to the certified IDR entities that is frequently missing under the status quo.

Each of the new required elements would provide specific information needed by the certified IDR entities to successfully conduct the Federal IDR process. The lack of these information elements creates a burden on the certified IDR entities, as they are currently required to undertake concerted efforts to obtain the information from the parties or other sources. This has resulted in additional time and effort for the certified IDR entities and caused the process to move at a slower pace than is desired. The Departments are of the view that requiring the parties to provide these notices and the information contained in them within the timeframes and in the manner proposed would result in a reduction in this burden on the certified IDR entities and would result in greater efficiency of the Federal IDR process overall. Additionally, the Departments are of the view that these additional elements would assist in determining whether the items or services associated with the dispute are eligible for the Federal IDR process, allow for a streamlined process to track dispute initiation, enhance communication between the parties, and facilitate a more efficient process of IDR initiation.

4. Certified IDR Entity Selection (26 CFR 54.9816–8(c)(1), 29 CFR 2590.716–8(c)(1), and 45 CFR 149.510(c)(1))

The Departments propose to establish a process for the preliminary selection of the certified IDR entity and final selection of the certified IDR entity at 26 CFR 54.9816–8(c)(1), 29 CFR 2590.716–8(c)(1), and 45 CFR 149.510(c)(1).

Specifically, the Departments propose amending the preliminary selection of the certified IDR entity process to establish that if the party last in receipt of either the notice of IDR initiation response or the notice of certified IDR entity selection received the notice on the third business day after the date of IDR initiation and did not agree to the other party's alternative preferred certified IDR entity by the end of third business day after the date of IDR initiation, the Departments would provide the party 2 additional business days to agree or object to other party's alternative preferred certified IDR entity selection. Further, the Departments propose to clarify that the date of preliminary selection of the certified IDR entity would be 3 business days after the date of IDR initiation if the parties jointly selected a certified IDR entity, or 6 business days after the date of IDR initiation if the parties fail to jointly select a certified IDR entity and the Departments select a certified IDR entity either based on the agreement (or failure to respond) of the party in receipt of the last notice (either the notice of IDR initiation response or the notice of certified IDR entity selection) or through random selection. Lastly, the Departments propose to establish the process for finalizing selection of the certified IDR entity at 26 CFR 54.9816–8(c)(1)(iv), 29 CFR 2590.716–8(c)(1)(iv), and 45 CFR 149.510(c)(1)(iv), which would establish that the date of final selection of the certified IDR entity is the date the Departments provide notice to the parties that the preliminarily selected certified IDR entity attests that it meets the conflict-of-interest requirements.

The Departments considered alternatives to this proposal. The Departments considered maintaining the status quo and not modifying the process of selecting a certified IDR entity. However, given that the current rules allow the conflict-of-interest review to coincide with the eligibility review, the Departments are of the view that creating a finalization stage of certified IDR entity selection in the Federal IDR process would improve efficiency and reduce confusion when completing certified IDR entity selection. The Departments are of the view that this proposed policy would not increase burden for disputing parties, including small entities, as the time period requirement for disputing parties to jointly select a certified IDR entity is not changing. The Departments are of the view that the certified IDR entity must be considered preliminarily selected until it is determined that the

certified IDR entity has no conflict of interest, and that the conflict-of-interest review should not cut into the time periods for either disputing party to submit their offers or for the certified IDR entity to make a payment determination.

5. Federal IDR Eligibility Determinations (26 CFR 54.9816–8(c)(1)(v), 29 CFR 2590.716–8(c)(1)(v), and 45 CFR 149.510(c)(1)(v))

The Departments propose to amend 26 CFR 54.9816–8(c), 29 CFR 2590.716–8(c), and 45 CFR 149.510(c) regarding Federal IDR eligibility determinations to make the Federal IDR process eligibility reviews the responsibility of the Departments under certain circumstances. Under this proposal, when a departmental eligibility review is in effect, the Departments would determine whether the dispute is eligible for the Federal IDR process. If the dispute is found to be eligible, the Departments would send it to the certified IDR entity to continue the Federal IDR process. If the dispute is found to be ineligible for the Federal IDR process, it would be closed.

The Departments considered being more involved in the entire eligibility review process on a permanent basis; however, once the Federal IDR process arrives at a steadier operational state, the Departments are of the view that the majority of eligibility work—in particular eligibility determinations—should be conducted by certified IDR entities, particularly if the other proposed policies in these proposed rules and non-regulatory improvements are successful in improving throughput. The Departments also considered maintaining the status quo of certified IDR entities performing the full scope of the eligibility determination process, but the burden of making these eligibility determinations has proven to be complex and time-consuming for certified IDR entities, and the statute only affords certified IDR entities the ability to collect the certified IDR entity fee when a payment determination is made. A payment determination can only be made for eligible disputes, so certified IDR entities are not able to keep any portion of their fee for disputes they determine are ineligible. This situation results in certified IDR entities being uncompensated for eligibility determination work on ineligible disputes. The Departments do not anticipate that this policy, if finalized as proposed, would have a differential impact on small entities. Therefore, the Departments are proposing this provision in a manner that provides the Departments with the

flexibility to move the responsibility for Federal IDR eligibility determinations between the Departments and certified IDR entities, as appropriate and with appropriate notice to interested parties.

6. Withdrawals (26 CFR 54.9816–8(c)(3), 29 CFR 2590.716–8(c)(3), and 45 CFR 149.510(c)(3))

The Departments propose to add 26 CFR 54.9816–8(c)(3)(ii), 29 CFR 2590.716–8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii) to establish a process for disputes to be withdrawn from the Federal IDR process. Specifically, the Departments propose that a dispute may be withdrawn from the Federal IDR process if: (1) the initiating party provides notification through the Federal IDR portal to the Secretary and the certified IDR entity (if selected) that both parties agree to withdraw the dispute from the Federal IDR process, with signatures from authorized signatories for both parties; (2) the initiating party provides a standard withdrawal request notice to the Departments, the certified IDR entity (if selected), and the non-initiating party, and the non-initiating party notifies the Secretary, certified IDR entity (if selected), and initiating party of its agreement to withdraw within 5 business days of the initiating party's request (or the non-initiating party fails to respond within 5 business days of the initiating party's request); (3) the certified IDR entity or the Departments cannot determine eligibility because both parties to the dispute are unresponsive to any requests for additional information to determine eligibility; or (4) the certified IDR entity cannot make a payment determination because both parties to the dispute have failed to submit an offer as described in 26 CFR 54.9816–8(c)(5)(i), 29 CFR 2590.716–8(c)(5)(i), and 45 CFR 149.510(c)(5)(i).

The Departments considered alternatives to this proposal. The Departments considered maintaining the status quo and not formalizing the process for disputes to be withdrawn. The Departments recognize that the withdrawal process may place particular burden on resource constrained small entities, that may face greater challenges meeting the timetables described in this proposal. However, given that the current rules do not establish a clear uniform process for disputes to be withdrawn, the Departments are of the view that these proposals would encourage efficiency by creating a centralized process for the parties to request a withdrawal of a dispute and requiring that the dispute would be withdrawn in the event the

parties are nonresponsive within the required timeframes. Further, the Departments also are of the view that permitting the withdrawal of a dispute in these cases would decrease the number of payment determinations the certified IDR entity is required to adjudicate.

7. Treatment of Batched Items and Services (26 CFR 54.9816–8(c)(4), 29 CFR 2590.716–8(c)(4), and 45 CFR 149.510(c)(4))

After considering feedback from interested parties, the Departments are of the view that the batching rules should be amended to capture additional efficiencies and expand access to the Federal IDR process, while avoiding combinations of unrelated claims in a single dispute that could unnecessarily complicate an IDR payment determination and operate to reduce efficiency. The Departments also anticipate that these batching policies, if finalized as proposed, would be particularly beneficial to small entities. By offering greater flexibility, these policies will improve the economic cost of the Federal IDR process and reduce the burden on small entities' billing and coding staff.

The Departments considered different approaches to expand the batching rules at proposed 26 CFR 54.9816–8(c)(4), 29 CFR 2590.716–8(c)(4), and 45 CFR 149.510(c)(4) for determining whether the items or services are related to treatment of a similar condition. In particular, the Departments considered approaches that relied on existing code sets that would capture a wider range of items and services than those under the current regulations, including the vacated provisions (discussed in section II.E.2. of this preamble). The rationale underlying batching based on code sets (or subsets of those code sets) is that based on the manner in which these code sets were built (by medical and coding professionals and others), the code sets present a reasonable basis upon which to conclude that certain sections (or subsections) of those code sets describe items and services that are related to the treatment of a similar condition.

The broadest potentially workable standard the Departments considered for determining whether the items or services are related to treatment of a similar condition is the Berenson-Eggers Type of Service (BETOS) codes. The BETOS coding system was originally developed for analyzing the growth in Medicare expenditures and is not

utilized for the purposes of billing.²⁰⁸ The Restructured BETOS Classification System (RBCS) includes HCPCS Level I codes (commonly referred to as “CPT codes”) and HCPCS Level II codes (commonly referred to as “HCPCS codes”) and groups CPT and HCPCS procedural codes into a few very broad categories: (1) anesthesia, (2) evaluation and management, (3) procedures, (4) imaging, (5) tests, (6) durable medical equipment, (7) treatment, and (8) other. However, this could theoretically offer unlimited batching of services furnished by specialty providers and, accordingly, result in batches that would be difficult for certified IDR entities to adjudicate in a timely manner. While this coding system is stable over time and is relatively immune to minor changes in technology or practice patterns, this approach would require parties and certified IDR entities to learn and become familiar with a new framework for categorizing items and services for the specific purpose of engaging with the Federal IDR process. The Departments are of the view that this would result in confusion and an exacerbation of backlog issues.

The Departments also considered allowing initiating parties to batch all items and services with the same ICD–10 diagnosis code. Every medical claim includes at least one ICD–10 diagnosis code, including a primary diagnosis code and optional secondary diagnosis codes. There are approximately 68,000 ICD–10 diagnosis codes that cover a wide variation in patient diagnoses. Given the wide variation in diagnoses and the fact that a single ICD–10 diagnosis code can cover a wide range of individual items or services, it is conceivable that diagnosis codes are not a reasonable basis upon which to determine that items or services provided to different patients sufficiently relate to treatment of a similar condition. Furthermore, the Departments are of the view that this level of variation could create complexity for disputing parties and certified IDR entities and increase the risk of inconsistent batching determinations.

In addition to batching based on code sets, the Departments considered specific recommendations from interested parties on creating additional batching flexibilities for determining whether the items or services are related to treatment of a similar condition. As

discussed in section II.E.2. of this preamble, anesthesiologists have advocated for batching by conversion factor since contracting practices for anesthesiology items and service focus on conversion factor rates. The Departments are of the view that this approach would undermine the Departments' efforts to increase efficiency in the Federal IDR process. Because conversion factors would be identical for every out-of-network service furnished by an anesthesiologist provider or provider group, the “same conversion factor” requirement results in the provider or provider group being able to batch every out-of-network service it furnishes that otherwise satisfies the requirements of the batching rules at proposed 26 CFR 54.9816–8(c)(4), 29 CFR 2590.716–8(c)(4), and 45 CFR 149.510(c)(4). Instead, the Departments are of the view that batching based on CPT code categories would lead to greater efficiency, would more closely align with the interpretation of treatment of a similar condition, and would lead to less risk in the variability among the items and services and factual circumstances that certified IDR entities must consider.

Additionally, the Departments considered feedback provided by emergency physicians, who stated that the nature of emergency care makes it difficult for them to batch claims under the current rules and suggested that the batching rules should allow for the most common evaluation and management CPT codes (99281–99285) to be batched together. However, the Departments have concluded that in the context of emergency care, the acuity of a patient may vary substantially in these circumstances. This means that certified IDR entities would need to review complex and disparate factual conditions for each item or service in a batch pertaining to emergency care, which would be extremely time consuming. Batching in these circumstances would therefore exacerbate payment determination delays and compound the backlog of disputes.

Similarly, the Departments considered allowing batching of all items and services within one of the six major sections of the CPT code book: (1) evaluation & management, (2) anesthesiology, (3) surgery, (4) radiology, (5) pathology and laboratory, and (6) medicine. This could allow batching of the services most often provided by emergency physicians, anesthesiologists, radiologists, pathologists, and other specialty providers. Due to the breadth of CPT

²⁰⁸ Centers for Medicare & Medicaid Services. (October 20, 2022). Restructured BETOS Classification System. <https://data.cms.gov/provider-summary-by-type-of-service/provider-service-classifications/restructured-betos-classification-system>.

codes relevant to surgery and radiology services, the Departments considered further limiting providers' batching ability to the specific services represented by the code spans relevant to each row in Table 8 that correlates to surgery or radiology services. While

these delineations could serve as straightforward guidelines that may result in consistent application of a batching standard across certified IDR entities, the Departments are of the view that variations in these services within a batched dispute could present

challenges to certified IDR entities' efficient resolution of disputes due again to the fact-specific and time intensive nature of reviewing information specific to each item or service within a batch.

TABLE 8: CPT Level I HCPCS Codes Groupings

CPT Level I HCPCS Codes (CPT) Code Span	Description
99202 – 99499	Evaluation and Management
00100 – 01999	Anesthesia
10004 – 19499	Surgery/Integumentary System
20100 – 29999	Surgery/Musculoskeletal System
33016 – 39599	Surgery/Cardiovascular System
40490 – 49999	Surgery/Digestive System
50010 – 53899	Surgery/Urinary System
54000 – 55980	Surgery/Male Genital System
56405 – 58999	Surgery/Female Genital System
60000 – 60599	Surgery/Endocrine System
61000 – 64999	Surgery/Nervous System
65091 – 68899	Surgery/Eye and Ocular Adnexa
69000 – 69979	Surgery/Auditory System
70010 – 77092	Radiology/Diagnostic Radiology/Diagnostic Ultrasound
77261 – 79999	Radiology/Radiation Oncology/Nuclear Medicine
80047 – 89398 0001U – 0284U	Pathology and Laboratory/Proprietary Laboratory Analysis
90281 – 99607	Medicine

The Departments are of the view that specific, narrower ranges within CPT Category I sections could mitigate this risk, more closely relate to the treatment of a similar condition, and encourage efficiencies of the Federal IDR process. Further, the Departments are of the view that batching based on CPT code categories would lead to greater efficiency, would more closely align with the interpretation of treatment of a similar condition, and would lead to less risk in the variability among the items and services and factual circumstances that certified IDR entities must consider. Thus, in balancing the need to create a workable batching rule for all parties and encouraging efficiency (including minimizing costs) to the Federal IDR process, the Departments determined that it would be appropriate to propose amendments to allow qualified IDR items and services to be batched by: (1) items and services furnished to a single patient during a patient encounter on one or more consecutive dates of service and billed on the same claim form (single patient encounter); (2) items and services furnished to one or more

patients and billed under the same service code, or a comparable code under a different procedural code system; or (3) anesthesiology, radiology, pathology, and laboratory IDR items and services furnished under service codes belonging to the same Category I CPT code range, as specified in guidance by the Departments, in order to address the unique circumstances of certain medical specialties and provider types.

Because these proposed rules would potentially allow batching of an unlimited number of qualified IDR items or services, the Departments also considered different approaches to mitigate the risk of large batches that may require certified IDR entities to review the eligibility for each line item, the acuity of each patient and/or other payment determination factors for each line item in the batch. First, the Departments considered modifying regulations related to the certified IDR entity fee to permit certified IDR entities to charge per line item. However, the Departments are of the view that a per line-item charge would present cost challenges for providers with lower dollar-value claims when utilizing the

Federal IDR process. The Departments subsequently considered modifying the IDR entity fee structure such that the certified IDR entity could charge per unique service code, so that certified IDR entities would be able to be adequately compensated for the time and work involved in payment determinations, while allowing for flexibility to batch a greater number of line items per dispute. However, given the Departments' experience in managing the Federal IDR process, the Departments are of the view that such a modification to the certified IDR entity fee structure would still necessitate a line-item limit to ensure certified IDR entities are able to make payment determinations within the required 30-business-day period. It is the Departments' understanding that a per service code charge and line-item limit combined may unnecessarily restrict access to the Federal IDR process.

The Departments also considered limiting a batched dispute to more than 25 different payment offers. For line items in which the payment offers are equal, the certified IDR entity could resolve all such line items through its

review of a single set of facts and documentation. A few certified IDR entities noted that it is easier to resolve payment determinations if the QPA is the same across codes. However, to accommodate batching of more than 25 qualified IDR items and services with equal payment offers, the initiating party would need to provide the offer for each line item or service earlier in the process such as during open negotiation or in the notice of IDR initiation as opposed to only at the time of the notice of offer. The Departments are of the view that this option would prove challenging because it would raise the issue of how to handle the limit of unique payment offers if the non-initiating party disagrees with the amount of unique payment offers. Further, under this approach, if the Departments would require offer information at the time of IDR initiation, the initiating party would only have 4 days to determine their offer following the end of the open negotiation period.

Lastly, the Departments considered imposing line-item limits to mitigate the risk of unwieldy batches. Specifically, the Departments considered proposing a limit of no more than 50 qualified IDR items or services in a batched determination. As of June 6, 2023, the average number of line items per batched dispute was 9 line items from April 2022 to June 2023. The Departments considered that while the average number of line items per batched dispute is much lower than the 50-line-item limit, this data is reflective of the number of line items a party can submit under the same service code, or a comparable code under a different procedural code system, and that there may likely be a higher average with the additional proposed batching flexibilities. Further, the Departments considered that 50 line items might, in some cases, still allow certified IDR entities to resolve payment determinations within the required 30-business-day period. However, based on their experience making payment determinations under the current batching rule, many certified IDR entities stated that batched determinations with more than 25 line items would be difficult to render payment determinations within the 30-business-day period if the Departments proposed additional batching flexibilities. To ensure operational efficiency for certified IDR entities as they make their payment determinations and given the average number of line items in a batched dispute, the Departments propose to require that no more than 25 qualified IDR items and

services may be considered jointly as part of one payment determination for the purposes of batched determinations.

8. Administrative and Certified IDR Entity Fee Collection (26 CFR 54.9816–8T(d), 29 CFR 2590.716–8(d), and 45 CFR 149.510(d))

The Departments considered maintaining the current policy that both the administrative fee and the certified IDR entity fee are due at the same time, later in the Federal IDR process. The Departments, however, determined that requiring a uniform 2-business-day requirement for the administrative fee to be paid by the parties was appropriate. The Departments are of the view that requiring payment by an initiating party within 2 business days of the date of preliminary selection of the certified IDR entity and by a non-initiating party within 2 business days of a notice of an eligibility determination by either the certified IDR entity or the Departments would substantially accelerate dispute throughput in the Federal IDR process and ensure that the costs of using the Federal IDR process are being allocated to both eligible and ineligible disputes.

Further, the Departments considered requiring the initiating party to pay the administrative fee within 1 business day of the date of preliminary selection of the certified IDR entity. The Departments considered whether the initiating party, by virtue of being the party that brings the dispute into the Federal IDR process, takes a more active role from the outset, and it should therefore be aware that it would be required to pay the administrative fee soon after initiating the dispute. In contrast, the Departments considered whether it was appropriate to allow the non-initiating party an additional business day from the date of notice of an eligibility determination to pay the administrative fee, because the non-initiating party neither controls when the dispute is initiated nor when eligibility is determined. On balance, the Departments determined a uniform 2 business day deadline from the date the administrative fee amount is determined (which is at preliminary selection of the certified IDR entity for the initiating party and at notification of an eligibility determination for the non-initiating party) was appropriate to allow equitable payment timeframes for both disputing parties.

Further, the Departments considered requiring the non-initiating party to pay the administrative fee within 2 business days of preliminary selection of the certified IDR entity. However, because the Departments propose in these proposed rules that the non-initiating

party may receive a reduced administrative fee for an ineligible dispute, the Departments determined requiring payment within 2 business days of notification of the eligibility determination was more appropriate. In making this determination, the Departments considered the additional burden associated with an overcharge to non-initiating parties for ineligible disputes, including the hold of additional administrative fees while eligibility is determined and operational costs to effectuate refunds to overcharged non-initiating parties.

The Departments considered maintaining the status quo of certified IDR entities collecting the administrative fee on behalf of the Departments. However, collection of the administrative fee by the certified IDR entities is inefficient, increases the burden of uncompensated work to certified IDR entities when the volume of ineligible disputes is high, and has historically resulted in low collection rates for ineligible disputes partially due to the existing administrative fee collection timing. The Departments also considered direct collection of both the administrative fee and certified IDR entity fee. The Departments are of the view that direct payment of the fee by the parties to the organization to which payment is ultimately owed (the Departments for the administrative fee and the certified IDR entity for the certified IDR entity fee) is more appropriate, especially in light of the different timing of these fee collections.

The Departments also considered only pursuing collection actions from all non-paying parties instead of moving up the timing of the fee collection. This option was counterbalanced by the expense associated with collection proceedings and the need to implement a policy that appropriately accounts for the financial burden of ineligible disputes.

The Departments considered allowing disputes to be placed on a temporary hold while fees are paid. However, ensuring all appropriate Federal IDR process fees are paid was counterbalanced by the need to implement an efficient Federal IDR process to determine out-of-network rates between providers, facilities, and providers of air ambulance services and plans, issuers, and FEHB carriers. The Departments are also of the view that a hold would not incentivize non-responsive parties to take action to challenge eligibility and further participate in open negotiation and the Federal IDR process, which are some of the goals of this proposal.

The Departments also considered charging only the initiating party a reduced administrative fee for low-dollar disputes and charging the non-initiating party the full administrative fee; however, the Departments determined this may be unnecessarily punitive to non-initiating parties in low-dollar disputes. Before proposing the highest offer from a disputing party during open negotiation as the proper metric to determine whether a dispute is low-dollar, the Departments considered setting the threshold for low-dollar disputes based on several metrics including the QPA, billed charge amount, and submitted offer. The Departments are of the view that the QPA is inappropriate because interested parties have expressed concerns about relying on the QPA as a determinative factor in the Federal IDR process. Similarly, billed charge amount was discarded as an option because it is a statutorily prohibited factor in payment determinations; thus, including it as an anchoring point for the administrative fee amount in the Federal IDR portal may lead disputing parties to believe the billed charge amount would be improperly considered by the certified IDR entity in making the final payment determination. Additionally, it would be inappropriate to utilize the final offer amount for two reasons. First, the parties may not know their offer amount when the certified IDR entity is selected and the administrative fee is billed. Second, utilizing the initiating party's offer amount may result in the non-initiating party having insight into the final offer of the initiating party, which may afford a negotiating advantage to non-initiating parties.

The Departments also considered creating an administrative fee that would be scaled based on the value of the dispute initiated, such as charging each disputing party an administrative fee that was 20 percent of the value of the dispute submitted. The Departments, however, are of the view that this approach is not appropriate for two reasons. First, the value of disputes can have a wide range, such as a \$5 million dispute for a NICU inpatient hospital stay compared to a \$500 outpatient service. This example structure would result in parties to the former dispute paying a \$1 million administrative fee and parties to the latter dispute paying a \$100 administrative fee. Second, the Departments recognize that resolving a dispute generally costs the Departments the same amount regardless of whether the dispute involves low-dollar or high-dollar items or services, and the Federal

IDR process is intended to streamline resolution of payment disputes between plans or issuers and providers or facilities. Further, the nature of estimating the administrative fee based on the expenditures made by the Departments in a given year means the administrative fee is not particularized to an individual dispute. This makes a sliding scale impractical to apply to the wide range of disputes subject to the Federal IDR process. Finally, the Departments considered maintaining a flat administrative fee applicable to all disputes but determined that the impact of a flat administrative fee amount on parties seeking to initiate low-dollar disputes could make the Federal IDR process cost prohibitive for some initiating parties.

The Departments considered applying a standardized administrative fee to all parties in all disputes regardless of eligibility. After considering a uniform application, the Departments determined that a framework that better accounts for eligibility costs based on the role of the disputing party and the eligibility of the dispute was a more appropriate distribution of the Departments' expenditures which the administrative fee is designed to recoup. The Departments also had concerns that non-initiating parties could be penalized by paying for an ineligible dispute if an initiating party indiscriminately submitted disputes; however, given that an initiating party must pay the administrative fee for a dispute to be considered fully submitted and for the fee to be assessed to both parties, the Departments are of the view that there are sufficient safeguards in place. Further, the Departments also considered not charging non-initiating parties for ineligible disputes; however, because the statute indicates that each party to a dispute is responsible for the administrative fee, and even in ineligible disputes the non-initiating party is benefiting from Federal IDR process safeguards such as access to the proposed registry and open negotiation, the Departments are of the view that a payment of a reduced administrative fee for non-initiating parties is appropriate, even in disputes that are not eligible for the Federal IDR process. The Departments recognize that the timelines described in this proposed policy may place additional burden on resource constrained small entities. However, the Departments believe that any additional burden to small entities will be significantly outweighed by the additional benefits to small entities from the proposed policies regarding low dollar and ineligible disputes.

9. Extension of Time Periods for Extenuating Circumstances (26 CFR 54.9816–8(g), 29 CFR 2590.716–8(g), and 45 CFR 149.510(g))

Under the proposed amendments to 26 CFR 54.9816–8(g), 29 CFR 2590.716–8(g), and 45 CFR 149.510(g), the Departments would provide an extension of the time periods associated with the Federal IDR process if they identify unforeseen or good cause delays on a case-by-case basis, as opposed to solely relying on one of the parties to submit an extension request. Further, the Departments also propose to codify a generally applicable extension of time periods when the Departments determine that such extension is necessary due to extenuating circumstances that contribute to systematic delays in processing disputes under the Federal IDR process, such as an unforeseen high volume of disputes or Federal IDR portal system failures.

The Departments considered alternatives to these proposals, including maintaining the status quo and not proposing to modify the ability of the Departments to provide extensions on a case-by-case basis or for generally applicable extensions of time periods. Additionally, the Departments considered only proposing the former, and not proposing to codify generally applicable extensions. However, the Departments are of the view that both proposed pathways to granting extensions of time periods for extenuating circumstances are relevant and necessary for the parties and entities participating in the Federal IDR process. In particular, the Departments are of the view that the ability to grant generally applicable extensions of time periods due to extenuating circumstances that contribute to systematic delays would provide protection for parties engaged in the Federal IDR process from the impact of systematic processing delays and ensure that unforeseen circumstances do not unfairly disadvantage a party or hinder its ability to comply with the Federal IDR process timeframes. Furthermore, the Departments believe that these additional protections may be especially beneficial to small entities, which may face difficulty in complying with the timelines proposed in this rulemaking. This proposed policy may partially offset the additional timeframe compliance burden placed on small entities, as described throughout this section, by providing greater flexibility in obtaining extensions in extenuating circumstances.

10. Registration of Group Health Plans and Health Insurance Issuers (26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530)

These proposed rules would require plans and issuers to submit certain information to the Departments within 30 business days after the effective date of the final rules through an IDR registration process, and would make the resulting registry of plans and issuers available to parties initiating open negotiation requests or disputes through the Federal IDR portal. The Departments also recognize that this proposed policy may impose additional burden on resource constrained small entities by requiring them to submit additional information to the Departments. The Departments considered limiting registration information to a plan's or issuer's contact information and plan type (for example, fully-insured, self-insured, etc.). However, the Departments are of the view that this limited set of information would be insufficient to allow providers, facilities, and providers of air ambulances to initiate open negotiation and disputes correctly. For example, if a plan submitted information that it was self-insured but did not submit information showing that it had opted into a specified State law, a provider might incorrectly initiate a payment dispute in the Federal IDR process rather than the relevant State process. The Departments also considered requiring more

comprehensive registration information, including a list of items and services that the plan covers which would be subject to a specified State law or All-Payer Model Agreement. The Departments are of the view that this level of detail would be overly burdensome on plans and issuers. Additionally, since States regularly modify the requirements of their specified State laws and All-Payer Model Agreements, the information contained in the registry would frequently be out-of-date. The Departments also considered allowing plans and issuers a period of one year following the rules' effective date to register; however, the Departments are of the view that since plans and issuers are already required to disclose most of the proposed registration information, requiring registration by 30 business days after the rules' effective date would not be unduly burdensome.

*F. Paperwork Reduction Act—
Department of Health and Human
Services, Department of Labor, and
Department of the Treasury*

Under the Paperwork Reduction Act of 1995 (PRA), the Departments are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to OMB for review and approval. To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA

requires that the Departments solicit comment on the following issues:

- The need for information collection and its usefulness in carrying out the proper functions of the Departments.
- The accuracy of the Departments' estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

1. Wage Estimates

To derive wage estimates, the Departments generally used data from the Bureau of Labor Statistics to derive average labor costs (including a 100 percent increase for fringe benefits and overhead) for estimating the burden associated with the information collection requirements (ICRs).²⁰⁹ Table 9 presents the mean hourly wage, the cost of fringe benefits and overhead, and the adjusted hourly wage from the May 2022 National Occupational Employment and Wage Estimates (https://www.bls.gov/oes/current/oes_nat.htm).

As indicated, employee hourly wage estimates have been adjusted by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly across employers and because methods of estimating these costs vary widely across studies.

TABLE 9: Adjusted Hourly Wages Used in Burden Estimates

Occupation Title	Occupational Code	Mean Hourly Wage (\$/hour)	Fringe Benefits and Overhead (\$/hour)	Adjusted Hourly Wage (\$/hour)
Computer Programmers	15-1251	\$49.42	\$49.42	\$98.84
General and Operations Manager	11-1021	\$59.07	\$59.07	\$118.14
Secretaries and Administrative Assistants, Except Legal, Medical, and Executive	43-6014	\$20.87	\$20.87	\$41.74
Compensation and Benefits Manager	11-3111	\$68.82	\$68.82	\$137.64
Medical and Health Services Manager	11-9111	\$61.53	\$61.53	\$123.06
Office Clerk	43-9061	\$19.78	\$19.78	\$39.56

2. ICRs Regarding Information To Be Shared About the QPA (26 CFR 54.9816–6(d), 29 CFR 2590.716–6(d), and 45 CFR 149.140(d))

The July 2021 interim final rules, as updated by the August 2022 final rules, require plans and issuers to provide

certain information regarding the QPA to providers, facilities, and providers of air ambulance services when making an initial payment or notice of denial of payment when the QPA is the recognized amount (or, for air ambulance services, the amount on which cost sharing is based).

These proposed rules would require plans and issuers to disclose the legal business name of the group health plan (if any) or issuer; the legal business name of the plan sponsor (if applicable); and the assigned Federal IDR registration number (if the plan or issuer is registered with the Federal IDR

²⁰⁹ *Id.*

registry). In addition, these proposed rules would amend the statement required under 26 CFR 54.9816–6(d)(1)(iv), 29 CFR 2590.716–6(d)(1)(iv), and 45 CFR 149.140(d)(1)(iv) to make technical and conforming changes to the content of the statement.

The Departments assume that TPAs would provide this information on behalf of the self-insured plans they administer. The Departments assume that issuers and TPAs would automate the process of preparing and providing this information to providers, facilities, and providers of air ambulance services. The Departments anticipate that issuers and TPAs would need to make a one-time change to their IT systems to make changes to the currently required QPA notification to incorporate the proposed information described in the proposed new paragraph (d)(1)(v) and paragraph (d)(1)(iv). The Departments estimate that for each plan and issuer, on average, it would take a computer programmer 3 hours (at an hourly rate of \$98.84) to add fillable fields to disclose the legal

business name (if any) of the group health plan or issuer; the legal business name of the plan sponsor (if applicable) and the assigned Federal IDR registration number (if the plan or issuer is registered with the Federal IDR registry); to add information notifying the provider, facility, or provider of air ambulance services of the proposed requirement to notify the Departments to initiate open negotiation; and to replace the phrase “amount of total payment” with the term “out-of-network rate” and the term “determination” with the phrase “agreement on the amount of payment” in the statement about initiating open negotiation. The Departments estimate that the one-time burden for each plan or issuer, to be incurred in 2024, would be 3 hours on average, with an equivalent cost of approximately \$297. The Departments estimate a total one-time burden, for all issuers and TPAs, of 5,115 hours, with an associated cost of approximately \$505,567. As the Departments share jurisdiction, HHS

would account for 50 percent of the total burden, or approximately 2,558 burden hours, with an equivalent cost of approximately \$252,783. The Departments of Labor and the Treasury would each account for 25 percent of the total burden, or approximately 1,279 burden hours, with an equivalent cost of approximately \$126,392. The Departments seek comment on these burden estimates.

In addition, the Departments propose to revise the regulation addressing information to be shared about the QPA to make clear these disclosures are required when the recognized amount (or for air ambulance services, the amount on which cost sharing is based) is the QPA or the amount billed by the provider, facility, or provider of air ambulance services. The Departments anticipate that this is not a common occurrence and therefore would not result in an increase in burden for plans and issuers.

TABLE 10: One-Time IT Burden and Cost for Plans and Issuers to Incorporate Information Related to QPA to Providers, Facilities, and Providers of Air Ambulance Services

Year	Department	Estimated Number of Respondents	Estimated Number of Responses	Burden per Response (Hours)	Total Annual Burden (Hours)	Total Estimated Cost
2024	HHS	853	853	3	2,557.5	\$252,783
	Labor	426	426	3	1,278.8	\$126,392
	Treasury	426	426	3	1,278.8	\$126,392

The Departments would revise the information collection currently approved under OMB control number 0938–1401 to account for this new burden.²¹⁰

3. ICRs Regarding Open Negotiation (26 CFR 54.9816–8(b)(1), 29 CFR 2590.716–8(b)(1), and 45 CFR 149.510(b)(1))

The Departments propose to require a party to provide an open negotiation notice containing additional required elements and supporting documentation to the other party and the Departments to initiate the open negotiation period. The October 2021 interim final rules established that the initiating party must provide an open negotiation notice to

the other party which must include information sufficient to identify the items or services subject to negotiation, including the date(s) the item(s) or service(s) were furnished, the service code, and initial payment amount, if applicable), an offer of an out-of-network rate, and contact information for the party sending the open negotiation notice. The provisions in these proposed rules would expand the required information in an open negotiation notice to include 12 new content additions to the existing required elements. The expanded content requirements would include: (1) information sufficient to identify the provider, facility or provider of air ambulance services, including name and current contact information (including the legal business name, email address, phone number, and

mailing address) and the National Provider Identifier (NPI); (2) the plan’s or issuer’s registration number as required under 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530 (if the plan or issuer is not registered under 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530, an attestation by the party submitting the open negotiation notice that the plan or issuer was not registered by the date it submitted the open negotiation notice), the legal business name of the plan or issuer as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment, and if the party submitting the open negotiation notice is a plan or issuer, the plan type (for example, self-insured or fully-insured); (3) the name

²¹⁰ OMB Control Number: 0938–1401 (CMS–10780, Requirements Related to Surprise Billing: Qualifying Payment Amount, Notice and Consent, Disclosure on Patient Protections Against Balance Billing, and State Law Opt-in).

and contact information including the legal business name, email address, phone number, and mailing address for any third party representing the party submitting the open negotiation notice and an attestation that the third party has the authority to act on behalf of the party it represents in the open negotiation; (4) information sufficient to identify the item or service, including, but not limited to: the date(s) the item or service was furnished and the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer; the type of item or service including, whether the item or service is an emergency service as defined in 26 CFR 54.9816-4T(c)(2), 29 CFR 2590.716-4(c)(2), and 45 CFR 149.110(c)(2), non-emergency times and services as described in 26 CFR 54.9816-5T(b), 29 CFR 2590.716-5(b), and 45 CFR 149.120(b); or an air ambulance service as defined in 26 CFR 54.9816-3T, 29 CFR 2590.716-3, and 45 CFR 149.30; whether the service is a professional service or facility-based service; the State where the item or service was furnished; the claim number; the service code; and information sufficient to identify the location the item of service was furnished (such as place of service code or bill type); (5) the initial payment amount (including \$0 if, for example, payment is denied); (6) the QPA if provided with the initial payment or denial of payment; (7) an offer of an out-of-network rate for each item or service; (8) if the party submitting the open negotiation notice is a plan or issuer, the amount of cost sharing imposed for the item or service; (9) if the party submitting the open negotiation notice is a provider or facility, a statement that the patient who received the item or service did not receive notice or provide consent as described in 45 CFR 149.410(b) or 149.420(c) through (i) to be treated by a nonparticipating provider or nonparticipating emergency facility; (10) a statement that the provider, facility, or provider of air ambulance services was a nonparticipating provider, nonparticipating emergency facility, or nonparticipating provider of air ambulance services on the date the item or service was furnished; (11) general information listed in the standard open negotiation notice developed by the Departments describing the open negotiation period and the Federal IDR process (including a description of the purpose of the open negotiation period and Federal IDR process and key

deadlines in the open negotiation period and Federal IDR process); and (12) a copy of the initial payment or notice of denial of payment or other remittance advice that is required to include the disclosures under 26 CFR 54.9816-6T(d)(1), 29 CFR 2590.716-6(d)(1), and 45 CFR 149.140(d)(1) for the item or service.

Furthermore, the Departments propose that the party in receipt of the open negotiation notice would be required to provide a response to the open negotiation notice through the Federal IDR portal no later than the 15th business day of the 30-business-day open negotiation period. The proposed open negotiation response notice would require the following categories of information, beginning with the same information as specified in proposed 26 CFR 54.9816-8(b)(1)(ii)(A)(1) through (3), 29 CFR 2590.716-8(b)(1)(ii)(A)(1) through (3), and 45 CFR 149.510(b)(1)(ii)(A)(1) through (3) related to the requirements to provide contact information for the provider, facility, or provider of air ambulance services, and the plan or issuer that is a party to the open negotiation, and any third party representing a party in the open negotiation. It would also include (4) information sufficient to identify each item or service included in the open negotiation notice, including the date(s) the item or service was furnished and the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer and the claim number; (5) if the party in receipt of the open negotiation notice is a plan or issuer, a statement as to whether the party in receipt of the open negotiation notice agrees that the initial payment amount (including \$0 if, for example, payment is denied) and the QPA reflected in the open negotiation notice is accurate for the item or service, and if not, or if the open negotiation notice indicated that the initial payment amount or qualifying payment amount was not communicated by the plan or issuer with the initial payment or notice of denial of payment or other remittance advice, the initial payment amount (including \$0 if, for example, payment is denied) and/or QPA amount it believes to be correct and documentation to support the statement; (6) if the party in receipt of the open negotiation notice is a plan or issuer, the amount of cost sharing imposed for the item or service; (7) a counteroffer of an out-of-network rate for the item or service or an acceptance of the other party's offer; (8) if the party in receipt

of the open negotiation notice is a provider or facility, a statement that the patient who received the item or service did not receive notice or provide consent to be treated by a nonparticipating provider or nonparticipating emergency facility as described in 149.410(b) or 149.420(c) through (i); (9) with respect to each item or service, either a statement and supporting documentation that notes why the item or service is ineligible for the Federal IDR process or a statement agreeing that the item or service is eligible for the Federal IDR process; (10) a statement as to whether any of the information provided in the open negotiation notice is inaccurate and the basis for the assertion; and (11) a statement confirming that the initial payment or notice of denial of payment or other remittance advice provided with the open negotiation notice is accurate, and if inaccurate, a copy of the initial payment or notice of denial of payment or other remittance advice that are required to include the disclosures under 26 CFR 54.9816-6T(d)(1), 29 CFR 2590.716-6(d)(1), and 45 CFR 149.140(d)(1), for the item or service.

In addition to the paperwork costs for the Federal IDR process previously accounted for in the July 2021 interim final rules and October 2021 interim final rules, the Departments estimate that it would take a compensation and benefits manager 30 minutes (at an hourly rate of \$137.64) and an office clerk 15 minutes (at an hourly rate of \$39.56) on average to prepare and submit the additional information for open negotiation for each plan, issuer, or FEHB carrier and provider or facility initiating open negotiation. This results in a cost of \$78.71 per party per open negotiation notice. Similarly, the Departments estimate that it would take a compensation and benefits manager 30 minutes (at an hourly rate of \$137.64) and an office clerk 15 minutes (at an hourly rate of \$39.56) on average to prepare and submit the proposed open negotiation response notice for each party in receipt of the open negotiation notice, resulting in a cost of \$78.71 per party per open negotiation response notice. In the October 2021 interim final rules, the Departments originally estimated that 25 percent of disputes would be resolved in open negotiation before entering the Federal IDR process.²¹¹ The Departments request data or comments on whether this assumption has been proven correct. Accordingly, the Departments estimate that 560,000 disputes per year would go through open negotiation, requiring

²¹¹ 86 FR 56056.

560,000 initiating parties to prepare and submit the additional materials proposed for the open negotiation notice and 560,000 non-initiating parties to prepare and submit the additional materials proposed for the open negotiation notice response notice. At a cost of \$78.71 (\$68.82 for 30 minutes by the compensation and benefits manager and \$9.89 for 15 minutes by the office clerk, or a combined hourly rate of \$104.95) per party per dispute, this

results in a total annual hour burden of 840,000 hours with an equivalent cost of approximately \$88,158,000 for 560,000 disputes annually beginning in 2025.²¹² As the Departments and OPM share jurisdiction, HHS would account for 45 percent of the total burden, or approximately 378,000 burden hours, with an equivalent cost of approximately \$39,671,100. The Departments of Labor and the Treasury would each account for 25 percent of

the total burden, or approximately 210,000 burden hours, with an equivalent cost of approximately \$22,039,500. OPM would account for 5 percent of the total burden, or approximately 42,000 burden hours, with an equivalent cost of approximately \$4,407,900. The Departments seek comment on these assumptions.

TABLE 11: Annual Burden and Cost for Open Negotiation

Department	Estimated Number of Respondents	Estimated Number of Responses	Burden per Response (Hours)	Total Annual Burden (Hours)	Total Estimated Cost
HHS	472,500	472,500	0.75	378,000	\$39,671,100
Labor	262,500	262,500	0.75	210,000	\$22,039,500
Treasury	262,500	262,500	0.75	210,000	\$22,039,500
OPM	52,500	52,500	0.75	42,000	\$4,407,900

The Departments would revise the information collection currently approved under OMB control number 1210–0169 to account for this new burden.²¹³

4. ICRs Regarding Initiating the Federal IDR Process and the Notice of IDR Initiation (26 CFR 54.9816–8(b)(2), 29 CFR 2590.716–8(b)(2), and 45 CFR 149.510(b)(2))

a. Notice of IDR Initiation and Notice of IDR Initiation Response

To initiate the Federal IDR process, the initiating party must submit a written notice of IDR initiation to the non-initiating party and to the Departments (using the standard form developed by the Departments) during the 4-business-day period beginning on the first business day after the close of the 30-business-day open negotiation period. The Departments propose to add additional required elements under the 8 categories to the existing required information in the written notice of IDR initiation: (1) information sufficient to identify the initiating party, including the TIN, the NPI of the provider, facility, or provider of air ambulance services (if available), the plan’s or issuer’s registration number, if the plan or issuer is registered under 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530, and if the initiating party is a plan or issuer, the plan type; (2) the

name and contact information for any third party representing the initiating party and an attestation that the third party has the authority to act on behalf of the party it represents in the Federal IDR process; (3) information sufficient to identify whether the dispute being initiated includes batched or bundled qualified IDR items or services; (4) information sufficient to identify the item or service included in the notice of IDR initiation, including the date(s) the item or service was furnished. If the initiating party is a provider, facility, or provider of air ambulances, the date(s) the provider, facility, or air ambulance provider received the initial payment or denial of payment, the date the open negotiation period began, the type of item or service, whether the service is a professional or service or facility-based service, the State where the item or service was furnished, the claim number, service code and information to identify the location the service was furnished (including place of service or bill type code); (5) if the non-initiating party is a plan or issuer, a statement that the provider, facility, or air ambulance provider was a nonparticipating provider, facility, or air ambulance provider; (6) an attestation that the item or service is a qualified IDR item or service and the basis for the attestation; (7) a copy of the initial payment or notice of denial of payment or other

prorated to 50 percent, or 420,000 hours with an equivalent cost of \$44,079,000.

remittance advice that is required to include the disclosures under 26 CFR 54.9816–6T(d)(1), 29 CFR 2590.716–6(d)(1), and 45 CFR 149.140(d)(1), with respect to the item or service; and (8) a statement describing the key aspects of the claim, such as patient acuity or level of training of the provider, facility, or provider of air ambulance services that furnished the qualified IDR item or service, discussed by the parties during open negotiation that relate to the payment for the disputed claim, whether the reasons for initiating the Federal IDR process are different from the aspects of the claim discussed during the open negotiation period, and an explanation of why the party is initiating the Federal IDR process.

The Departments also propose that the non-initiating party must submit a written response to the notice of IDR initiation to the initiating party and to the Departments during the 3-business-day period beginning on the day after the notice of IDR initiation is received by the Departments. This proposed IDR initiation response notice would require the following information: (1) information sufficient to identify the provider, facility, or provider of air ambulance services, including name and current contact information (including the legal business name, email address, phone number, and mailing address), the TIN, the NPI of the

²¹² As the Departments do not anticipate these proposed rules would be finalized and effective before July 1, 2024, the burden for 2024 would be

²¹³ OMB Control Number: 1210–0169 (No Surprises Act: IDR Process).

provider, facility, or provider of air ambulance services, (2) information sufficient to identify the plan or issuer including the plan's or issuer's registration number, as required under 26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530 or an attestation from the non-initiating party that the plan or issuer was not registered prior to the date that it submitted the notice, the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the party submitting the notice of IDR initiation response is a plan or issuer, the plan type (for example, self-insured or fully-insured) and TIN (or, in the case of a plan that does not have a TIN, the TIN of the plan sponsor); (3) the name and contact information for any third party representing the non-initiating party and an attestation that the third party has the authority to act on behalf of the party it represents in the Federal IDR process; (4) information sufficient to identify each item or service (including the date(s) the item or service was furnished, if the non-initiating party is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer, and the claim number); (5) if the non-initiating party is a plan or issuer, a statement as to whether the non-initiating party agrees that the initial payment (including \$0 if, for example, payment is denied) and the QPA reflected in the notice of IDR initiation is accurate and if not, an assertion of the correct initial payment amount and/or the QPA that was disclosed with the initial payment or notice of denial of payment for the item

or service and documentation to support the assertion; (6) if the non-initiating party is a plan or issuer, the amount of cost sharing imposed for the item or service; (7) if the non-initiating party is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at CFR 149.410(b) or 149.420(c); (8) for each item or service subject to the dispute, an attestation that the item or service that is the subject of the dispute is a qualified IDR item or service, and for each item or service that the non-initiating party attests is not a qualified IDR item or service, an explanation and supporting documentation; (9) a statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the initiating party under paragraph (b)(2)(ii)(A)(12) is accurate, and if inaccurate, a copy of the remittance advice or other documentation required to include the disclosures under 26 CFR 54.9816–6T(d)(1), 29 CFR 2590.716–6(d)(1), and 45 CFR 149.140(d)(1), with respect to the item or service; (10) a statement as to whether any of the information provided in the notice of IDR initiation is inaccurate and the basis for the statement as well as any supporting documentation; and (11) a statement as to whether the non-initiating party agrees or objects to the initiating party's preferred certified IDR entity and if the party objects, an alternative preferred certified IDR entity.

In addition to the paperwork costs for the Federal IDR process, the Departments estimate that it would take a compensation and benefits manager 30 minutes (at an hourly rate of \$137.64) and an office clerk 15 minutes (at an hourly rate of \$39.56) on average to prepare and submit the additional statements proposed for the notice of IDR initiation for each initiating party,

resulting in a cost of \$78.71 per party per notice of IDR initiation. Similarly, the Departments estimate that it would take a compensation and benefits manager 30 minutes (at an hourly rate of \$137.64) and an office clerk 15 minutes (at an hourly rate of \$39.56) on average to prepare and submit the proposed notice of IDR initiation response for each non-initiating party, resulting in a cost of \$78.71 per party per notice of IDR initiation response. The Departments estimate that 420,000 disputes would be initiated, requiring work by 840,000 disputing parties. At a per party cost of \$78.71 (\$68.82 for 30 minutes by the compensation and benefits manager at \$137.64 per hour and \$9.89 for 15 minutes by the office clerk at \$39.56 per hour, or a combined hourly rate of \$104.95) per party, this results in a total estimated annual hour burden of 630,000 hours or an equivalent cost burden of \$66,118,500 for 420,000 disputes, which includes 315,000 estimated annual burden hours or an equivalent annual cost burden of \$33,059,250 each for initiating and non-initiating parties, respectively, beginning in 2025.²¹⁴ As the Departments and OPM share jurisdictions, HHS would account for 45 percent of the total burden, or approximately 283,500 burden hours, with an equivalent cost of approximately \$29,753,325. The Departments of Labor and the Treasury would each account for 25 percent of the total burden, or approximately 157,500 burden hours, with an equivalent cost of approximately \$16,529,625. OPM would account for 5 percent of the total burden, or approximately 31,500 burden hours, with an equivalent cost of approximately \$3,305,925. The Departments seek comment on these assumptions.

TABLE 12: Annual Burden and Cost for Notice of IDR Initiation

Department	Estimated Number of Respondents	Estimated Number of Responses	Burden per Response (Hours)	Total Annual Burden (Hours)	Total Estimated Cost
HHS	378,000	378,000	0.75	283,500	\$29,753,325
DOL	210,000	210,000	0.75	157,500	\$16,529,625
Treasury	210,000	210,000	0.75	157,500	\$16,529,625
OPM	42,000	42,000	0.75	31,500	\$3,305,925

²¹⁴ As the Departments do not anticipate these proposed rules would be finalized and effective

before July 1, 2024, the burden for 2024 would be

prorated to 50 percent, or 315,000 hours with an equivalent cost of \$33,059,250.

The Departments would revise the information collection currently approved under OMB control number 1210–0169 to account for the new burden.²¹⁵

b. Preliminary Selection of the Certified IDR Entity

The Departments anticipate that the amendments to the process for the preliminary selection of the certified IDR entity would reduce the overall burden associated with collecting information through the notice of certified IDR entity selection. In these proposed rules, the Departments propose that the non-initiating party must agree or object to the preferred certified IDR entity in the notice of IDR initiation response. Accordingly, the initiating party would only be required to submit the notice of certified IDR entity selection if the non-initiating party objects to the initiating party's preferred certified IDR entity and submits an alternative preferred certified IDR entity in the notice of IDR initiation response, thus limiting the frequency with which the Departments expect the initiating party to submit this information. Similarly, the non-initiating party would only be required to use the notice of certified IDR entity selection if the non-initiating party objected to the initiating party's alternative preferred certified IDR entity included in the initiating party's notice of certified IDR selection form. The content submitted through the notice would also be streamlined to only reflect information confirming the party's agreement or objection, preferred alternative to other party's alternative preferred certified IDR entity, and if applicable, an explanation of the conflict of interest with the alternative preferred certified IDR entity.

Under the current rules and currently approved PRA package (OMB control number 1210–0169), the Departments assume that all disputes require the submission of the notice of certified IDR entity selection, and that each notice corresponds to approximately 1.25 burden hours, with an equivalent cost of \$119.²¹⁶ Across all disputes, the Departments assume an annual burden of approximately 21,794 hours at a cost of approximately \$2,156,635 for parties to submit the notice of certified IDR

entity selection. However, based on these proposed rules, the Departments anticipate that the frequency and content of this collection would change, thus impacting the currently estimated burden.

Under these proposed rules, this information collection would be limited to those disputes in which either party does not agree to the other party's preferred alternative certified IDR entity. For this subset of disputes, the initiating party would be required to submit the notice of certified IDR entity selection to indicate agreement or objection to the non-initiating party's alternate preferred certified IDR entity selection as indicated in the notice of IDR initiation response, and both parties would have the ability to submit the notice back-and-forth during the 3-day period after the date of IDR initiation until an agreed upon entity is identified or the parties fail to jointly agree. The content of the collection would be revised to only require a party to indicate their agreement or objection and if applicable an explanation of the conflict of interest, and identification of an alternate preferred certified IDR entity and thus the Departments anticipate that it would take a respondent much less time to submit this information than previously estimated.

Based on internal data, in approximately 29 percent of disputes, the non-initiating party objects to the certified IDR entity selected by the initiating party. Further, out of the 29 percent of disputes in which the non-initiating party objected to the certified IDR entity selected by the initiating party, the majority of those disputes (93 percent, or 27 percent of all disputes) the initiating party agreed to the alternate preferred certified IDR entity selected by the non-initiating party. In a very small percentage (approximately 2 percent) of disputes, the non-initiating party and initiating party engage in a back-and-forth by objecting to each other's preferred certified IDR entities multiple times. Based on the number of disputes submitted from June 2022 through June 2023, the Departments estimate that approximately 113,400 disputes would require the initiating party to submit a notice of certified IDR entity selection form a single time. The Departments estimate that it would take an office clerk 30 minutes (at an hourly rate of \$39.56) on average to prepare and submit the notice indicating agreement or objection to the alternate preferred certified IDR entity and selecting an alternative entity, if applicable. This would result in a cost of \$19.78 per dispute. For the approximately 113,400

disputes that would require this collection, the total annual hourly burden would be 56,700 hours, with an equivalent annual cost of approximately \$2,243,052.²¹⁷

In addition, the Departments expect that, for a small proportion of disputes, the initiating party and the non-initiating party would exchange the notice of certified IDR entity selection multiple times within the proposed timeframe before reaching agreement and jointly selecting or defaulting to random selection. To reflect the additional burden associated with disputes requiring multiple notices, the Departments estimate that approximately 8,400 disputes would require the provision of two total rounds of notice exchange²¹⁸ by the initiating party and non-initiating party before either jointly selecting a certified IDR entity or defaulting to selection by the Departments. This would result in a cost of \$39.56 per dispute, and a total annual hourly burden of 8,400 hours with an equivalent cost of \$332,304.²¹⁹

The Departments estimate that in total for disputes requiring this collection, including both the 113,400 disputes that the Departments anticipate would require a single submission of the notice of certified IDR entity selection form and the 8,400 disputes requiring multiple submissions of the form, the average burden per response would be approximately 0.53 hours²²⁰ with an equivalent cost of approximately \$21.14 per response.²²¹ Therefore, the total annual burden would be 65,100 hours, with an equivalent cost of

²¹⁷ The is calculated as follows: 113,400 disputes × 0.5 hours = 56,700 burden hours. 56,700 burden hours × \$39.56 hourly rate = \$2,243,052 total annual cost.

²¹⁸ Internal data show that the highest number of times a certified IDR entity was selected for a single dispute was five. Since these proposed rules would amend the frequency of use of the notice of certified IDR entity selection by transferring one of the selection instances to the notice of IDR initiation, five unique selections would correspond to four exchanges of the notice of certified IDR entity selection. However, the Departments anticipate that four exchanges would be quite rare based on internal data, so the Departments are using two exchanges of the notice of certified IDR entity selection in these estimates. The Departments seek comment on these assumptions.

²¹⁹ This is calculated as follows: 8,400 disputes × 0.5 hours × 2 exchanges = 8,400 burden hours. 8,400 burden hours × \$39.56 hourly rate = \$332,304 total annual cost.

²²⁰ The precise unrounded number for the weighted average time per response is 0.53448 hours. This unrounded number is used to calculate the total annual burden across the disputes requiring the submission of a certified IDR entity selection notice. The calculation is as follows: 0.53448 weighted average time per response × 121,800 disputes = 65,100 total annual burden hours.

²²¹ This is calculated as follows: 0.53 hours × \$39.56 hourly rate = \$21.14 cost per response.

²¹⁵ OMB Control Number: 1210–0169 (No Surprises Act: IDR Process).

²¹⁶ The Departments assume that it will take 1 hour for a medical and health services professional to write the notice and 15 minutes for a clerical worker to prepare and send the notice at a wage rate of \$109.03 per hour for the medical and health services manager and a wage rate of \$58.66 per hour for the clerical worker.

\$2,575,356.²²² As the Departments and OPM share jurisdiction, HHS would account for 45 percent of the total burden, or approximately 29,295 burden hours, with an equivalent cost of approximately \$1,158,910. The Departments of Labor and the Treasury would each account for 25 percent of the total burden, or approximately

16,275 burden hours each, with an equivalent cost of approximately \$643,839 each. OPM would account for 5 percent of the total burden, or approximately 3,255 burden hours, with an equivalent cost of approximately \$128,768.

However, as discussed earlier in this section, as the current information

collection assumes a burden per respondent of 1.25 hours and a total cost burden of \$2,156,635, the Departments estimate a total increase in costs of approximately \$418,621²²³ due to the proposed changes to the requirement to submit this notice. The Departments seek comment on these assumptions.

TABLE 13: Annual Burden and Cost for Notice of Certified IDR Entity Selection Form

Department	Estimated Number of Respondents	Estimated Number of Responses	Burden per Response (Hours)	Total Annual Burden (Hours)	Total Estimated Cost
HHS	44,370	44,370	0.53	29,295	\$1,158,910
Labor	24,650	24,650	0.53	16,275	\$643,839
Treasury	24,650	24,650	0.53	16,275	\$643,839
OPM	4,930	4,930	0.53	3,255	\$128,768

The Departments would revise the information collection currently approved under OMB control number 1210-0169 to account for this revised burden.

5. ICRs Regarding Federal IDR Eligibility Determinations (26 CFR 54.9816-8(c), 29 CFR 2590.716-8(c), and 45 CFR 149.510(c))

The Departments anticipate no change or nominal change in burden related to the proposed departmental eligibility review provision. This information collection is approved under OMB control number 1210-0169. The same type and quantity of information would continue to be collected from disputing parties to determine eligibility under these proposed rules. When the departmental eligibility review is in effect, the Departments would be collecting information related to Federal IDR dispute eligibility. When the departmental eligibility review is not in effect, the Departments and the certified IDR entities would be collecting this information. Therefore, the Departments are of the view that there is no change in burden associated with changing to whom the parties are submitting eligibility information. The Departments seek comment on these assumptions.

6. ICRs Regarding Withdrawals (26 CFR 54.9816-8(c)(3)(ii), 29 CFR 2590.716-8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii))

The Departments propose to add 26 CFR 54.9816-8(c)(3)(ii), 29 CFR 2590.716-8(c)(3)(ii), and 45 CFR 149.510(c)(3)(ii) to establish a process for disputes to be withdrawn from the Federal IDR process. The proposed withdrawal process would require the creation of a new collection of information and increase burden on the initiating and non-initiating parties required to submit the proposed notice. These proposed rules would require the initiating party to submit a withdrawal request to the Departments and the non-initiating party through the Federal IDR portal. The non-initiating party would then be required to provide a response within 5 business days indicating agreement or objection to the request for withdrawal. Each dispute would therefore require a collection from both the initiating (requesting) and the non-initiating (responding) parties in order to withdraw. If the non-initiating party fails to respond, the non-initiating party would be considered to have agreed to the dispute's withdrawal. The Departments expect that dispute withdrawals would be relatively rare: Based on internal data, the Departments anticipate that approximately 4 percent

of disputes (or 16,800 disputes) would be withdrawn annually.

The Departments estimate that it would take a compensation and benefits manager 15 minutes (at an hourly rate of \$137.64) and an office clerk 15 minutes (at an hourly rate of \$39.56) for the initiating party to prepare and submit the notice of request for withdrawal to the non-initiating party and the Departments through the Federal IDR portal, resulting in a time of 30 minutes and cost of \$44.30 per dispute for the initiating party.²²⁴ For the anticipated 16,800 withdrawn disputes annually, initiating parties would incur a total of 8,400 burden hours with an equivalent cost burden of \$744,240 to submit withdrawal requests annually.²²⁵ Because the notice of withdrawal response would have fewer data elements and would require a lower amount of time and labor burden to submit, the Departments estimate that it would take an office clerk approximately 15 minutes (at an hourly rate of \$39.56) on average for the non-initiating party to submit the notice of withdrawal response to the initiating party and the Departments through the Federal IDR portal, resulting in a cost of \$9.89 per response.²²⁶ For the anticipated 16,800 withdrawn disputes annually, the non-initiating party would

²²² As the Departments do not anticipate these proposed rules would be finalized and effective before July 1, 2024, the burden for 2024 would be prorated to 50 percent, or 32,550 hours with an equivalent cost of \$1,287,678.

²²³ This is calculated as follows: \$2,156,635 – \$2,575,256 = –\$418,621.

²²⁴ This is calculated as follows: 0.25 hours per response × \$137.64 hourly rate for a compensation and benefits manager = \$34.41 per response. 0.25 hours per response × \$39.56 hourly rate for an office clerk = \$9.89 per response. \$34.41 + \$9.89 = \$44.30 total per response.

²²⁵ This is calculated as follows: 16,800 disputes × 0.5 labor hours per dispute = 8,400 total burden hours. 16,800 disputes × \$44.30 per dispute =

\$744,240 total cost. As the Departments do not anticipate these proposed rules would be finalized and effective before July 1, 2024, the burden for 2024 would be prorated to 50 percent, or 4,200 hours with an equivalent cost of \$372,120.

²²⁶ This is calculated as follows: 0.25 hours per response × \$39.56 hourly rate for an office clerk = \$9.89 per response.

incur a total of 4,200 burden hours or an equivalent cost burden of \$166,152 to submit withdrawal responses annually.²²⁷ This results in a total estimated annual burden of 12,600 hours or an equivalent cost burden of \$910,392 across both the initiating and non-initiating parties.²²⁸

As the Departments and OPM share jurisdictions, HHS would account for 45 percent of the total burden, or approximately 5,670 burden hours, with an equivalent cost of approximately \$409,676. The Departments of Labor and the Treasury would each account for 25 percent of the total burden, or

approximately 3,150 burden hours, with an equivalent cost of approximately \$227,598. OPM would account for 5 percent of the total burden, or approximately 630 burden hours, with an equivalent cost of approximately \$45,520. The Departments seek comment on these assumptions.

TABLE 14: Annual Burden and Costs for Withdrawals

Department	Estimated Number of Respondents	Estimated Number of Responses	Burden per Response (Hours)	Total Annual Burden (Hours)	Total Estimated Cost
HHS	7,560	7,560	0.75	5,670	\$409,676
Labor	4,200	4,200	0.75	3,150	\$227,598
Treasury	4,200	4,200	0.75	3,150	\$227,598
OPM	840	840	0.75	630	\$45,520

The Departments would revise the information collection currently approved under OMB control number 1210–0169 to account for this proposed burden.

7. ICRs Regarding Administrative and Certified IDR Entity Fee Collection (26 CFR 54.9816–8(d), 29 CFR 2590.716–8(d), and 45 CFR 149.510(d))

The Departments propose to allow for the administrative fee due from each party for participating in the Federal IDR process to be paid to the Departments. The burden currently associated with this requirement is the time and effort for a certified IDR entity to track payments made by disputing parties and submit the administrative fees to HHS upon invoice. In the No Surprises Act: IDR Process PRA package,²²⁹ the Departments estimated that tracking payments made by disputing parties and submitting the administrative fees to HHS upon invoice

would take a clerical worker (a secretary or administrative assistant, not including legal, medical, or executive) approximately 18 hours annually (at a rate of \$39.56 per hour). The Departments estimated that each certified IDR entity would incur a burden of 18 hours annually at a cost of approximately \$711 per certified IDR entity to comply with the administrative fee reporting and submission requirements.

Since this proposal would eliminate the requirement that certified IDR entities collect the administrative fee on behalf of the Departments, the Departments propose to rescind this information collection. The burden associated with this information collection estimated above would be removed if this proposal is finalized, since certified IDR entities would no longer be collecting the administrative fee moving forward.

The Departments estimate a total burden reduction, for 13 certified IDR entities, of 234 hours, with an associated cost reduction of approximately \$9,257 beginning in 2025. As the Departments share jurisdiction, HHS would account for 45 percent of the total burden reduction, or a reduction of approximately 108 burden hours, with an equivalent cost reduction of approximately \$4,272. The Departments of Labor and the Treasury would each account for 25 percent of the total burden reduction, or approximately 54 burden hours each, with an equivalent cost reduction of approximately \$2,136. OPM would account for 5 percent of the total burden reduction, or approximately 18 burden hours, with an equivalent cost reduction of approximately \$712. The Departments seek comment on these assumptions.

²²⁷ This is calculated as follows: 16,800 disputes × 0.25 labor hours per dispute = 4,200 total burden hours. 16,800 disputes × \$9.89 = \$166,152 total cost. As the Departments do not anticipate these proposed rules would be finalized and effective before July 1, 2024, the burden for 2024 would be prorated to 50 percent, or 2,100 hours with an equivalent cost of \$83,076.

²²⁸ This is calculated as follows: 8,400 total initiating party burden hours + 4,200 total non-initiating party burden hours = 12,600 overall total burden hours. \$744,240 total initiating party cost + \$166,152 total non-initiating party cost = \$910,392 overall total cost. As the Departments do not anticipate these proposed rules would be finalized and effective before July 1, 2024, the burden for 2024 would be prorated to 50 percent, or 6,300 hours with an equivalent cost of \$455,196.

²²⁹ OMB Control Number: 1210–0169 (No Surprises Act: IDR Process). The burden is estimated as follows: (18 hours × \$39.56) = \$712.08 per certified IDR entity. A labor rate of \$39.56 is used for a clerical worker (a secretary or administrative assistant, not including legal, medical, or executive). The labor rates are applied in the following calculation: (13 certified IDR entities × 18 hours × \$39.56) = \$9,257.04.

TABLE 15: Annual Burden and Cost for Administrative Fee Collection

Department	Estimated Number of Respondents	Estimated Number of Responses	Burden per Response (Hours)	Total Annual Burden (Hours)	Total Estimated Cost
HHS	6	6	(18)	(108)	(\$4,272)
Labor	3	3	(18)	(54)	(\$2,136)
Treasury	3	3	(18)	(54)	(\$2,136)
OPM	1	1	(18)	(18)	(\$712)

This information collection is approved under OMB control number 1210–0169, and if this proposal is finalized, the Departments would rescind this information collection under OMB control number 1210–0169 accordingly. The Departments seek comment on this proposed burden reduction.

The Departments also propose to collect one new information collection element in the Federal IDR portal associated with the administrative fee. The Departments propose to require the initiating party to attest (for example, by checking a box) in the portal that no offer made by either party during open negotiation exceeded a predetermined threshold discussed in section II.E.3.f. of this preamble, to determine whether the parties should be charged the reduced administrative fee for low-dollar disputes. The Departments are of the view that checking this box would take a *de minimis* amount of time in the context of the total time it takes for the initiating party to initiate a dispute—2.25 hours, as discussed further in the PRA package for the Federal IDR process (OMB control number: 1210–0169). The Departments will add this information collection element to the information collection currently approved under OMB control number 1210–0169. The Departments seek comment on this proposed information collection.

Although the Departments would now be collecting the administrative fee directly from the disputing parties, rather than the certified IDR entities collecting the fee on the Departments’

behalf, generally, the information collected from disputing parties and associated with this step in the Federal IDR process would not change; the parties would be submitting this information to the Departments rather than to the certified IDR entities. Therefore, the Departments are of the view that there is no additional information collection burden associated with this proposal. The Departments seek comment on this assumption.

8. ICRs Regarding Extension of Time Periods for Extenuating Circumstances (26 CFR 54.9816–8(g), 29 CFR 2590.716–8(g), and 45 CFR 149.510(g))

The Departments anticipate that codifying the ability of certified IDR entities to submit case-by-case extension requests in the same manner as parties would slightly increase the estimated burden associated with collecting requests for extensions. In general, the Departments maintain the expectation that requests for extensions due to extenuating circumstances would be relatively limited, and do not expect that certified IDR entities would submit a high volume of requests for extensions, particularly since these proposed rules also propose to codify the Departments’ ability to grant case-by-case extensions of their own initiative without a prior request from certified IDR entities or parties. Based on internal data, the Departments anticipate that certified IDR entities would submit approximately 20 such requests for extensions annually.

The Departments estimate that it would take an office clerk approximately 15 minutes (at an hourly rate of \$39.56) on average to prepare and submit the Request for Extension due to Extenuating Circumstances form. Based on internal data reflecting the number of extension requests submitted by certified IDR entities, the Departments estimate that approximately 20 extensions requests would be submitted by certified IDR entities annually. Accordingly, the Departments estimate that the burden associated with the submission of the extension request notice by certified IDR entities would result in a total annual burden of 5 hours with an equivalent cost of approximately \$197.80²³⁰ across all certified IDR entities in addition to the existing burden estimate for extension requests submitted by plans, issuers, FEHB carriers, providers, facilities, and air ambulance services providers already approved under OMB 1210–0169. As the Departments and OPM share jurisdictions, HHS would account for 45 percent of the total burden, or approximately 2.25 burden hours, with an equivalent cost of approximately \$89.01. The Departments of Labor and the Treasury would each account for 25 percent of the total burden, or approximately 1.25 burden hours each, with an equivalent cost of approximately \$49.45 each. OPM would account for 5 percent of the total burden, or approximately 0.25 burden hours, with an equivalent cost of approximately \$9.89. The Departments seek comment on these assumptions.

²³⁰ This is calculated as follows: 20 annual requests × 0.25 hours = 5 annual burden hours. 5 annual burden hours × \$39.56 hourly rate = \$197.80

total annual cost. As the Departments do not anticipate these proposed rules would be finalized and effective before July 1, 2024, the burden for

2024 would be prorated to 50 percent, or 2.5 hours with an equivalent cost of \$99.

TABLE 16: Annual Burden and Cost for Extension Requests Submitted by Certified IDR Entities

Department	Estimated Number of Respondents	Estimated Number of Responses	Burden per Response (Hours)	Total Annual Burden (Hours)	Total Estimated Cost
HHS	9	9	0.25	2.25	\$89
Labor	5	5	0.25	1.25	\$49
Treasury	5	5	0.25	1.25	\$49
OPM	1	1	0.25	0.25	\$10

The Departments would revise the information collection currently approved under OMB control number 1210–0169 to account for this additional burden.

9. ICRs Regarding Registration of Group Health Plans and Health Insurance Issuers (26 CFR 54.9816–9, 29 CFR 2590.716–9, and 45 CFR 149.530)

These proposed rules would require plans and issuers that are subject to the Federal IDR process to register and submit certain information to the Departments.

The Departments assume that TPAs would register on behalf of most self-insured plans. The Departments estimate that a total of 1,705 issuers and TPAs would incur a burden to comply with this provision. The Departments estimate that for each issuer and TPA, an administrative assistant would spend 8 hours (at an hourly rate of \$41.74), a compensation and benefits manager would spend 2 hours (at an hourly rate of \$137.64), and a lawyer would spend 2 hours (at an hourly rate of \$157.48), to communicate with plans, gather the necessary information, and prepare the registration, resulting in a combined hourly rate of \$77.01. The estimated

total burden for each issuer or TPA would be 12 hours with an equivalent cost of approximately \$924.16. The estimated total cost for initial registration and submission of information would be 20,460 hours, with an equivalent cost of approximately \$1,575,693. As the Departments and OPM share jurisdictions, HHS would account for 45 percent of the total burden, or approximately 9,207 burden hours, with an equivalent cost of approximately \$709,062. The Departments of Labor and the Treasury would each account for 25 percent of the total burden, or approximately 5,115 burden hours, with an equivalent cost of approximately \$393,923. OPM would account for 5 percent of the total burden, or approximately 1,023 burden hours, with an equivalent cost of approximately \$78,785.

The proposed regulation would also require that plans update the information associated with their registration no later than 30 days after such information changes or at least annually. The Departments estimate that for each issuer and TPA, an administrative assistant would spend 30 minutes (at an hourly rate of \$41.74),

and a compensation and benefits manager would spend 15 minutes (at an hourly rate of \$137.64) to update information in a timely way when such information changes, resulting in a combined hourly rate of \$73.71. The estimated total burden for each issuer or TPA would be 0.75 hours with an equivalent cost of approximately \$55.28. The Departments estimate that updating information in a timely way would incur a total cost for all issuers and TPAs of approximately 1,279 hours with an equivalent cost of approximately \$94,252 beginning in 2025. As the Departments and OPM share jurisdictions, HHS would account for 45 percent of the total burden, or approximately 575 burden hours, with an equivalent cost of approximately \$42,414. The Departments of Labor and the Treasury would each account for 25 percent of the total burden, or approximately 320 burden hours, with an equivalent cost of approximately \$23,563. OPM would account for 5 percent of the total burden, or approximately 64 burden hours, with an equivalent cost of approximately \$4,713.

BILLING CODE 6325–63–P; 4830–01–P; 4510–29–P; 4120–01–P

TABLE 17: One-Time Burden and Cost for Plans and Issuers for Initial Registration and Submission of Certain Information to the Departments

Year	Department	Estimated Number of Respondents	Estimated Number of Responses	Burden per Response (Hours)	Total Annual Burden (Hours)	Total Estimated Cost
2023	HHS	767	767	12	9,207	\$709,062
	Labor	426	426	12	5,115	\$393,923
	Treasury	426	426	12	5,115	\$393,923
	OPM	85	85	12	1,023	\$78,785

TABLE 18: Annual Burden and Cost for Plans and Issuers to Register and Submit Certain Information to the Departments

Department	Estimated Number of Respondents	Estimated Number of Responses	Burden per Response (Hours)	Total Annual Burden (Hours)	Total Estimated Cost
HHS	767	767	0.75	575	\$42,414
DOL	426	426	0.75	320	\$23,563
Treasury	426	426	0.75	320	\$23,563
OPM	85	85	0.75	64	\$4,713

The Departments would revise the information collection currently approved under OMB control number

1210–0169 to account for this new burden.²³¹ The Departments seek comment on these burden estimates.

The information collections are summarized as follows:

²³¹ OMB Control Number: 0938–1401 (CMS–10780, Requirements Related to Surprise Billing;

Qualifying Payment Amount, Notice and Consent,

Disclosure on Patient Protections Against Balance Billing, and State Law Opt-in).

TABLE 19: Annual Recordkeeping and Reporting Requirements

Regulation Section	OMB Control Number	Respondents	Responses	Burden per Response (hours)	Total Annual Burden (hours)	Hourly Labor Cost of Reporting	Total Labor Cost of Reporting
45 CFR 149.510(b)(1)	1210-0169	HHS: 472,500 Labor: 262,500 Treasury: 262,500 OPM: 52,500	HHS: 472,500 Labor: 262,500 Treasury: 262,500 OPM: 52,500	HHS: 0.75 Labor: 0.75 Treasury: 0.75 OPM: 0.75	HHS: 378,000 Labor: 210,000 Treasury: 210,000 OPM: 42,000	HHS: \$104.95 Labor: \$104.95 Treasury: \$104.95 OPM: \$104.95	HHS: \$39,671,100 Labor: \$22,039,500 Treasury: \$22,039,500 OPM: \$4,407,900
45 CFR 149.510(b)(2)	1210-0169	HHS: 378,000 Labor: 210,000 Treasury: 210,000 OPM: 42,000	HHS: 378,000 Labor: 210,000 Treasury: 210,000 OPM: 42,000	HHS: 0.75 Labor: 0.75 Treasury: 0.75 OPM: 0.75	HHS: 283,500 Labor: 157,500 Treasury: 157,500 OPM: 31,500	HHS: \$104.95 Labor: \$104.95 Treasury: \$104.95 OPM: \$104.95	HHS: \$29,753,325 Labor: \$16,529,625 Treasury: \$16,529,625 OPM: \$3,305,925
45 CFR 149.510(c)(1)	1210-0169	HHS: 44,370 Labor: 24,650 Treasury: 24,650 OPM: 4,930	HHS: 44,370 Labor: 24,650 Treasury: 24,650 OPM: 4,930	HHS: 0.53 Labor: 0.53 Treasury: 0.53 OPM: 0.53	HHS: 29,295 Labor: 16,275 Treasury: 16,275 OPM: 3,255	HHS: \$39.56 Labor: \$39.56 Treasury: \$39.56 OPM: \$39.56	HHS: \$1,158,910 Labor: \$643,839 Treasury: \$643,839 OPM: \$128,767
45 CFR 149.510(c)(3)	1210-0169	HHS: 7,560 Labor: 4,200 Treasury: 4,200 OPM: 840	HHS: 7,560 Labor: 4,200 Treasury: 4,200 OPM: 840	HHS: 0.75 Labor: 0.75 Treasury: 0.75 OPM: 0.75	HHS: 5,670 Labor: 3,150 Treasury: 3,150 OPM: 630	HHS: \$72.25 Labor: \$72.25 Treasury: \$72.25 OPM: \$72.25	HHS: \$409,676 Labor: \$227,598 Treasury: \$227,598 OPM: \$45,520
45 CFR 149.510(d)	1210-0169	HHS: 6 Labor: 3 Treasury: 3 OPM: 1	HHS: 6 Labor: 3 Treasury: 3 OPM: 1	HHS: (18) Labor: (18) Treasury: (18) OPM: (18)	HHS: (108) Labor: (54) Treasury: (54) OPM: (18)	HHS: \$39.56 Labor: \$39.56 Treasury: \$39.56 OPM: \$39.56	HHS: (\$4,272) Labor: (\$2,136) Treasury: (\$2,136) OPM: (\$712)
45 CFR 149.510(g)	1210-0169	HHS: 9 Labor: 5 Treasury: 5 OPM: 1	HHS: 9 Labor: 5 Treasury: 5 OPM: 1	HHS: 0.25 Labor: 0.25 Treasury: 0.25 OPM: 0.25	HHS: 2.25 Labor: 1.25 Treasury: 1.25 OPM: 0.25	HHS: \$39.56 Labor: \$39.56 Treasury: \$39.56 OPM: \$39.56	HHS: \$89 Labor: \$49 Treasury: \$49 OPM: \$10
45 CFR 149.530	1210-0169	HHS: 767 Labor: 426 Treasury: 426 OPM: 85	HHS: 767 Labor: 426 Treasury: 426 OPM: 85	HHS: 0.75 Labor: 0.75	HHS: 575 Labor: 320 Treasury: 320 OPM: 64	HHS: \$73.71 Labor: \$73.71	HHS: \$42,414 Labor: \$23,563 Treasury: \$23,563 OPM: \$4,713

Regulation Section	OMB Control Number	Respondents	Responses	Burden per Response (hours)	Total Annual Burden (hours)	Hourly Labor Cost of Reporting	Total Labor Cost of Reporting
				<i>Treasury:</i> 0.75 <i>OPM:</i> 0.75		<i>Treasury:</i> \$73.71 <i>OPM:</i> \$73.71	
Total		<i>HHS:</i> 525,212 <i>Labor:</i> 291,784 <i>Treasury:</i> 291,784 <i>OPM:</i> 58,357 <i>Overall:</i> 1,167,137 ²³²	<i>HHS:</i> 903,212 <i>Labor:</i> 501,784 <i>Treasury:</i> 501,784 <i>OPM:</i> 100,357 <i>Overall:</i> 2,007,137		<i>HHS:</i> 673,310 <i>Labor:</i> 374,067 <i>Treasury:</i> 374,067 <i>OPM:</i> 74,086 <i>Overall:</i> 1,496,249		<i>HHS:</i> \$68,551,798 <i>Labor:</i> \$38,084,569 <i>Treasury:</i> \$38,084,569 <i>OPM:</i> \$7,616,630 <i>Overall:</i> \$152,337,567

BILLING CODE 6325-63-C; 4510-01-C; 4120-01-C

10. Submission of PRA-Related Comments²³²

The Departments have submitted a copy of these proposed rules to OMB for its review of the rule's information collection and recordkeeping requirements. These requirements are not effective until they have been approved by the OMB.

To obtain copies of the supporting statement and any related forms for the proposed collections for control number 0938-1401, please visit CMS's website at <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>. To obtain copies of the supporting statement for control number 1210-0169, please go to <https://www.RegInfo.gov> or email the request to ebssa.opr@dol.gov and reference control number 1210-0169. The Departments invite public comment on these potential information collection requirements. Commenters may send their views on the Departments' PRA analysis in the same way they send comments in response to these proposed rules as a whole (for example, through the <https://www.regulations.gov> website), including as part of a comment responding to the broader proposed rules.

If you wish to comment, please submit your comments electronically as specified in the **ADDRESSES** section of these proposed rules and identify the

rule (CMS-9897-P), the ICR's CFR citation, CMS ID number, and OMB control number.

ICR-related comments are due January 2, 2024.

G. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601, *et seq.*) requires agencies to analyze options for regulatory relief of small entities to prepare an initial regulatory flexibility analysis to describe the impact of these proposed rules on small entities, unless the head of the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities. The RFA generally defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a not-for-profit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000. States and individuals are not included in the definition of "small entity." The Departments use a change in revenues of more than 3 to 5 percent as its measure of significant economic impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdiction.

1. Need for Regulatory Action, Objectives, and Legal Basis

This proposed rulemaking authorized by the No Surprises Act is intended to address specific issues that are critical to ensuring the timely rendering of payment determinations and to address feedback from interested parties and certified IDR entities to improve the functioning of the Federal IDR process.

These proposed rules are intended to address some of the common communication issues stemming from a lack of clarity as to whether items and services are qualified IDR items and services covered by the No Surprises Act. These proposed rules would impose requirements and create incentives for parties to engage with one another during the open negotiation period, which would help reduce the volume of ineligible disputes being submitted. Specifically, these proposed rules would make changes to the information that plans, issuers, providers, facilities, and providers of air ambulance services must share before initiating the Federal IDR process by including proposals at 26 CFR 54.9816-6A, 29 CFR 2590.716-6A, and 45 CFR 149.100 to require plans and issuers to provide CARCs and RARCs when providing any paper or electronic remittance in response to a claim for payment for health care items or services furnished by an entity with which it does not have a direct or indirect contractual relationship. Additionally, the Departments propose amendments at 26 CFR 54.9816-6, 29 CFR 2590.716-6, and 45 CFR 149.140 to the information that must be disclosed about the QPA. These proposed rules would also establish new requirements at 26 CFR 54.9816-9, 29 CFR 2590.716-9, and 45 CFR 149.530, which would require plans and issuers to register with the Federal IDR portal to better enable a provider, facility, or provider of air ambulance services to identify the appropriate plan or issuer with which it has a dispute and determine whether its coverage of an item or service is subject to a specified State law, an All-Payer

²³² 840,000 respondents are duplicated between the open negotiation and Federal IDR process initiation information collections because these respondents must complete open negotiations to be a party to an initiated dispute; therefore, the total number of respondents has been reduced to reflect an accurate total of respondents.

Model Agreement, or the Federal IDR process for determining the out-of-network rate.

To further facilitate communication and improve open negotiations, these proposed rules would amend the open negotiation process that precedes the Federal IDR process. Specifically, at 26 CFR 54.9816–8(b)(1), 29 CFR 2590.716–8(b)(1), and 45 CFR 149.510(b)(1), these proposed rules would amend the content requirements of the standard open negotiation notice, would establish requirements related to an open negotiation response notice, and would clarify the timing for when the open negotiation period begins. These proposed rules would also amend the process for initiating the Federal IDR process. Specifically, at 26 CFR 54.9816–8(b)(2), 29 CFR 2590.716–8(b)(2), and 45 CFR 149.510(b)(2), these proposed rules would amend the content of the notice of IDR initiation and establish new requirements for a notice of IDR initiation response from the non-initiating party. At 26 CFR 54.9816–8T(b)(3), 29 CFR 2590.716–8(b)(3), and 45 CFR 149.510(b)(3), these proposed rules would also establish a new manner for providing notices to the other party and the Departments.

These proposed rules would also provide additional clarity regarding timeframes within the Federal IDR process. The No Surprises Act includes certain timeframes by which certain steps of the Federal IDR process must be conducted. For example, disputing parties must jointly select a certified IDR entity not later than the last day of the 3-business-day period following the date of the initiation of the Federal IDR process, and if the parties fail to jointly select a certified IDR entity, the Departments must select a certified IDR entity not later than 6 business days after the date of IDR initiation.²³³ While the No Surprises Act also provides detailed timeframes for certain other steps in the process, the steps that must be conducted before a payment determination can be issued are not as clearly defined, such as when a certified IDR entity must conduct a conflict-of-interest review and must determine whether an item or service is a qualified IDR item or service, as defined in 26 CFR 54.9816–8T(a)(2)(xi), 29 CFR 2590.716–8(a)(2)(xi), and 45 CFR 149.510(a)(2)(xi), and eligible for the Federal IDR process. Therefore, the provisions in these proposed rules would adjust certain steps and establish associated timeframes (see Table 1).

These include provisions related to establishing a process for preliminary selection of the certified IDR entity and final selection of the certified IDR entity as set out in 26 CFR 54.9816–8(c)(1), 29 CFR 2590.716–8(c)(1), and 45 CFR 149.510(c)(1), in order to account for the time it takes certified IDR entities to confirm that they do not have a conflict of interest with either party. To allow more time for certified IDR entities to conduct eligibility reviews, these proposed rules would include proposed amendments to the Federal IDR process eligibility review proposed in 26 CFR 54.9816–8T(c)(2), 29 CFR 2590.716–8(c)(2), and 45 CFR 149.510(c)(2). As discussed in section I.H. of this preamble, eligibility reviews have proven to be complex and time consuming. In extenuating circumstances, such as when dispute volume is high, it may be more appropriate for the Departments, rather than certified IDR entities, to conduct eligibility reviews to facilitate quicker dispute processing. Therefore, these proposed rules would establish a Departmental eligibility review process in proposed paragraph 26 CFR 54.9816–8(c)(2)(ii), 29 CFR 2590.716–8(c)(2)(ii), and 45 CFR 149.510(c)(2)(ii). Further, to support eligibility determinations, conflict-of-interest reviews, and payment determinations, the Departments propose requirements for the submission of additional information from the disputing parties at 26 CFR 54.9816–8(c)(2)(iii), 29 CFR 2590.716–8(c)(2)(iii), and 45 CFR 149.510(c)(2)(iii). To clarify and establish a standard process for disputes to be withdrawn from the Federal IDR process, the Departments propose four conditions in which a dispute may be withdrawn at 26 CFR 54.9816–8(c)(3)(i), 29 CFR 2590.716–8(c)(3)(i), and 45 CFR 149.510(c)(3)(ii). To further adjust timeframes and processes associated with the Federal IDR process, these proposed rules would include proposed amendments related to submission of offers and payment determination and notification at 26 CFR 54.9816–8(c)(5), 29 CFR 2590.716–8(c)(5), and 45 CFR 149.510(c)(5); the collection of the certified IDR entity fee at 26 CFR 54.9816–8(d)(1), 29 CFR 2590.716–8(d)(1), and 45 CFR 149.510(d)(1); and the collection of the administrative fee, including a process for setting a reduced administrative fee for low-dollar amount disputes and for non-initiating parties in cases of ineligible disputes, at 26 CFR 54.9816–8(d)(2), 29 CFR 2590.716–8(d)(2), and 45 CFR 149.510(d)(2). These proposed rules also include provisions to expand upon situations in which

Federal IDR process timeframes may be waived due to extenuating circumstances at 26 CFR 54.9816–8T(g), 29 CFR 2590.716–8(g), and 45 CFR 149.510(g).

Lastly, to address concerns regarding the vacated batching provision at 26 CFR 54.9816–8(c)(3)(i)(C), 29 CFR 2590.716–8(c)(3)(i)(C), and 45 CFR 149.510(c)(3)(i)(C) and to create more efficiencies in the process, these proposed rules at 26 CFR 54.9816–8(c)(4), 29 CFR 2590.716–8(c)(4), and 45 CFR 149.510(c)(4) include provisions that would allow for more flexibility in batching multiple items or services in a single dispute.

It is the Departments' intention that the implementation of the proposed provisions in these proposed rules, if finalized, would lead to a more efficient Federal IDR process and more timely payment determinations.

2. Small Entities Regulated

The provisions in these proposed rules would affect plans (or their TPAs), health insurance issuers offering group or individual health insurance coverage, certified IDR entities, and providers, facilities, and providers of air ambulance services.

For purposes of analysis under the RFA, the Departments consider an employee benefit plan with fewer than 100 participants to be a small entity.²³⁴ The basis of this definition is found in section 104(a)(2), which permits the Secretary of Labor to prescribe simplified annual reports for plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Under the authority of section 104(a)(3), DOL has previously issued simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans, which cover fewer than 100 participants and satisfy certain requirements.²³⁵ While some large employers have small plans, small plans are generally maintained by small employers. Thus, the Departments are of the view that assessing the impact of these proposed rules on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of a small entity considered

²³³ Section 9816(c)(4)(F) of the Code, section 716(c)(4)(F) of ERISA, and section 2799A–1(c)(4)(F) of the PHS Act.

²³⁴ The Department of Labor consulted with the Small Business Administration Office of Advocacy in making this determination, as required by 5 U.S.C. 603(c) and 13 CFR 121.903(c) in a memo dated June 4, 2020.

²³⁵ See 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10.

appropriate for this purpose differs, however, from a definition of a small business based on size standards issued by the SBA²³⁶ in accordance with the Small Business Act.²³⁷

In 2021, there were 1,500 issuers in the U.S. health insurance market²³⁸ and 205 TPAs.²³⁹ Health insurance issuers are generally classified under the North American Industry Classification System (NAICS) code 524114 (Direct Health and Medical Insurance Carriers). According to SBA size standards,²⁴⁰ entities with average annual receipts of \$47 million or less are considered small entities for this NAICS code. The Departments expect that few, if any, insurance companies underwriting health insurance policies fall below these size thresholds. Based on data from MLR annual report submissions for the 2021 MLR reporting year, approximately 87 out of 483 issuers of health insurance coverage nationwide had total premium revenue of \$47 million or less.²⁴¹ However, it should be noted that also based on MLR data, over 77 percent of these small companies belong to larger holding groups, and many, if not all, of these small companies, are likely to have non-health lines of business that would result in their revenues exceeding \$47 million. The Departments are of the view that the same assumptions also apply to TPAs that would be affected by these proposed rules.²⁴² To produce a conservative estimate, for the purposes of this analysis, the Departments assume 4.1 percent, or 62 health insurance issuers and 8 TPAs, of the total of 1,500 health insurance issuers and 205 TPAs across the country, are considered small entities.²⁴³ The Departments seek comment on this assumption.

²³⁶ 13 CFR 121.201 (2011).

²³⁷ 15 U.S.C. 631 *et seq.* (2011).

²³⁸ Centers for Medicare and Medicaid Services. (2022). *Medical Loss Ratio Data and System Resources*. <https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr>. There are 483 issuers of health insurance coverage nationwide and 1,500 issuer-State combinations.

²³⁹ Non-issuer TPAs based on data derived from the 2016 benefit year reinsurance program contributions.

²⁴⁰ United States Small Business Administration. (March 17, 2023). *Table of Size Standards*. <https://www.sba.gov/document/support-table-size-standards>.

²⁴¹ Centers for Medicare and Medicaid Services. (2022). *Medical Loss Ratio Data and System Resources*. <https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr>.

²⁴² The Departments are of the view that most TPAs are also issuers.

²⁴³ These numbers are calculated as follows: 77 percent of small companies belong to larger holding groups, so 23 percent do not and would be small entities. $87 \text{ issuers} \times 0.23 = 20$. $20/483 = 4.1$ percent. Applying the 4.1 percent to 1,500 issuers and 205 TPAs total = 62 small issuers and 8 small TPAs.

These proposed rules would also affect health care providers due to the proposed requirements for the initiating party to submit the open negotiation notice to the non-initiating party and the Departments, among other proposals.²⁴⁴ The Departments estimate that 140,270 physicians, on average, bill on an out-of-network basis. The number of small physicians is estimated based on the SBA's size standards. The size standard applied for providers is NAICS 62111 (Offices of Physicians), for which a business with less than \$16 million in receipts is considered to be small. By this standard, the Departments estimate that 47.2 percent or 66,207 physicians are considered small under the SBA's size standards.²⁴⁵ These proposed rules are also expected to affect non-physician providers who bill on an out-of-network basis. The Departments lack data on the number of non-physician providers who would be impacted.

The Departments do not have the same level of data for the air ambulance sub-sector. In 2020, the total revenue of providers of air ambulance services was estimated to be \$4.2 billion, with 1,114 air ambulance bases.²⁴⁶ This results in an industry average of \$3.8 million per air ambulance base. Based on a 2020 U.S.C.-Brookings Schaeffer report on air ambulance services,²⁴⁷ by 2017, large private equity firms controlled roughly two-thirds of the air ambulance market. The Departments seek comment on the number of small entities in the air ambulance market.

Although based on the Departments' experience operating the Federal IDR process, significantly fewer than 66,207 small providers have accessed the process to date, and the vast majority of disputes are initiated by 10 large revenue cycle management companies

²⁴⁴ Historically, less than 1 percent of disputes for emergency and non-emergency services have been submitted by group health plans, health insurance issuers, or FEHB carriers. See U.S. Department of Labor, U.S. Department of the Treasury, and U.S. Department of Health and Human Services.

(December 15, 2022) *Initial Report on the Federal Independent Dispute Resolution (IDR) Process*, April 15–September 30, 2022. <https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf>.

²⁴⁵ Based on data from the NAICS Association for NAICS code 62111, the Departments estimate the percent of businesses within the industry of Offices of Physicians with less than \$16 million in annual sales. See <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>.

²⁴⁶ ASPE Office of Health Policy. (September 10, 2021). *Air Ambulance Use and Surprise Billing*. <https://aspe.hhs.gov/sites/default/files/2021-09/aspe-air-ambulance-ib-09-10-2021.pdf>.

²⁴⁷ Adler, L., Hannick, K., and Lee, S. High Air Ambulance Charges Concentrated in Private Equity-Owned Carriers. U.S.C.-Brookings Schaeffer Initiative for Health Policy. October 13, 2020.

or provider groups,²⁴⁸ the Departments lack adequate data to better inform the number of small providers impacted by these proposed rules. The Departments are also aware that many providers are subject to a specified State law or All-Payer Model Agreement, rather than the Federal IDR process, and therefore would not have reason to access the Federal IDR process or need to review these proposed rules.²⁴⁹ Therefore, although the Departments acknowledge that 66,207 small providers is likely a significant overestimate of the number of small providers impacted by these proposed rules, the Departments use this number of small providers in this analysis to be conservative. The Departments seek comment on this assumption.

Additionally, as discussed in the *Partial Report on the Federal Independent Dispute Resolution (IDR) Process, October 1–December 31, 2022*, the top 10 initiating parties initiate approximately 85 percent of disputes, and the top 10 non-initiating parties are initiated against in approximately 95 percent of disputes.²⁵⁰ These top 10 parties are large provider groups or revenue cycle management groups and large insurance companies or their representatives. Therefore, for purposes of this analysis, the Departments assume that only 15 percent of all disputes involve small providers. The 5 percent of all disputes that do not involve the top 10 non-initiating parties could involve any of the 1,695 issuers and TPAs that are not the top 10 non-initiating parties (1,500 issuers and 205 TPAs total – 10 top non-initiating parties = 1,695 remaining issuers and TPAs). The Departments assume that the same proportion of small issuers and TPAs to all issuers and TPAs also applies to the number of disputes each issuer or TPA is involved in, as small issuers and TPAs cover fewer enrollees than large issuers and TPAs. The Departments seek comment on this assumption.

3. Compliance Requirements

The proposed policies that would result in an increased burden to small entities are described below.

²⁴⁸ See U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury, *Partial Report on the Federal Independent Dispute Resolution (IDR) Process, October 1–December 31, 2022*. (n.d.). <https://www.cms.gov/files/document/partial-report-idr-process-octoberdecember-2022.pdf>.

²⁴⁹ See Chart for Determining the Applicability for the Federal Independent Dispute Resolution (IDR) Process (n.d.). <https://www.cms.gov/files/document/caa-federal-idr-applicability-chart.pdf>.

²⁵⁰ *Id.*

The Departments propose to require that plans and issuers use CARCs and RARCs to convey information related to the No Surprises Act, on electronic and paper remittance advice. The annual burden per issuer/TPA associated with this proposal is \$909. For more details, please refer to section V.D.2.a. of this preamble.

The Departments also propose to amend the information plans and issuers must provide related to the QPA with an initial payment or notice of denial of payment. The one-time burden per issuer/TPA associated with this proposal is \$297. For more details, please refer to V.F.2 of this preamble.

Additionally, the Departments propose to require the party to provide an open negotiation notice and supporting documentation to the other party and the Departments to initiate the open negotiation period. Furthermore, the party in receipt of the open negotiation notice would be required to provide a response to the open negotiation notice that is provided to the other party and the Departments within the first 15 business days of the 30-business-day open negotiation period. The annual burden per small provider associated with this proposal is \$79,²⁵¹ and the annual burden per small issuer/TPA associated with this proposal is \$1,338.²⁵² For more details, please refer to section V.F.3. of this preamble.

Furthermore, the Departments propose to continue requiring the initiating party to submit a written notice of IDR initiation to the non-initiating party and to the Departments. The Departments also propose that the

non-initiating party must submit a written response to the notice of IDR initiation to the initiating party and to the Departments. The annual burden per small provider associated with this proposal is \$79,²⁵³ and the annual burden per small issuer/TPA associated with this proposal is \$945.²⁵⁴ For more details, please refer to section V.F.4.a. of this preamble.

Additionally, the Departments propose to revise the content in the notice of certified IDR entity selection form to reflect that this notice would only be used in situations in which the non-initiating party disagrees with the initiating party's preferred certified IDR entity identified in the notice of IDR initiation form. The annual burden per small provider associated with this proposal is \$21,²⁵⁵ and the annual burden per small issuer/TPA associated with this proposal is \$85.²⁵⁶ For more details, please refer to section V.F.4.b. of this preamble.

Moreover, the Departments propose to establish a process for disputes to be withdrawn from the Federal IDR process, including the creation of new notice of withdrawal and notice of withdrawal response forms. The annual burden per small provider associated with this proposal is \$44,²⁵⁷ and the annual burden per small issuer/TPA associated with this proposal is \$10.²⁵⁸ For more details, please refer to section V.F.6. of this preamble.

Additionally, for disputes initiated on or after January 1, 2025, the Departments propose to establish the administrative fee amount at \$150 per party per dispute, a reduced administrative fee amount for both

parties in low-dollar disputes of \$75 per party per dispute, and a reduced administrative fee for non-initiating parties in ineligible disputes of \$30 per party per dispute. The annual burden per small provider associated with this proposal is \$150,²⁵⁹ and the annual burden per small issuer/TPA is \$1,290.²⁶⁰ For more details, please refer to section V.D.2.i.i. of this preamble.

Finally, the Departments propose to require plans and issuers to submit information to the Departments to receive a registration number. The initial (one-time) burden per issuer/TPA associated with this proposal is \$924, and the annual burden per issuer/TPA associated with this proposal is \$55. For more details, please refer to section V.F.9. of this preamble.

The Departments estimate the one-time cost to review the rule would be \$1,575 per entity. For more details, please refer to section V.D.4. of this preamble.

Thus, the per-entity estimated annual cost for each small issuer/TPA is \$4,632, and the per-entity estimated annual cost for each small provider is \$373. The total annual cost for small issuers and TPAs is \$324,240, and the total annual cost for small providers is \$24,695,211. The per-entity estimated one-time cost for each small issuer/TPAs is \$2,796, and the per-entity estimated one-time cost for each small provider is \$1,575. The total one-time cost for small issuers and TPAs is \$195,720, and the total one-time cost for small providers is \$622,125. See Tables 20, 21, 22, and 23.

BILLING CODE 6325-63-P; 4830-01-P; 4510-29-P; 4120-01-P

²⁵¹ 560,000 disputes in open negotiations—85 percent (476,000) disputes entered into open negotiations by the top 10 initiating parties = 84,000 disputes entered into open negotiations by other initiating parties. 84,000 disputes/66,207 small providers = approximately 1 dispute initiated per small provider annually. 1 dispute × \$78.71 per dispute = \$79 per small provider.

²⁵² 560,000 disputes in open negotiations—95 percent (532,000) disputes entered into open negotiations against the top 10 non-initiating parties = 28,000 disputes entered into open negotiations against other non-initiating parties. 28,000 disputes/1,695 issuers/TPAs = 17 disputes per issuer/TPA. 17 disputes × \$78.71 per dispute = \$1,338 per small issuer/TPA.

²⁵³ 420,000 disputes initiated—85 percent (357,000) disputes initiated by the top 10 initiating parties = 63,000 disputes initiated by other initiating parties. 63,000 disputes/66,207 small providers = approximately 1 dispute initiated per small provider annually. 1 dispute × \$78.71 per dispute = \$79 per small provider.

²⁵⁴ 420,000 disputes initiated—95 percent (399,000) disputes initiated against the top 10 non-initiating parties = 21,000 disputes initiated against

other non-initiating parties. 21,000 disputes/1,695 issuers/TPAs = 12 disputes per issuer/TPA annually. 12 disputes × \$78.71 per dispute = \$945 per small issuer/TPA.

²⁵⁵ 120,200 disputes for which a notice of certified IDR entity selection is required—85 percent (102,170) disputes initiated by the top 10 initiating parties = 18,030 disputes for other initiating parties. 18,030 disputes/66,207 small providers = less than 1 dispute per small provider annually. 1 dispute × \$21.14 = \$21 per small provider.

²⁵⁶ 120,200 disputes for which a notice of certified IDR entity selection is required—95 percent (114,190) disputes initiated against the top 10 non-initiating parties = 6,010 disputes for other non-initiating parties. 6,010 disputes/1,695 issuers/TPAs = 4 disputes per issuer/TPA annually. 4 disputes × \$21.14 = \$85 per small issuer/TPA.

²⁵⁷ 16,800 disputes withdrawn—85 percent (14,280) disputes withdrawn by the top 10 initiating parties = 2,520 disputes withdrawn by other initiating parties. 2,520 disputes/66,207 small providers = less than 1 dispute withdrawn per small provider annually. 1 dispute × \$44.30 per dispute = \$44 per small provider.

²⁵⁸ 16,800 disputes withdrawn—95 percent (15,960) disputes withdrawn against the top 10 non-initiating parties = 840 disputes withdrawn against other non-initiating parties. 840 disputes/1,695 issuers/TPAs = less than 1 dispute withdrawn per issuer/TPA annually. 1 dispute × \$9.89 per dispute = \$10 per small issuer/TPA.

²⁵⁹ 420,000 disputes initiated—85 percent (357,000) disputes initiated by the top 10 initiating parties = 63,000 disputes initiated by other initiating parties. 63,000 disputes/66,207 small providers = approximately 1 dispute initiated per small provider annually. 1 dispute × \$150 per dispute = \$150 per small provider.

²⁶⁰ 420,000 disputes initiated—95 percent (399,000) disputes initiated against the top 10 non-initiating parties = 21,000 disputes initiated against other non-initiating parties. 21,000 disputes/1,695 issuers/TPAs = 12 disputes per issuer/TPA annually. Of those 12 disputes, issuers/TPAs would pay a \$75 administrative fee for 16 percent (or 2 disputes), a \$30 administrative fee for 22 percent (or 3 disputes), and a \$150 administrative fee for 62 percent (or 7 disputes). (2 disputes × \$75 per dispute) + (3 disputes × \$30 per dispute) + (7 disputes × \$150 per dispute) = \$1,290.

TABLE 20: Detailed Annual Costs for Small Entities

Description of Cost	Annual Cost per Small Issuer/TPA	Annual Cost per Small Provider
CARCs and RARCs	\$909	N/A
Open Negotiation	\$1,338	\$79
Initiation	\$945	\$79
Certified IDR Entity Selection	\$85	\$21
Withdrawal	\$10	\$44
Administrative Fees	\$1,290	\$150
Registration	\$55	N/A
Total	\$4,632	\$373

TABLE 21: Aggregate Annual Costs for Small Entities

Affected Entity	Affected Small Entities	Annual Cost per Entity	Aggregate Annual Cost for Small Entities
Issuer/TPA	70	\$4,632	\$324,240
Provider	66,207	\$373	\$24,695,211

TABLE 22: One-Time Costs for Small Entities

Description of Cost	One-Time Cost per Small Issuer/TPA	One-Time Cost per Small Provider
QPA Disclosures	\$297	N/A
Registration	\$924	N/A
Regulatory Review	\$1,575	\$1,575
Total	\$2,796	\$1,575

TABLE 23: Aggregate One-Time Costs for Small Entities

Affected Entity	Affected Small Entities	One-Time Cost per Entity	Aggregate One-Time Cost for Small Entities
Issuer/TPA	70	\$2,796	\$195,720
Provider	395	\$1,575	\$622,125

BILLING CODE 6325–63–C; 4830–01–C; 4510–29–C; 4120–01–C

The annual cost per small provider of \$373 is approximately 0.03 percent of the average annual receipts per small provider. The Departments anticipate that small providers would be unlikely to initiate disputes and thereby incur these costs unless they anticipate prevailing in the dispute and receiving payment from issuers or TPAs that exceed the costs incurred to initiate the dispute. The Departments therefore are of the view that small providers could experience an increase in receipts commensurate or larger than the increase in costs. The annual cost per small issuer/TPA of \$4,632 is approximately 0.25 percent of the average annual receipts per small issuer/TPA. The Departments anticipate

that small issuers/TPAs could pass on these increased costs to consumers in the form of higher premiums (or for TPAs, higher administration fees), resulting in an increase in receipts commensurate with the increase in costs. However, the Departments are of the view that the actual increase in costs and subsequent impact on revenue is de minimis and likely to decrease due to the proposals in these rules, as many proposals are anticipated to result in increased efficiency and fewer dispute initiations, as discussed further in section V.D.1.l. of this preamble. Additionally, the Departments anticipate that by batching qualified IDR items and services, there may be a reduction in the per-service cost of the Federal IDR process, and potentially the

aggregate administrative costs, because the Federal IDR process is likely to exhibit at least some economies of scale.²⁶¹ The Departments seek comment on these assumptions.

Thus, the Departments do not anticipate that these proposed rules would have a significant impact on a substantial number of small entities, based on the HHS threshold of 3 to 5 percent change in revenue. The Departments seek comment on this analysis and seek information on the

²⁶¹ Fielder, M., Adler, L., Ippolito, B. (March 16, 2021). *Recommendations for Implementing the No Surprises Act*. U.S.C.-Brookings Schaeffer on Health Policy. <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2021/03/16/recommendations-for-implementing-the-no-surprises-act/>.

number of small issuers, TPAs, or providers that may be affected by the provisions in these proposed rules, as well as any additional costs associated with these proposed rules that could have a significant economic impact on a substantial number of small entities.

4. Duplication, Overlap, and Conflict With Other Rules and Regulations

The Departments do not anticipate any duplication, overlap, or conflict with other rules and regulations associated with these proposed rules. These proposed rules revise current regulations and add new regulations to continue to implement the No Surprises Act and improve the Federal IDR process. The Departments seek comment on any duplication, overlap, or conflict with other rules and regulations identified by interested parties.

5. Significant Alternatives

The regulatory alternatives considered in developing these proposed rules are discussed in section V.E. of this preamble. The Departments are of the view that none of these alternatives would both achieve the policy objectives and goals of these proposed rules as previously stated and be less burdensome to small entities. For example, although the proposals pertaining to the open negotiation notice and response, initiation notice and response, selection form and response, and withdrawal form and response may impose costs on small entities, these proposals are critical to ensure the exchange of information between the parties in a standardized time and format, in order to reduce wasted effort for the parties at other stages of the Federal IDR process due to inappropriately or incorrectly initiated open negotiations or Federal IDR process disputes. Although the Departments recognize that the less stringent timetables considered in certain regulatory alternatives described in section V.E. of this preamble may account for the resources available to small entities, they would be contrary to the policy objectives of these proposed rules. Alternative timelines for small entities for any of the policy proposals described in these rules were not considered. The Departments did not identify any alternatives to these proposals that would be less burdensome to small entities while still achieving the objectives of these proposed rules. In addition, the proposals pertaining to the administrative fee may impose costs on small entities, but the proposed \$150 administrative fee amount in these

proposed rules for disputes initiated on or after January 1, 2025 is the same as the proposed administrative fee amount for disputes initiated on or after January 1, 2024,²⁶² and these proposed rules further propose to reduce the administrative fee amount for both parties in low-dollar disputes and non-initiating parties in ineligible disputes. Therefore, although some of the regulatory alternatives considered may have led to minor reduction in burden to small entities, we believe they would ultimately undermine the proposals to reduce the cost to initiate a Federal IDR process dispute for small entities in certain situations, which we believe will confer a far greater benefit to small entities.

For a more detailed discussion of the regulatory alternatives considered, please reference section V.E. of this preamble.

6. Small Rural Hospitals

In addition, section 1102(b) of the Social Security Act requires the Departments 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 603 of the RFA. For purposes of section 1102(b) of the Act, the Departments define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. The Departments have determined that these proposed rules will not affect small rural hospitals and that these proposed rules are not subject to section 1102(b) of the Act. Therefore, the Secretary certifies that these proposed rules will not have a significant economic impact on a substantial number of small rural hospitals.

H. Special Analyses—Department of the Treasury

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

²⁶² See *Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges* proposed rules. 88 FR 65888 (September 26, 2023).

I. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a proposed rule or any final rule for which a general notice of proposed rulemaking was published that includes any Federal mandate that may result in expenditures in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. That threshold is approximately \$177 million in 2023. As discussed earlier in the RIA, plans, issuers, TPAs, certified IDR entities, and providers, facilities, and providers of air ambulance services would incur costs to comply with the proposed provisions of these proposed rules. The Departments estimate the combined impact on State, local, or tribal governments and the private sector would not be above the threshold.

J. Federalism

Executive Order 13132 outlines the fundamental principles of federalism. It requires adherence to specific criteria by Federal agencies in formulating and implementing policies that have “substantial direct effects” on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies issuing regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to these proposed rules.

The Departments do not anticipate that these proposed rules would have any federalism implications or limit the policy-making discretion of the States in compliance with the requirement of Executive Order 13132. The Departments recognize that at least one State (and possibly more) currently require the use of CARCs and RARCs to communicate information related to the applicability of State balance billing laws. In these instances, these proposed rules would not infringe upon the State’s ability to continue to specify its requirements related to using CARCs and RARCs.

State and local government health plans may be subject to the Federal IDR process where a specified State law or All-Payer Model Agreement does not apply. The No Surprises Act authorizes States to enforce the new requirements, including those related to balance

billing, for issuers, providers, facilities, and providers of air ambulance services, with HHS enforcing only in cases where the State has notified HHS that the State does not have the authority to enforce or is otherwise not enforcing, or HHS has made a determination that a State has failed to substantially enforce the requirements. However, in the Departments' view, the federalism implications of these proposed rules are substantially mitigated because some States have their own process for determining the total amount payable under a plan or coverage for out-of-network emergency services and to out-of-network providers for patient visits to in-network facilities. Where a State has a specified State law, the State law, rather than the Federal IDR process, would apply. The Departments anticipate that some States, with their own process, may want to change their laws or adopt new laws in response to these proposed rules. The Departments anticipate that these States would incur a small incremental cost when making changes to their laws.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Departments have engaged in efforts to consult with and work cooperatively with affected States, including participating in conference calls with and attending conferences of the National Association of Insurance Commissioners and consulting with State insurance officials on an individual basis.

While developing these rules, the Departments attempted to balance the States' interests in regulating health insurance issuers with the need to ensure market stability. By doing so, the Departments complied with the requirements of Executive Order 13132.

Laurie Bodenheimer,

Associate Director, Healthcare and Insurance, Office of Personnel Management.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Xavier Becerra,

Secretary, Department of Health and Human Services.

List of Subjects

5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance,

Health professions, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR Part 149

Balance billing, Health care, Health insurance, Reporting, and recordkeeping requirements, Surprise billing, State regulation of health insurance, and Transparency in coverage.

OFFICE OF PERSONNEL MANAGEMENT

For the reasons stated in the preamble, the Office of Personnel Management proposes to amend 5 CFR part 890 as set forth below:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

■ 1. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.102 also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521 (36 U.S.C. 5522); Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604 (2 U.S.C. 2051); Sec. 890.113 also issued under section 1110 of Pub. L. 116–92, 133 Stat. 1198 (5 U.S.C. 8702 note); Sec. 890.301 also issued under section 311 of Pub. L. 111–3, 123 Stat. 64 (26 U.S.C. 9801); Sec. 890.302(b) also issued under section 1001 of Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029 (42 U.S.C. 300gg–14); Sec. 890.803 also issued under 50 U.S.C. 3516 (formerly 50 U.S.C. 403p) and 22 U.S.C. 4069c and 4069c–1; subpart L also issued under section 599C of Pub. L. 101–513, 104 Stat. 2064 (5 U.S.C. 5561 note), as amended; and subpart M also issued under section 721 of Pub. L. 105–261 (10 U.S.C. 1108), 112 Stat. 2061; 25 U.S.C. 1647b.

■ 2. Section 890.114 is amended by revising paragraph (a) to read as follows:

§ 890.114 Surprise billing.

(a) A carrier must comply with requirements described in 26 CFR 54.9816–3, 54.9816–3T through 54.9816–6T, 54.9816–6A, 54.9816–6, 54.9816–8T, 54.9816–8, 54.9817–1T, 54.9817–2, 54.9817–2T, 54.9822–1T, and 54.9825–3T through 6T; 29 CFR 2590.716–3 through 2590.716–6, 2590.716–6A, 2590.716–8, 2590.717–1, 2590.717–2, 2590.722, 2590.725–1 through 2590.725–4; and 45 CFR 149.30,

149.100, 149.110 through 149.140, 149.310, 149.510 through 530, and 149.710 through 149.740 in the same manner as such provisions apply to a group health plan or health insurance issuer offering group or individual health insurance coverage, subject to 5 U.S.C. 8902(m)(1), and the provisions of the carrier's contract. For purposes of application of such sections, all carriers are deemed to offer health benefits in the large group market.

* * * * *

**DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE**

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 54 as follows:

PART 54—PENSION EXCISE TAXES

■ 3. The authority citation for part 54 is amended by adding entries for §§ 54.9816–3, 54.9816–6A and 54.9816–9 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Section 54.9816–3 also issued under 26 U.S.C. 9816.

Section 54.9816–6A also issued under 26 U.S.C. 9816.

Section 54.9816–9 also issued under 26 U.S.C. 9816.

* * * * *

■ 4. Section 54.9816–3 is added to read as follows:

§ 54.9816–3 Definitions.

(a) The definitions in § 54.9801–2 apply to §§ 54.9816–4 through 54.9816–9, 54.9817–1, 54.9817–2, and 54.9822–1, unless otherwise specified. In addition, for purposes of §§ 54.9816–4 through 54.9816–9, 54.9817–1, 54.9817–2, and 54.9822–1, the following definition applies:

Bundled payment arrangement means an arrangement under which—

(1) A provider, facility, or provider of air ambulance services bills for multiple items and/or services furnished to a single patient under a single service code that represents multiple items or services (for example, a Diagnosis-Related Group (DRG) code); or

(2) A plan or issuer makes an initial payment or notice of denial of payment to a provider, facility, or provider of air ambulance services under a single service code that represents multiple items or services furnished to a single patient (for example, a DRG code).

(b) For further guidance, see § 54.9816–3T.

■ 5. Section 54.9816–3T is amended by—

■ a. Revising the introductory text; and

■ b. Adding the definition of “Bundled payment arrangement” in alphabetical order.

The revisions and additions read as follows:

§ 54.9816–3T Definitions (temporary).

For further guidance, see § 54.9816–3 introductory text;

* * * * *

Bundled payment arrangement has the meaning given in § 54.9816–3(a).

* * * * *

■ 6. Section 54.9816–6A is added to read as follows:

§ 54.9816–6A Use of Claim Adjustment Reason Codes and Remittance Advice Remark Codes.

(a) *In general.* When providing any paper or electronic remittance advice to an entity that does not have a contractual relationship directly or indirectly with a group health plan or a health insurance issuer offering group or individual health insurance coverage with respect to the furnishing of the item or service under the plan or coverage in response to a claim for payment for health care items and services furnished by that entity, the plan or issuer must use claim adjustment reason codes (CARCs) and remittance advice remark codes (RARCs) (see 45 CFR 162.1602 and 162.1603) as specified in guidance issued by the Secretaries of the Treasury, Labor, and Health and Human Services, or as required under any applicable adopted standards and operating rules under 45 CFR part 162, to communicate information related to whether the claim is or is not subject to the provisions of this part and 45 CFR part 149, subpart E.

(b) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions in § 54.9816–6A are intended to be severable from the provisions in §§ 54.9816–6, 54.9816–6T, 54.9816–8, 54.9816–8T, and 54.9816–9, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in §§ 54.9816–6, 54.9816–6T, 54.9816–8, 54.9816–8T, and 54.9816–9.

■ 7. Section 54.9816–6 is amended by adding a heading to paragraph (a), revising paragraphs (b), (c), and (d) and adding paragraph (h) to read as follows:

§ 54.9816–6 Methodology for calculating qualifying payment amount.

(a) *Definitions.* * * *

(b) *Methodology for calculation of median contracted rate.* For further guidance, see § 54.9816–6T(b).

(c) *Methodology for calculation of the qualifying payment amount.* For further guidance, see § 54.9816–6T(c).

(d) *Information to be shared about the qualifying payment amount.* In cases in which the recognized amount, with respect to an item or service furnished by a nonparticipating provider or nonparticipating emergency facility, is the qualifying payment amount or the amount billed by the provider or facility, or if the amount on which cost sharing is based with respect to air ambulance services furnished by a nonparticipating provider of air ambulance services is the qualifying payment amount or the amount billed by the provider of air ambulance services, the plan must provide to the provider, facility, or provider of air ambulance services, as applicable, in writing, in paper or electronic form—

(1) With an initial payment or notice of denial of payment under § 54.9816–4, § 54.9816–4T, § 54.9816–5, § 54.9816–5T, § 54.9817 or § 54.9817–T:

(i) For further guidance, see § 54.9816–6T(d)(i);

(ii) If the qualifying payment amount is based on a downcoded service code or modifier—

(A) A statement that the service code or modifier billed by the provider, facility, or provider of air ambulance services was downcoded;

(B) An explanation of why the claim was downcoded, which must include a description of which service codes were altered, if any, and a description of which modifiers were altered, added, or removed, if any; and

(C) The amount that would have been the qualifying payment amount had the service code or modifier not been downcoded.

(iii) For further guidance, see § 54.9816–6T(d)(1)(iii);

(iv) A statement that—

(A) If the provider, facility, or provider of air ambulance services, as applicable, wishes to initiate a 30-business-day open negotiation period for purposes of determining the out-of-network rate, the provider, facility, or provider of air ambulance services must:

(1) Contact the appropriate person or office to initiate open negotiation within 30 business days of receiving the initial

payment or notice of denial of payment, and

(2) For disclosures required to be provided on or after [DATE 90 DAYS AFTER PUBLICATION OF FINAL REGULATIONS IN THE FEDERAL REGISTER] and once the open negotiation notice can be submitted through the Federal IDR portal, notify the Secretary as described under § 54.9816–8(b)(1)(i); and

(B) If the 30-business-day open negotiation period does not result in an agreement on the amount of payment the provider, facility, or provider of air ambulance services may generally initiate the Federal IDR process within 4 business days after the end of the open negotiation period;

(v) For disclosures required to be provided on or after [DATE 90 DAYS AFTER PUBLICATION OF FINAL REGULATIONS IN THE FEDERAL REGISTER], the legal business name of the group health plan (if any), the legal business name of the plan sponsor (if applicable), and the registration number assigned under § 54.9816–9, if the plan is registered under § 54.9816–9.

(vi) For further guidance, see § 54.9816–6T(d)(1)(vi);

(2) In a timely manner upon request of the provider, facility, or provider of air ambulance services:

(i) For further guidance, see § 54.9816–6T(d)(2)(i) through (iv)

(ii) [Reserved]

* * * * *

(h) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions in § 54.9816–6 are intended to be severable from the provisions in §§ 54.9816–6A, 54.9816–6T, 54.9816–8, 54.9816–8T, and 54.9816–9, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in §§ 54.9816–6A, 54.9816–8, 54.9816–8T, and 54.9816–9.

■ 8. Section 54.9816–6T is amended by:

■ a. Revising paragraphs (d) introductory text, (d)(1)(iv) and (v);

■ b. Adding paragraph (d)(1)(vi);

■ c. Revising paragraph (d)(2) introductory text; and

■ d. Adding paragraph (h).

The additions read as follows:

§ 54.9816–6T Methodology for calculating qualifying payment amount (temporary).

* * * * *

(d) For further guidance, see § 54.9816–6(d) introductory text;

(1) * * *

(iv) For further guidance, see § 54.9816–6(d)(1)(iv); and

(v) For further guidance, see § 54.9816–6(d)(1)(v);

(vi) Contact information, including a telephone number and email address, for the appropriate person or office to initiate open negotiations for purposes of determining an amount of payment (including cost sharing) for such item or service.

(2) For further information see § 54.9816–6(d)(2):

* * * * *

(h) *Severability*. For further guidance, see § 54.9816–6(h).

■ 9. Section 54.9816–8 is amended by revising paragraphs (a), (b), (c), (d), (e), (g), and (h), and adding paragraph (i) to read as follows:

The revisions and additions read as follows:

§ 54.9816–8 Independent dispute resolution process.

(a) *Scope and definitions*—(1) *Scope*. For further guidance, see § 54.9816–8T(a)(1).

(2) *Definitions*. For further guidance, see § 54.9816–8T(a)(2). Additionally, for purposes of this section, the following definitions apply:

(i) *Batched qualified IDR items and services* means multiple qualified IDR items or services that are considered jointly as part of one payment determination by a certified IDR entity for purposes of the Federal IDR process in accordance with paragraph (c)(4) of this section.

(ii) For further guidance, see § 54.9816–8T(a)(2)(ii)–(xii).

(b) *Determination of payment amount through open negotiation and the initiation of the Federal IDR process*—

(1) *Determination of payment amount through open negotiation*—(i) *In general*. With respect to an item or service that meets the requirements of § 54.9816–8T(a)(2)(xi)(A), the provider, facility, or provider of air ambulance services, or the group health plan or health insurance issuer offering group or individual health insurance coverage may, during the 30-business-day period beginning on the day the provider, facility, or provider of air ambulance services receives an initial payment or notice of denial of payment regarding the item or service, initiate an open negotiation period for purposes of

determining the out-of-network rate for such item or service. To initiate the open negotiation period, a party must submit a written open negotiation notice with the content specified in paragraph (b)(1)(ii) of this section to the other party and to the Secretary in the manner specified in paragraph (b)(3) of this section. The 30-business-day open negotiation period begins on the day on which the party first submits the open negotiation notice and the remittance advice documentation specified in paragraph (b)(1)(ii)(A)(12) of this section to the other party and the Secretary. The party in receipt of the open negotiation notice must provide to the other party and to the Secretary in the manner specified in paragraph (b)(3) of this section as soon as practicable, but no later than the 15th business day of the 30-business-day open negotiation period, a written notice and supporting documentation in response to the open negotiation notice, as specified in paragraph (b)(1)(iii)(A) of this section.

(ii) *Open negotiation notice*—(A) *Content*. The open negotiation notice must include, with respect to the item or service that is the subject of the open negotiation notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address) as provided with the claim form submitted by the provider, facility, or air ambulance provider to the plan or issuer, and the National Provider Identifier (NPI);

(2) Information sufficient to identify the plan or issuer, including the plan's or issuer's registration number, as required under § 54.9816–9, if the plan or issuer is registered under § 54.9816–9, or an attestation from the party submitting the open negotiation notice that the plan or issuer was not registered prior to the date it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the party submitting the open negotiation notice is a plan or issuer, the plan type (for example, self-insured or fully-insured);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the party submitting the open negotiation notice, and an

attestation that the third party has the authority to act on behalf of the party it represents in the open negotiation;

(4) Information sufficient to identify the item or service, including: the date(s) the item or service was furnished and, if the party submitting the open negotiation notice is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for the item or service from the plan or issuer; the type of item or service (specifically, whether the item or service is an emergency service as defined in § 54.9816–4T(c)(2)(i) or (ii), a non-emergency service as described in § 54.9816–5T(b), or an air ambulance service as defined in § 54.9816–3T); whether the service is a professional service or facility-based service; the State where the item or service was furnished; the claim number; the service code; and information to identify the location where the item or service was furnished (such as, place of service code or bill type code);

(5) The initial payment amount (including \$0 if, for example, payment is denied);

(6) The qualifying payment amount, if provided with the initial payment or notice of denial of payment or if the party submitting the open negotiation notice is a plan or issuer;

(7) An offer of an out-of-network rate for each item or service;

(8) If the party submitting the open negotiation notice is a plan or issuer, the amount of cost sharing imposed for the item or service, if any;

(9) If the party submitting the open negotiation notice is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or § 149.420(c) through (i);

(10) A statement that the provider, facility, or provider of air ambulance services was a nonparticipating provider, nonparticipating emergency facility, or nonparticipating provider of air ambulance services on the date the item or service was furnished;

(11) General information listed in the standard open negotiation notice developed by the Secretary pursuant to paragraph (b)(3) of this section describing the open negotiation period and the Federal IDR process (including a description of the purpose of the open negotiation period and Federal IDR process and key deadlines in the open negotiation period and Federal IDR process); and

(12) A copy of the initial payment or notice of denial of payment or other remittance advice that is required to include the disclosures under §§ 54.9816–6T(d)(1) and 54.9816–6(d)(1), with respect to the item or service.

(B) [Reserved]

(iii) *Open negotiation response notice*—(A) *Content*. The response to the open negotiation notice must include, with respect to the item or service that is the subject of the open negotiation response notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address) as provided with the claim form submitted by the provider, facility, or provider of air ambulance services to the plan or issuer, and the NPI;

(2) Information sufficient to identify the plan or issuer, including the plan's or issuer's registration number, as required under § 54.9816–9 if the plan or issuer is registered under § 54.9816–9, or an attestation from the party submitting the open negotiation response notice that the plan or issuer was not registered prior to the date it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the party submitting the open negotiation response notice is a plan or issuer, the plan type (for example, self-insured or fully-insured);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the party submitting the open negotiation response notice, and an attestation that the third party has the authority to act on behalf of the party it represents in the open negotiation;

(4) Information sufficient to identify the item or service included in the open negotiation notice, including the date(s) the item or service was furnished, and if the party submitting the open negotiation response notice is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment

for such item or service from the plan or issuer, and the claim number;

(5) If the party submitting the open negotiation response notice is a plan or issuer, a statement as to whether it agrees that the initial payment amount (including \$0 if, for example, payment is denied) and the qualifying payment amount reflected in the open negotiation notice accurately reflect the initial payment amount and qualifying payment amount disclosed with the initial payment for the item or service, and if not, or if the open negotiation notice indicates that the qualifying payment amount was not communicated by the plan or issuer with the initial payment or notice of denial of payment or other remittance advice, the initial payment amount (including \$0 if, for example, payment is denied) and/or qualifying payment amount it believes to be correct, and documentation to support the statement (for example, the remittance advice confirming the qualifying payment amount);

(6) If the party submitting the open negotiation response notice is a plan or issuer, the amount of cost sharing imposed for the item or service, if any;

(7) A counteroffer for an out-of-network rate for each item or service or an acceptance of the other party's offer;

(8) If the party submitting the open negotiation response notice is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 45 CFR 149.420(c) through (i);

(9) With respect to each item or service, either a statement and supporting documentation that explains why the item or service is not subject to the Federal IDR process or a statement agreeing that the item or service is subject to the Federal IDR process;

(10) A statement as to whether any of the information provided in the open negotiation notice is inaccurate and the basis for the statement, as well as supporting documentation; and

(11) A statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the party submitting the open negotiation notice under paragraph (b)(1)(ii)(A)(12) of this section is accurate, and if inaccurate, a copy of the accurate initial payment or notice of denial of payment or other remittance advice required to include the disclosures under § 54.9816–6(d)(1) and § 54.9816–6T(d)(1), with respect to the item or service.

(B) [Reserved]

(2) *Initiating the Federal IDR process*—(i) *In general*. Either party may

initiate the Federal IDR process with respect to a qualified IDR item or service for which the parties do not agree upon an out-of-network rate by the last day of the open negotiation period provided for under paragraph (b)(1) of this section. To initiate the Federal IDR process, a party (the initiating party) must submit a written notice of IDR initiation, consistent with paragraph (b)(2)(ii) of this section, to the other party to the dispute (the non-initiating party), and to the Secretary in the manner specified in paragraph (b)(3) of this section, during the 4-business-day period beginning on the first business day after the last day of the open negotiation period (unless it is otherwise required to be submitted in the timeframe specified in paragraph (c)(5)(vii)(C) of this section). The date of IDR initiation is the date that the Secretary receives the notice of IDR initiation described in paragraph (b)(2)(ii) of this section.

(A) *Exception for items and services provided by certain nonparticipating providers and facilities*. A party may not initiate the Federal IDR process with respect to an item or service if, with respect to that item or service, the party knows (or reasonably should have known) that the provider or facility provided notice and received consent under 45 CFR 149.410(b) or 149.420(c) through (i).

(B) [Reserved]

(ii) *Notice of IDR initiation*—(A) *Content*. The notice of IDR initiation must include, with respect to the item or service that is the subject of the notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address), and the NPI; and if the initiating party is a provider, facility, or provider of air ambulance services, the Tax Identification Number (TIN);

(2) Information sufficient to identify the plan or issuer, including the plan's or issuer's registration number, as required under § 54.9816–9 if the plan or issuer is registered under § 54.9816–9, or an attestation from the initiating party that the plan or issuer was not registered prior to the date that it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the initiating party is a plan or issuer, the

plan type (for example, self-insured or fully-insured) and TIN (or, in the case of a plan that does not have a TIN, the TIN of the plan sponsor);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the initiating party, and an attestation that the third party has the authority to act on behalf of the party it represents in the Federal IDR process;

(4) Information sufficient to identify whether the dispute being initiated includes batched or bundled qualified IDR items or services as described in paragraph (c)(4) of this section;

(5) Information sufficient to identify the qualified IDR item or service that is the subject of the notice of IDR initiation, including the date(s) the qualified IDR item or service was furnished; if the initiating party is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer; the date the open negotiation period under paragraph (b)(1) of this section began; the type of item or service (specifically, whether the qualified IDR item or service is an emergency service as defined in § 54.9816–4T(c)(2)(i) or (ii), a non-emergency service as described in § 54.9816–5T(b), or an air ambulance service as defined in § 54.9816–3T); whether the service is a professional service or facility-based service; the State where the item or service was furnished; the claim number; the service code; and information to identify the location the item or service was furnished (including place of service code or bill type code);

(6) The initial payment amount (including \$0 if, for example, payment is denied);

(7) The qualifying payment amount, if provided with the initial payment or notice of denial of payment or if the initiating party is a plan or issuer;

(8) If the initiating party is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 45 CFR 149.420(c) through (i);

(9) A statement that the provider, facility, or provider of air ambulance services was a nonparticipating provider, nonparticipating emergency facility, or nonparticipating provider of air ambulance services on the date the item or service was furnished;

(10) Attestation that the item or service under dispute is a qualified IDR

item or service, and the basis for the attestation;

(11) General information listed in the standard notice of IDR initiation developed by the Secretary pursuant to paragraph (b)(3) of this section describing the Federal IDR process (including a description of the purpose of the Federal IDR process and key deadlines in the Federal IDR process);

(12) A copy of the initial payment or notice of denial of payment or other remittance advice that is required to include the disclosures under § 54.9816–6(d)(1) and § 54.9816–6T(d)(1), with respect to the item or service;

(13) Preferred certified IDR entity; and

(14) A statement describing the key aspects of the claim, such as patient acuity or level of training of the provider, facility, or provider of air ambulance services that furnished the qualified IDR item or service, discussed by the parties during open negotiation that relate to the payment for the disputed claim, whether the reasons for initiating the Federal IDR process are different from the aspects of the claim discussed during the open negotiation period, and an explanation of why the party is initiating the Federal IDR process, including any of the permissible considerations described in paragraph (c)(5)(iii) of this section and § 54.9817–2(b)(2) that serve as the party's basis for initiating the Federal IDR process.

(B) [Reserved]

(iii) *Notice of IDR initiation response.*

-The non-initiating party must provide to the initiating party and to the Secretary in the manner specified in paragraph (b)(3) of this section within 3 business days after the date of IDR initiation, a written notice and supporting documentation in response to the notice of IDR initiation, as specified in paragraph (b)(2)(iii)(A) of this section.

(A) *Content.* The notice of IDR initiation response must include, with respect to the item or service that is the subject of the notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address), and the NPI; and if the non-initiating party is a provider, facility, or provider of air ambulance services, the TIN;

(2) Information sufficient to identify the plan or issuer, including the plan's or issuer's registration number, as

required under § 54.9816–9 if the plan or issuer is registered under § 54.9816–9 or an attestation from the non-initiating party that the plan or issuer was not registered prior to the date that it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the non-initiating party is a plan or issuer, the plan type (for example, self-insured or fully-insured) and TIN (or, in the case of a plan that does not have a TIN, the TIN of the plan sponsor);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the non-initiating party, and an attestation that the third party has the authority to act on behalf of the party it represents in the Federal IDR process;

(4) Information sufficient to identify each item or service included in the notice of IDR initiation, including the date(s) the item or service was furnished. If the non-initiating party is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer, and the claim number;

(5) If the non-initiating party is a plan or issuer, a statement as to whether the non-initiating party agrees that the initial payment (including \$0 if, for example, payment is denied) and the qualifying payment amount reflected in the notice of IDR initiation are accurate for the item or service that is the subject of the dispute, and if not, the initial payment amount (including \$0 if, for example, payment is denied) and/or qualifying payment amount it believes to be correct, and documentation to support the statement (for example, the remittance advice confirming the qualifying payment amount);

(6) If the non-initiating party is a plan or issuer, the amount of cost sharing imposed for the item or service, if any;

(7) If the non-initiating party is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 45 CFR 149.420(c) through (i);

(8) With respect to each item or service that is the subject of the dispute, either an attestation that the item or service is a qualified IDR item or service, or, for each item or service that

the non-initiating party asserts is not a qualified IDR item or service, an explanation and documentation to support the statement;

(9) A statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the initiating party under paragraph (b)(2)(ii)(A)(12) of this section is accurate, and if inaccurate, a copy of the accurate initial payment or notice of denial of payment or other remittance advice required to include the disclosures under §§ 54.9816–6(d)(1) and 54.9816–6T(d)(1), with respect to the item or service;

(10) A statement as to whether any of the information provided in the notice of IDR initiation is inaccurate and the basis for the statement as well as any supporting documentation; and

(11) A statement as to whether the non-initiating party agrees or objects to the initiating party's preferred certified IDR entity. If the non-initiating party objects to the initiating party's preferred certified IDR entity, the notice of IDR initiation response must include the name of an alternative preferred certified IDR entity and, if applicable, an explanation of any conflict of interest with the initiating party's preferred certified IDR entity.

(B) [Reserved].

(3) *Manner.* A party furnishing notices as required under paragraphs (b)(1)(ii) and (iii), and (b)(2)(ii) and (iii) of this section must furnish the notices using the standard forms developed by the Secretary and must furnish the notices and supporting documentation to the other party and the Secretary, through the Federal IDR portal.

(c) *Federal IDR process following initiation*—(1) *Selection of certified IDR entity*—(i) *Preliminary selection of the certified IDR entity.* Within 3 business days after the date of IDR initiation, the non-initiating party must agree or object to the preferred certified IDR entity identified in the notice of IDR initiation, as described in paragraph (b)(2)(iii)(A)(11) of this section.

(A) If the non-initiating party agrees, or fails to object, to the selection of the initiating party's preferred certified IDR entity in the manner described in paragraph (b)(2)(iii)(A)(11) of this section and within the timeframe specified in paragraph (c)(1)(i) of this section, the initiating party's preferred certified IDR entity will be considered jointly selected on the third business day after the date of IDR initiation.

(B) If the non-initiating party objects to the selection of the initiating party's preferred certified IDR entity by designating an alternative preferred certified IDR entity in the manner

described in paragraph (b)(2)(iii)(A)(11) of this section and within 3 business days after the date of IDR initiation, the initiating party may then agree or object to the non-initiating party's alternative preferred certified IDR entity by submitting the notice of certified IDR entity selection in the manner specified in paragraph (c)(1)(i)(D) of this section. If the initiating party agrees to the non-initiating party's alternative preferred certified IDR entity within 3 business days after the date of IDR initiation, or if the non-initiating party submits the notice of IDR initiation response on or before the second business day after the date of IDR initiation and the initiating party fails to respond within 3 business days after the date of IDR initiation, the alternative preferred certified IDR entity will be considered jointly selected by the parties. If the non-initiating party submits the notice of IDR initiation response on the third business day after the date of IDR initiation and the initiating party does not agree on the same day, selection will proceed under paragraph (c)(1)(i)(C) of this section.

(C) If a certified IDR entity is not jointly selected under paragraph (c)(1)(i)(A) or (B) of this section, either party may select an alternative preferred certified IDR entity by submitting the notice of certified IDR entity selection in the manner specified in paragraph (c)(1)(i)(D) of this section, until the earlier of the date that the parties agree on the alternative preferred certified IDR entity or the deadline for joint selection, which is 3 business days after the date of IDR initiation. Once a party submits a notice of certified IDR entity selection, it may not submit another notice of certified IDR entity selection until after it receives a responding notice of certified IDR entity selection from the other party.

(1) If a party submits a notice of certified IDR entity selection to the other party on the first or second day after the date of IDR initiation and the party in receipt of the notice agrees or fails to object to the alternative preferred certified IDR entity by the third business day after the date of IDR initiation, the alternative preferred certified IDR entity will be considered jointly selected by the parties.

(2) If a party submits a notice of certified IDR entity selection to the other party on the third business day after the date of IDR initiation and the party last in receipt of the notice agrees to the alternative preferred certified IDR entity on the same day, the alternative preferred certified IDR entity will be considered jointly selected by the parties.

(3) If a party submits a notice of certified IDR entity selection to the other party on the third business day after the date of IDR initiation and the party last in receipt of the notice does not agree to the alternative preferred certified IDR entity on the same day, the parties will have failed to jointly select a certified IDR entity.

(D) To notify the other party and the Secretary of an agreement or objection to an alternative preferred certified IDR entity under paragraph (c)(1)(i)(C) of this section, a party must submit the notice of certified IDR entity selection. The party must furnish the notice of certified IDR entity selection using the standard form developed by the Secretary and must furnish the notice to the other party and the Secretary through the Federal IDR portal within 3 business days after the date of IDR initiation. However, in the event the conditions under paragraph (c)(1)(ii) of this section apply, the party may notify the Secretary of an agreement or objection to an alternative preferred certified IDR entity in accordance with paragraph (c)(1)(ii) of this section. The notice of certified IDR entity selection must include a statement indicating the party's agreement with or objection to the other party's alternative preferred certified IDR entity and, if applicable, an explanation of any conflict of interest with the alternative preferred certified IDR entity. If the party in receipt of a notice of certified IDR entity selection objects to the other party's alternative preferred certified IDR entity and the party submits a notice of certified IDR entity selection by the end of the third business day after the date of IDR initiation, that party's notice of certified IDR entity selection reflecting the objection must include the name of another alternative preferred certified IDR entity.

(ii) *Failure to jointly select a certified IDR entity.* If the parties fail to jointly select a certified IDR entity within 3 business days after the date of IDR initiation, the Secretary will select a certified IDR entity. The parties will have failed to jointly select a certified IDR entity if, by the end of the third business day after the date of IDR initiation, the party last in receipt of the notice of IDR initiation response or the notice of certified IDR entity selection has objected to the other party's alternative preferred certified IDR entity, or if the notice of IDR initiation response or the notice of certified IDR entity selection is submitted to the other party on the third business day after the date of IDR initiation and the party in receipt of the notice does not agree to the alternative preferred certified IDR

entity within 3 business days after the date of IDR initiation.

(A) In selecting the certified IDR entity, the Secretary will first confirm whether a party submitted the notice of IDR initiation response or the notice of certified IDR entity selection with an alternative preferred certified IDR entity on the third business day after the date of IDR initiation without the other party's agreement to the selection. If either notice was provided on the third business day after the date of IDR initiation without the other party's agreement to the alternative preferred certified IDR entity by the end of third business day after the date of IDR initiation, the Secretary will provide the party last in receipt of the applicable notice 2 additional business days to agree or object to the other party's alternative preferred certified IDR entity selection.

(1) If the party last in receipt of the notice of IDR initiation response or the notice of certified IDR entity selection agrees with the other party's alternative preferred certified IDR entity and notifies the Secretary of the agreement or fails to notify the Secretary of its objection in the Federal IDR portal by the fifth business day after the date of IDR initiation, the Secretary will select the final alternative preferred certified IDR entity selected in the applicable notice. In disputes where the applicable notice was submitted on the third business day after the date of IDR initiation, the party last in receipt of the notice will not be allowed to select another alternative preferred certified IDR entity.

(2) If the party notifies the Secretary of its objection to the alternative preferred certified IDR entity by the fifth business day after the date of IDR initiation, the Secretary will proceed with the random selection of the certified IDR entity from among the certified IDR entities (other than the preferred certified IDR entity and any alternative preferred certified IDR entity previously selected in such dispute by a party, unless there is no other certified IDR entity available to select) that charge a fee within the allowed range of certified IDR entity fees on the sixth business day after the date of IDR initiation. If there are insufficient certified IDR entities that charge a fee within the allowed range of certified IDR entity fees available to arbitrate the dispute, the Secretary will select a certified IDR entity that has received approval, as described in § 54.9816–8T(e)(2)(vii)(B), to charge a fee outside of the allowed range of certified IDR entity fees. In either case, the Secretary will notify the parties of the preliminary

selection of the certified IDR entity not later than 6 business days after the date of IDR initiation.

(B) [Reserved].

(iii) *Date of preliminary selection of the certified IDR entity.* The date of preliminary selection of the certified IDR entity will be:

(A) Three business days after the date of IDR initiation if the parties jointly selected a certified IDR entity, as specified in paragraph (c)(1)(i) of this section; or

(B) Six business days after the date of IDR initiation, if the parties fail to jointly select a certified IDR entity as specified in paragraph (c)(1)(ii) of this section.

(iv) *Final selection of certified IDR entity—(A) Conflict-of-interest review.* The certified IDR entity preliminarily selected for a dispute must review the selection. The selection of the certified IDR entity will be finalized only if the certified IDR entity attests to the Secretary that it meets the following requirements:

(1) The certified IDR entity does not have a conflict of interest as defined in § 54.9816–8T(a)(2)(iv);

(2) The certified IDR entity will only assign personnel to a dispute and make decisions regarding hiring, compensation, termination, promotion, or other similar matters related to personnel assigned to the dispute in a manner that is not based upon the likelihood that the assigned personnel will support a particular party to the dispute; and

(3) The certified IDR entity will not assign any personnel to a dispute who would have any conflicts of interest, as defined in § 54.9816–8T(a)(2)(iv), regarding any party to the dispute or whose relationship with a party within the 1 year immediately preceding the assignment to the dispute would violate the restrictions on aiding or advising a former employer or principal in a manner similar to the restrictions set forth in 18 U.S.C. 207(b).

(B) *Failure to meet conflict-of-interest requirements.* If the certified IDR entity notifies the Secretary within 3 business days of the date of preliminary selection of the certified IDR entity that it does not meet the requirements of paragraphs (c)(1)(iv)(A)(1) through (3) of this section or if the certified IDR entity does not respond within 3 business days after the date of preliminary selection of the certified IDR entity, the Secretary will randomly select another certified IDR entity consistent with paragraph (c)(1)(ii) of this section. The Secretary will notify the parties of the new randomly preliminarily selected certified IDR entity no later than 1

business day after the previously selected certified IDR entity notifies the Secretary that it has a conflict of interest or, if the previously selected certified IDR entity fails to respond within 3 business days after the date of preliminary selection of the certified IDR entity, no later than 1 business day after the end of the 3-business-day period.

(C) *Date of final selection of the certified IDR entity.* If the certified IDR entity that has been preliminarily selected attests within 3 business days that it meets the requirements of paragraphs (c)(1)(iv)(A)(1) through (3) of this section, the Secretary will notify the parties of the final selection of the certified IDR entity no later than 1 business day after the certified IDR entity attests that it meets the conflict-of-interest requirements. The date of final selection of the certified IDR entity is the date that the Secretary provides this notice to the parties.

(2) *Federal IDR process eligibility review—(i) Federal IDR process eligibility determination by certified IDR entity.* Unless the departmental eligibility review described in paragraph (c)(2)(ii) of this section applies, the selected certified IDR entity must review the information in the notice of IDR initiation, notice of IDR initiation response, and any additional information described in paragraph (c)(2)(iii) of this section, and make a final determination as to whether the item or service is a qualified IDR item or service, as defined in § 54.9816–8T(a)(2)(xi), that is eligible for the Federal IDR process. The certified IDR entity must make such a determination and notify the Secretary and both parties no later than 5 business days after the date of final selection of the certified IDR entity. If the certified IDR entity determines that the item or service is not a qualified IDR item or service, the dispute will be closed, and the selected certified IDR entity will not take any action with regard to the dispute.

(ii) *Departmental eligibility review for Federal IDR process eligibility determinations.* When the conditions for the departmental eligibility review set forth in paragraph (c)(2)(ii)(A) of this section are met, the Secretary will conduct the eligibility review and make the eligibility determination instead of the certified IDR entity. If the Secretary determines that the item or service is not a qualified IDR item or service, the dispute will be closed, and the selected certified IDR entity will not take any action with regard to the dispute. If the dispute is found to be eligible, the Secretary will inform the preliminarily

selected certified IDR entity of the dispute's eligibility so that it may conduct its conflict-of-interest assessment, and the dispute will otherwise continue through the Federal IDR process, including notification of the eligibility determination to the disputing parties by the preliminarily selected certified IDR entity.

(A) *Application of the departmental eligibility review.* The departmental eligibility review will apply when the Secretary determines that any of the extenuating circumstances described in paragraph (g)(1) of this section require application of the departmental eligibility review to facilitate timely payment determinations or the effective processing of disputes under the Federal IDR process.

(B) *Notification regarding applicability of the departmental eligibility review.* Before invoking the application of the departmental eligibility review, the Secretary will post advance public notification of the date on which the departmental eligibility review will take effect and the reasons for invoking the application of the departmental eligibility review. Before ending the application of the departmental eligibility review, the Secretary will post advance public notification of the date on which the departmental eligibility review will no longer be in effect and the reasons for ending the application of the departmental eligibility review.

(iii) *Request for additional information.* The Secretary or the selected certified IDR entity may request additional information from either party to a dispute at any time, including for the purpose of assessing whether a conflict of interest exists, conducting an eligibility determination, or making a payment determination.

(A) Upon request, a party must submit the additional information within 5 business days to the Secretary or the selected certified IDR entity, as applicable, through the Federal IDR portal. Following a request for additional information, the time period for the applicable stage of the Federal IDR process will be tolled until the earlier of the date either all of the requested information is provided or the 5-business-day period expires, and each subsequent timeframe in the Federal IDR process will be determined based on the date of completion of the stage of the Federal IDR process that was tolled for provision of the requested information.

(B) If a party fails to submit the additional information as required, the related determination, including the eligibility determination, conflict-of-

interest review, or payment determination will be made without the requested information unless a good-cause extension of the 5-business-day period, as specified in paragraph (g)(1)(i) of this section, has been provided, and the party subsequently submits the additional information requested within the extended period.

(3) *Authority to continue negotiations or withdraw—(i) Authority to continue to negotiate.* If the parties to the Federal IDR process agree on an out-of-network rate for a qualified IDR item or service after providing the notice of IDR initiation to the Secretary required under paragraph (b)(2)(ii) of this section, but before the certified IDR entity has made its payment determination, the amount agreed to by the parties for the qualified IDR item or service will be treated as the out-of-network rate for the qualified IDR item or service. To the extent the amount exceeds the initial payment amount and any cost sharing paid or required to be paid by the participant, beneficiary, or enrollee, or there was an initial denial of payment, payment must be made directly by the plan or issuer to the nonparticipating provider, nonparticipating facility, or nonparticipating provider of air ambulance services not later than 30 business days after the agreement is reached. In no instance may either party seek additional payment from the participant, beneficiary, or enrollee, including in instances in which the out-of-network rate exceeds the qualifying payment amount. The initiating party must send a notification to the Secretary and to the certified IDR entity (if selected) electronically, through the Federal IDR portal, as soon as possible, but no later than 3 business days after the date of the agreement. The notification must include the dispute number, a statement of the out-of-network rate for the qualified IDR item or service, and signatures from authorized signatories for both parties.

(ii) *Withdrawals.* A dispute may be withdrawn from the Federal IDR process by the initiating party, the Secretary, or a certified IDR entity before a payment determination is made if one of the following conditions is met:

(A) The initiating party provides notification through the Federal IDR portal to the Secretary and the certified IDR entity (if selected) that both parties to the dispute agree to withdraw the dispute from the Federal IDR process without agreement on an out-of-network rate. The notification must include the dispute number, a statement about both parties' agreement to withdraw, and signatures from authorized signatories for both parties.

(B) The initiating party provides a standard withdrawal request notice through the Federal IDR portal to the Secretary, the certified IDR entity (if selected), and the non-initiating party of its request to withdraw the dispute from the Federal IDR process and the non-initiating party notifies the Secretary, certified IDR entity (if selected), and the initiating party through the Federal IDR portal of its agreement to withdraw from the Federal IDR process within 5 business days of the initiating party's request. If the non-initiating party fails to respond within 5 business days of the initiating party's request, the non-initiating party will be considered to have agreed to the withdrawal, and the dispute will be withdrawn.

(C) The certified IDR entity or Secretary cannot determine eligibility because both parties to the dispute are unresponsive to any requests for additional information to determine eligibility as described in paragraph (c)(2)(iii) of this section, or

(D) The certified IDR entity cannot make a payment determination because both parties to the dispute have failed to submit an offer as described in paragraph (c)(5)(i) of this section.

(4) *Treatment of batched qualified IDR items and services—(i) In general.* A certified IDR entity may consider up to 25 qualified IDR items and services jointly as part of one payment determination that is subject to the certified IDR entity fee for batched determinations only if the qualified IDR items and services meet the requirements of this paragraph (c)(4)(i).

(A) For further guidance, see § 54.9816–8T(c)(4)(i)(A);

(B) Payment for the qualified IDR items and services is required to be made by the same group health plan or health insurance issuer. For group or individual health insurance coverage, this requirement is satisfied if the same issuer is required to make payment for the qualified IDR items and services, even if the qualified IDR items and services relate to claims from different group health plans or individual market policies. For self-insured group health plans, this requirement is satisfied if the same self-insured group health plan is required to make payment for the qualified IDR items and services, including when the plan makes payments through a third party administrator; the requirement is not satisfied if multiple self-insured group health plans are required to make payments for the qualified IDR items and services, even if those group health plans make payments through the same third party administrator;

(C) The qualified IDR items and services meet any of the following criteria under which multiple qualified IDR items and services relate to the treatment of a similar condition and therefore are permitted to be considered jointly as a single payment determination for purposes of encouraging efficiencies (including minimizing costs) in the Federal IDR process:

(1) The qualified IDR items or services were furnished to a single patient during the same patient encounter. For purposes of this section, a single patient encounter is defined as a patient encounter on one or more consecutive days during which the qualified IDR items or services were furnished to the same patient and billed on the same claim form; or

(2) The qualified IDR items and services were furnished to one or more patients and were billed under the same service code or a comparable code under a different procedural coding system, such as Current Procedural Terminology (CPT) codes with modifiers, if applicable, Healthcare Common Procedure Coding System (HCPCS) codes with modifiers, if applicable, or Diagnosis-Related Group (DRG) codes with modifiers, if applicable; or

(3) For anesthesiology, radiology, pathology, and laboratory qualified IDR items and services, the qualified IDR items and services were furnished to one or more patients and were billed under service codes belonging to the same Category I CPT code range, as specified in guidance published by the Secretary; and

(D) All the qualified IDR items and services were furnished within the same 30-business-day period following the date on which the first item or service included in the batched determination was furnished and were the subjects of a 30-business-day open negotiation period that ended within 4 business days of IDR initiation, except as provided in paragraph (c)(5)(vii) of this section.

(ii) *Treatment of bundled payment arrangements.* Qualified IDR items and services that meet the definition of a bundled payment arrangement under § 54.9816–3 may be submitted and considered as a single payment determination, and the certified IDR entity must make a single payment determination for the multiple qualified IDR items and services included in the bundled payment arrangement. Bundled payment arrangements as defined in § 54.9816–3 and submitted under this paragraph (c)(4)(ii) are subject to the

certified IDR entity fee for single determinations.

(5) *Payment determination for a qualified IDR item or service—(i) Submission of offers.* Not later than 10 business days after the date of final selection of the certified IDR entity as described in paragraph (c)(1)(iv)(C) of this section (or not later than 10 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section, when the Secretary determines that any of the extenuating circumstances described in paragraph (g)(1)(ii) of this section apply), the plan or issuer and the provider, facility, or provider of air ambulance services:

(A) For further guidance, see § 54.9816–8T(c)(5)(i)(A).

(B) For further guidance, see § 54.9816–8T(c)(5)(i)(B);

(ii) *Payment determination and notification.* Not later than 30 business days after the date of final selection of the certified IDR entity as described in paragraph (c)(1)(iv)(C) of this section (or not later than 30 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section, when the Secretary determines that any of the extenuating circumstances described in paragraph (g) of this section apply), the certified IDR entity must:

(A) Select as the out-of-network rate for the qualified IDR item or service one of the offers submitted under paragraph (c)(5)(i) of this section, weighing only the considerations specified in paragraph (c)(5)(iii) of this section (as applied to the information provided by the parties pursuant to § 54.9816–8T(c)(5)(i)). The certified IDR entity must select the offer that the certified IDR entity determines best represents the value of the qualified IDR item or service as the out-of-network rate.

(1) *Prevailing party.* In the case of single determinations, the party whose offer is selected by the certified IDR entity is considered the prevailing party. In the case of batched determinations, the party with the most determinations in its favor is considered the prevailing party; if each party prevails in an equal number of determinations, neither party will be considered the prevailing party, and the certified IDR entity fee will be split evenly between the parties.

(2) *Non-prevailing party.* In the case of single determinations, the party whose offer is not selected by the certified IDR entity is considered the non-prevailing party. In the case of batched determinations, the party with the fewest determinations in its favor is considered the non-prevailing party.

(B) *For further guidance, see § 54.9816–8T(c)(5)(ii)(B).*

(iii) *Considerations in determination.* In determining which offer to select:

(A) The certified IDR entity must consider the qualifying payment amount(s) for the applicable year for the same or similar item or service.

(B) The certified IDR entity must then consider information submitted by a party that relates to the following circumstances:

(1) The level of training, experience, and quality and outcomes measurements of the provider or facility that furnished the qualified IDR item or service (such as those endorsed by the consensus-based entity authorized in section 1890 of the Social Security Act).

(2) The market share held by the provider or facility or that of the plan or issuer in the geographic region in which the qualified IDR item or service was provided.

(3) The acuity of the participant or beneficiary receiving the qualified IDR item or service, or the complexity of furnishing the qualified IDR item or service to the participant or beneficiary.

(4) The teaching status, case mix, and scope of services of the facility that furnished the qualified IDR item or service, if applicable.

(5) Demonstration of good faith efforts (or lack thereof) made by the provider or facility or the plan or issuer to enter into network agreements with each other, and, if applicable, contracted rates between the provider or facility, as applicable, and the plan or issuer, as applicable, during the previous 4 plan years.

(C) The certified IDR entity must also consider information provided by a party in response to a request by the certified IDR entity under § 54.9816–8T(c)(4)(i)(A)(2) that relates to the offer for the payment amount for the qualified IDR item or service that is the subject of the payment determination and that does not include information on factors described in § 54.9816–8T(c)(4)(v).

(D) The certified IDR entity must also consider additional information submitted by a party that relates to the offer for the payment amount for the qualified IDR item or service that is the subject of the payment determination and that does not include information on factors described in § 54.9816–8T(c)(4)(v).

(E) In weighing the considerations described in paragraphs (c)(4)(iii)(B) through (D) of this section, the certified IDR entity should evaluate whether the information is credible and relates to the offer submitted by either party for the payment amount for the qualified IDR

item or service that is the subject of the payment determination. The certified IDR entity should not give weight to information to the extent it is not credible, it does not relate to either party's offer for the payment amount for the qualified IDR item or service, or it is already accounted for by the qualifying payment amount under *paragraph (c)(4)(iii)(A)* of this section or other credible information under *paragraphs (c)(4)(iii)(B) through (D)* of this section.

(iv) *Examples.* The rules of *paragraph (c)(4)(iii)* of this section are illustrated in the following paragraphs. Each example assumes that the Federal IDR process applies for purposes of determining the out-of-network rate, that both parties have submitted the information parties are required to submit as part of the Federal IDR process, and that the submitted information does not include information on factors described in *paragraph (c)(4)(v)* of this section:

(A) *Example 1—(1) Facts.* A level 1 trauma center that is a nonparticipating emergency facility and an issuer are parties to a payment determination in the Federal IDR process. The facility submits an offer that is higher than the qualifying payment amount. The facility also submits additional written information showing that the scope of services available at the facility was critical to the delivery of care for the qualified IDR item or service provided, given the particular patient's acuity. This information is determined to be credible by the certified IDR entity. Further, the facility submits additional information showing the contracted rates used to calculate the qualifying payment amount for the qualified IDR item or service were based on a level of service that is typical in cases in which the services are delivered by a facility that is not a level 1 trauma center and that does not have the capability to provide the scope of services provided by a level 1 trauma center. This information is also determined to be credible by the certified IDR entity. The issuer submits an offer equal to the qualifying payment amount. No additional information is submitted by either party. The certified IDR entity determines that all the information submitted by the nonparticipating emergency facility relates to the offer for the payment amount for the qualified IDR item or service that is the subject of the payment determination.

(2) *Conclusion.* In this *paragraph (c)(4)(iv)(A)* (*Example 1*), the certified IDR entity must consider the qualifying payment amount. The certified IDR entity then must consider the additional information submitted by the

nonparticipating emergency facility, provided the information relates to circumstances described in *paragraphs (c)(4)(iii)(B) through (D)* of this section and relates to the offer for the payment amount for the qualified IDR item or service that is the subject of the payment determination. If the certified IDR entity determines that it is appropriate to give weight to the additional credible information submitted by the nonparticipating emergency facility and that the additional credible information submitted by the facility demonstrates that the facility's offer best represents the value of the qualified IDR item or service, the certified IDR entity should select the facility's offer.

(B) *Example 2—(1) Facts.* A nonparticipating provider and an issuer are parties to a payment determination in the Federal IDR process. The provider submits an offer that is higher than the qualifying payment amount. The provider also submits additional written information regarding the level of training and experience the provider possesses. This information is determined to be credible by the certified IDR entity, but the certified IDR entity finds that the information does not demonstrate that the provider's level of training and experience relates to the offer for the payment amount for the qualified IDR item or service that is the subject of the payment determination (for example, the information does not show that the provider's level of training and experience was necessary for providing the qualified IDR service that is the subject of the payment determination to the particular patient, or that the training or experience made an impact on the care that was provided). The nonparticipating provider does not submit any additional information. The issuer submits an offer equal to the qualifying payment amount, with no additional information.

(2) *Conclusion.* In this *paragraph (c)(4)(iv)(B)* (*Example 2*), the certified IDR entity must consider the qualifying payment amount. The certified IDR entity must then consider the additional information submitted by the nonparticipating provider, provided the information relates to circumstances described in *paragraphs (c)(4)(iii)(B) through (D)* of this section and relates to the offer for the payment amount for the qualified IDR item or service that is the subject of the payment determination. In addition, the certified IDR entity should not give weight to information to the extent it is already accounted for by the qualifying payment amount or other credible information under *paragraphs (c)(4)(iii)(B) through (D)* of this section.

If the certified IDR entity determines that the additional information submitted by the provider is credible but does not relate to the offer for the payment amount for the qualified IDR service that is the subject of the payment determination, and determines that the issuer's offer best represents the value of the qualified IDR service, in the absence of any other credible information that relates to either party's offer, the certified IDR entity should select the issuer's offer.

(C) *Example 3—(1) Facts.* A nonparticipating provider and an issuer are parties to a payment determination in the Federal IDR process involving an emergency department visit for the evaluation and management of a patient. The provider submits an offer that is higher than the qualifying payment amount. The provider also submits additional written information showing that the acuity of the patient's condition and complexity of the qualified IDR service furnished required the taking of a comprehensive history, a comprehensive examination, and medical decision making of high complexity. This information is determined to be credible by the certified IDR entity. The issuer submits an offer equal to the qualifying payment amount for CPT code 99285, which is the CPT code for an emergency department visit for the evaluation and management of a patient requiring a comprehensive history, a comprehensive examination, and medical decision making of high complexity. The issuer also submits additional written information showing that this CPT code accounts for the acuity of the patient's condition. This information is determined to be credible by the certified IDR entity. The certified IDR entity determines that the information provided by the provider and issuer relates to the offer for the payment amount for the qualified IDR service that is the subject of the payment determination. Neither party submits any additional information.

(2) *Conclusion.* In this *paragraph (c)(4)(iv)(C)* (*Example 3*), the certified IDR entity must consider the qualifying payment amount. The certified IDR entity then must consider the additional information submitted by the parties, but the certified IDR entity should not give weight to information to the extent it is already accounted for by the qualifying payment amount or other credible information under *paragraphs (c)(4)(iii)(B) through (D)* of this section. If the certified IDR entity determines the additional information on the acuity of the patient and complexity of the service is already accounted for in the

calculation of the qualifying payment amount, the certified IDR entity should not give weight to the additional information provided by the provider. If the certified IDR entity determines that the issuer's offer best represents the value of the qualified IDR service, the certified IDR entity should select the issuer's offer.

(D) *Example 4—(1) Facts.* A nonparticipating emergency facility and an issuer are parties to a payment determination in the Federal IDR process. Although the facility is not participating in the issuer's network during the relevant plan year, it was a participating facility in the issuer's network in the previous 4 plan years. The issuer submits an offer that is higher than the qualifying payment amount and that is equal to the facility's contracted rate (adjusted for inflation) for the previous year with the issuer for the qualified IDR service. The issuer also submits additional written information showing that the contracted rates between the facility and the issuer during the previous 4 plan years were higher than the qualifying payment amount submitted by the issuer, and that these prior contracted rates account for the case mix and scope of services typically furnished at the nonparticipating facility. The certified IDR entity determines this information is credible and that it relates to the offer submitted by the issuer for the payment amount for the qualified IDR service that is the subject of the payment determination. The facility submits an offer that is higher than both the qualifying payment amount and the contracted rate (adjusted for inflation) for the previous year with the issuer for the qualified IDR service. The facility also submits additional written information, with the intent to show that the case mix and scope of services available at the facility were integral to the service provided. The certified IDR entity determines this information is credible and that it relates to the offer submitted by the facility for the payment amount for the qualified IDR service that is the subject of the payment determination. Neither party submits any additional information.

(2) *Conclusion.* In this paragraph (c)(4)(iv)(D) (*Example 4*), the certified IDR entity must consider the qualifying payment amount. The certified IDR entity then must consider the additional information submitted by the parties, but should not give weight to information to the extent it is already accounted for by the qualifying payment amount or other credible information under paragraphs (c)(4)(iii)(B) through (D) of this section. If the certified IDR

entity determines that the information submitted by the facility regarding the case mix and scope of services available at the facility includes information that is also accounted for in the information the issuer submitted regarding prior contracted rates, then the certified IDR entity should give weight to that information only once. The certified IDR entity also should not give weight to the same information provided by the nonparticipating emergency facility in relation to any other factor. If the certified IDR entity determines that the issuer's offer best represents the value of the qualified IDR service, the certified IDR entity should select the issuer's offer.

(E) *Example 5—(1) Facts.* A nonparticipating provider and an issuer are parties to a payment determination in the Federal IDR process regarding a qualified IDR service for which the issuer downcoded the service code that the provider billed. The issuer submits an offer equal to the qualifying payment amount (which was calculated using the downcoded service code). The issuer also submits additional written information that includes the documentation disclosed to the nonparticipating provider under § 54.9816–6(d)(1)(ii) at the time of the initial payment (which describes why the service code was downcoded). The certified IDR entity determines this information is credible and that it relates to the offer for the payment amount for the qualified IDR service that is the subject of the payment determination. The provider submits an offer equal to the amount that would have been the qualifying payment amount had the service code not been downcoded. The provider also submits additional written information that includes the documentation disclosed to the nonparticipating provider under § 54.9816–6(d)(1)(ii) at the time of the initial payment. Further, the provider submits additional written information that explains why the billed service code was more appropriate than the downcoded service code, as evidence that the provider's offer, which is equal to the amount the qualifying payment amount would have been for the service code that the provider billed, best represents the value of the service furnished, given its complexity. The certified IDR entity determines this information to be credible and that it relates to the offer for the payment amount for the qualified IDR service that is the subject of the payment determination. Neither party submits any additional information.

(2) *Conclusion.* In this paragraph (c)(4)(iv)(E) (*Example 5*), the certified

IDR entity must consider the qualifying payment amount, which is based on the downcoded service code. The certified IDR entity then must consider whether to give weight to additional information submitted by the parties. If the certified IDR entity determines that the additional credible information submitted by the provider demonstrates that the nonparticipating provider's offer, which is equal to the qualifying payment amount for the service code that the provider billed, best represents the value of the qualified IDR service, the certified IDR entity should select the nonparticipating provider's offer.

(v) *Prohibition on consideration of certain factors.* For further guidance, see § 54.9816–8T(c)(5)(v).

(vi) *Written Decision.* For further guidance, see § 54.9816–8T(c)(5)(vi).

(vii) *Effects of determination—(A) Binding.* For further guidance see § 54.9816–8T(c)(5)(vii)(A).

(B) *Suspension of certain subsequent IDR requests.*—In the case of a determination made by a certified IDR entity under paragraph (c)(5)(ii) of this section, the party that submitted the initial notification under paragraph (b)(2) of this section may not submit a subsequent notification involving the same other party with respect to a claim for the same item or service that was the subject of the initial notification during the 90-calendar-day period following the determination.

(C) *Subsequent submission of requests permitted.* If the end of the open negotiation period specified in paragraph (b)(1) of this section occurs during the 90-calendar-day suspension period regarding claims for the same item or service that were the subject of the initial notice of IDR determination as described in paragraph (c)(5)(vi) of this section, either party may initiate the Federal IDR process for those claims by submitting a notification as specified in paragraph (b)(2) of this section during the 30-business-day period beginning on the day after the last day of the 90-calendar-day suspension period.

(viii) *Recordkeeping requirements.* For further guidance see § 54.9816–8T(c)(5)(viii).

(ix) *Payment.* For further guidance see § 54.9816–8T(c)(5)(ix).

(d) *Costs of IDR process—(1) Certified IDR entity fee—(i) Timing of payment of certified IDR entity fee.* Each party to a dispute for which there is a final selection of the certified IDR entity and a determination that the dispute is eligible for the Federal IDR process in accordance with paragraph (c)(2) of this section must pay to the certified IDR entity the predetermined certified IDR entity fee charged by the certified IDR

entity. The certified IDR entity fee must be paid no later than the date a party submits its offer to the certified IDR entity, in accordance with paragraph (c)(5)(i) of this section.

(ii) *Failure to timely pay certified IDR entity fee.* If a party fails to pay the certified IDR entity fee as specified in paragraph (d)(1)(i) of this section, that party's offer will not be considered received. Such party will continue to be responsible for payment of the certified IDR entity fee.

(iii) *Method of allocation of the certified IDR entity fee after a payment determination.* After making a payment determination, the certified IDR entity shall retain the certified IDR entity fee described under paragraph (d)(1)(i) of this section paid by the non-prevailing party as defined in paragraph (c)(5)(ii)(A)(2) of this section. The certified IDR entity must return the fee paid by the prevailing party, as defined in paragraph (c)(5)(ii)(A)(1) of this section, within 30 business days following the date of the certified IDR entity's payment determination. In the event of a batched dispute in which each party prevails in an equal number of determinations, the certified IDR entity fee will be split evenly between the parties. In that case, the certified IDR entity must return half the fee paid by each party within 30 business days following the date of the certified IDR entity's payment determination.

(iv) *Method of allocation of the certified IDR entity fee upon agreement or withdrawal after an eligibility determination.* For a dispute for which there is a final selection of the certified IDR entity and a determination that the dispute is eligible for the Federal IDR process in accordance with paragraph (c)(2) of this section, unless directed otherwise by both parties, the certified IDR entity is required to return half of each party's certified IDR entity fee within 30 business days of the date both parties notify the certified IDR entity that they have:

(A) Reached an agreement on an out-of-network rate for qualified IDR items or services before the certified IDR entity has made its payment determination, as described in paragraph (c)(3)(i) of this section; or

(B) Withdrawn the dispute before the certified IDR entity has made its payment determination, as described in paragraph (c)(3)(ii) of this section.

(v) *Method of allocation of the certified IDR entity fee upon agreement or withdrawal before an eligibility determination.* When the parties reach an agreement on an out-of-network rate or withdraw a dispute for which there is a final selection of the certified IDR

entity, but for which no eligibility determination has yet been made, unless directed otherwise by both parties, the certified IDR entity is required to return each party's full certified IDR entity fee within 30 business days of the date both parties notify the certified IDR entity that they have agreed on an out-of-network rate or agreed to withdraw the dispute.

(2) *Administrative fee—(i) In general.* Each party to a dispute for which a certified IDR entity is selected under paragraph (c)(1) of this section must pay a non-refundable administrative fee to the Secretary for participating in the Federal IDR process.

(A) *Timing of payment of administrative fee.* The initiating party must pay the administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity as described in paragraph (c)(1)(iii) of this section. The non-initiating party must pay the administrative fee within 2 business days of the date the non-initiating party receives notice that an eligibility determination for the Federal IDR process has been reached by either the certified IDR entity or the Departments in accordance with paragraph (c)(2) of this section.

(B) *Agreements and withdrawals.* In the case of an agreement, as described in paragraph (c)(3)(i) of this section, or a withdrawal, as described in paragraph (c)(3)(ii) of this section, the administrative fee will not be returned to the parties if preliminary selection of the certified IDR entity has occurred, as described in paragraph (c)(1)(i) of this section; if not yet collected, the administrative fee must still be paid, except as provided in paragraph (d)(2)(i)(C) of this section for a dispute closed for nonpayment by an initiating party.

(C) *Failure to pay administrative fee.* If the initiating party fails to pay the administrative fee in accordance with paragraph (d)(2)(i)(A) of this section, the dispute will be closed due to nonpayment and neither party will be responsible for the administrative fee. If the non-initiating party fails to pay the administrative fee in accordance with paragraph (d)(2)(i)(A) of this section, that party's offer will not be considered received and the non-initiating party will continue to be responsible for payment of the administrative fee.

(D) *Collection of unpaid fees.* Any party that fails to pay the administrative fee owed in accordance with paragraph (d)(2)(i)(A) of this section is obligated to pay the administrative fee otherwise due and owing, except as provided in paragraph (d)(2)(i)(C) of this section for

a dispute closed for nonpayment by an initiating party. The Secretary will pursue collection from a party to a dispute of any administrative fee that is not timely paid pursuant to applicable debt collection authorities.

(ii) *Administrative fee amount.* The administrative fee amount and method of payment will be established through notice and comment rulemaking in a manner such that the total administrative fees paid for a year, including administrative fees reduced under paragraph (d)(2)(iii) of this section, are estimated to be equal to the projected amount of expenditures made by the Secretaries of the Treasury, Labor, and Health and Human Services for the year in carrying out the Federal IDR process.

(A) For disputes initiated on or after the later of the effective date of Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges final rules or January 1, 2024, the administrative fee amount is \$150 per party per dispute, which will remain in effect until changed by subsequent rulemaking.

(B) [Reserved]

(iii) *Reducing the administrative fee amount.* For disputes initiated on or after January 1, 2025—

(A) The Secretary may reduce the administrative fee for both parties in accordance with paragraph (d)(2)(iii)(C) of this section when the highest offer made by either party during open negotiation for the dispute is less than the threshold established through notice and comment rulemaking, pursuant to paragraph (d)(2)(ii) of this section. For a dispute that satisfies the requirements for a reduced administrative fee in accordance with this paragraph and for which a determination has been made that the dispute is eligible for the Federal IDR process in accordance with paragraph (c)(2) of this section, the administrative fee amount may be reduced to 50 percent of the administrative fee amount as described in paragraph (d)(2)(ii) of this section for each party to the dispute. For a dispute that satisfies the requirements for a reduced administrative fee in accordance with this paragraph and for which a determination has been made that the dispute is ineligible for the Federal IDR process in accordance with paragraph (c)(2) of this section, the administrative fee amount may be reduced to 50 percent of the administrative fee amount as described in paragraph (d)(2)(ii) of this section for the initiating party and to 20 percent of the administrative fee amount for the non-initiating party.

(B) The Secretary may reduce the administrative fee for a non-initiating party in accordance with paragraph (d)(2)(iii)(C) of this section when the dispute is determined to be ineligible for the Federal IDR process in accordance with paragraph (c)(2) of this section. For a dispute that satisfies the requirements for a reduced administrative fee in accordance with this paragraph, the administrative fee amount for the non-initiating party may be reduced to 20 percent of the administrative fee amount as described in paragraph (d)(2)(ii) of this section.

(C) The reduced administrative fee amounts provided for in paragraphs (d)(2)(iii)(A) and (B) of this section shall be established in notice and comment rulemaking and will remain in effect until changed by subsequent rulemaking, pursuant to paragraph (d)(2)(ii) of this section.

(e) *Certification of IDR entity—(1) In general.* For further guidance, see § 54.9816–8T(e)(1);

(2) *Requirements.* For further guidance, see § 54.9816–8T(e)(2) introductory text;

(i) For further guidance, see § 54.9816–8T(e)(2)(i);

(ii) For further guidance, see § 54.9816–8T(e)(2)(ii);

(iii) For further guidance, see § 54.9816–8T(e)(2)(iii);

(iv) For further guidance, see § 54.9816–8T(e)(2)(iv);

(v) For further guidance, see § 54.9816–8T(e)(2)(v);

(vi) Meet appropriate indicators of fiscal integrity and stability by demonstrating that the certified IDR entity has a system of safeguards and controls in place to prevent and detect improper financial activities by its employees and agents to assure fiscal integrity and accountability for all certified IDR entity fees and administrative fees (if applicable) received, held, and disbursed and by submitting 3 years of financial statements or, if not available, other information to demonstrate fiscal stability of the certified IDR entity;

(vii) For further guidance, see § 54.9816–8T(e)(2)(vii);

(viii) Have a procedure in place to retain the certified IDR entity fees described in paragraph (d)(1) of this section paid by both parties in a trust or escrow account and to return the certified IDR entity fee paid by the prevailing party or a portion of each party's certified IDR entity fee in the case of an agreement described in paragraph (c)(3)(i) of this section, a withdrawal described in paragraph (c)(3)(ii) of this section, or a circumstance described under

paragraph (d)(1)(iii) of this section, within 30 business days following the date of the determination;

(ix) Have a procedure in place to retain the administrative fees (if applicable) described in paragraph (d)(2) of this section and to remit the administrative fees to the Secretary in accordance with the timeframe and procedures set forth in guidance published by the Secretary;

(x) For further guidance, see § 54.9816–8T(e)(2)(x); and

(xi) For further guidance, see § 54.9816–8T(e)(2)(xi);

(3) *Conflict-of-interest standards.* For further guidance, see § 54.9816–8T(e)(3).

(4) *Period of Certification.* For further guidance, see § 54.9816–8T(e)(4).

(5) *Petition for denial or revocation.* For further guidance, see § 54.9816–8T(e)(5).

(6) *Denial of IDR entity certification or revocation of certified IDR entity certification.* For further guidance, see § 54.9816–8T(e)(6).

* * * * *

(g) *Extension of time periods for extenuating circumstances—(1) In general.* The time periods specified in this section (other than the time for payment, if applicable, under § 54.9816–8T(c)(5)(ix)) may be extended in extenuating circumstances at the Secretary's discretion. Extenuating circumstances include, but are not limited to when:

(i) With respect to a specific dispute, the Secretary determines that the parties or certified IDR entity cannot meet applicable timeframes due to matters beyond the control of one or both parties or the certified IDR entity, or for other good cause. The certified IDR entity or either party may also submit a request for an extension due to extenuating circumstances to the Secretary through the Federal IDR portal. The requesting certified IDR entity or party must attest that it will take prompt action to ensure that the certified IDR entity's payment determination under this section may be made as soon as administratively practicable under the circumstances; or

(ii) The Secretary determines that the parties or certified IDR entity cannot meet applicable timeframes due to systematic delays in processing disputes under the Federal IDR process, such as an unforeseen volume of disputes or Federal IDR portal system failures. Extensions provided due to extenuating circumstances caused by an unforeseen volume of disputes will be applied to the timeframe for eligibility determinations under paragraph (c)(2) of this section. Extensions provided due to

extenuating circumstances caused by systems failures within the Federal IDR portal will be applied to the Federal IDR process timeframe(s) determined relevant by the Secretary. The Secretary will post a public notice regarding any extensions of time periods pursuant to this paragraph (g)(1)(ii).

(A) *Timeframe following an extension to eligibility determination.* When an extension to the eligibility determination timeframe pursuant to paragraph (g)(1)(ii) of this section is in effect, the start date of the subsequent timeframes in the Federal IDR process will be determined based on the date of completion of the eligibility determination by the certified IDR entity or the Secretary.

(1) *Submission of offers.* The parties must submit their offers and certified IDR entity fees to the certified IDR entity not later than 10 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section.

(2) *Payment Determination.* The certified IDR entity must make the payment determination and notification of the payment determination to the parties not later than 30 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section.

(B) *Timeframe following an extension to other timeframes in the Federal IDR process.* When an extension to any timeframe within the Federal IDR process, other than the eligibility timeframe, is in effect pursuant to paragraph (g)(1)(ii) of this section, the start date of each subsequent timeframe in the Federal IDR process will be determined based on the date of completion of the process for which the extension was granted.

(2) [Reserved]

(h) *Applicability date.* (1) Paragraph (a) of § 54.9816–8T is applicable with respect to plan years beginning on or after January 1, 2022, except that the provisions regarding IDR entity certification at § 54.9816–8T(a) and (e) are applicable beginning on October 7, 2021, and the revised definition for batched qualified IDR items and services at paragraph (a)(2)(i) of this section is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule.

(2) Paragraph (b) of this section is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule.

(3) Paragraph (c)(1) of this section, regarding the selection of a certified IDR entity, is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule, except that paragraphs (c)(1)(iv)(A)(1) through (3) of this section, regarding the conflict-of-interest standards, are applicable with respect to plan years beginning on or after January 1, 2022.

(4) Paragraph (c)(2) of this section, regarding the Federal IDR process eligibility review and paragraph (c)(3) of this section regarding the authority to continue negotiations or withdraw, are applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule, and paragraph (c)(4) of this section regarding the treatment of batched and bundled qualified IDR items and services is applicable 90 days after the effective date of the rule.

(5) Paragraphs (c)(5)(i) and (ii), and (c)(5)(vii)(B) and (C) of this section regarding the deadlines for the submission of offers, payment determination and notification, suspension of certain subsequent IDR requests, and subsequent submission of requests submitted are applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule. Paragraphs (c)(5)(iii) and (vi) of this section regarding considerations in payment determinations and the related examples and paragraph (c)(5)(vi)(B) of this section regarding written decisions are applicable with respect to items or services furnished on or after October 25, 2022, for plan years beginning on or after January 1, 2022. Section 54.9816–8T(c)(5)(v) through (c)(5)(vi)(A), § 54.9816–8T(c)(5)(vii)(A), and § 54.9816–8T(c)(5)(viii) and (ix) are applicable with respect to plan years beginning on or after January 1, 2022.

(6) Paragraph (d) of this section regarding the costs of the IDR process is applicable to disputes initiated on or after January 1, 2025.

(7) Section 54.9816–8T(e) is applicable with respect to plan years beginning on or after January 1, 2022. The provisions regarding IDR entity certification at paragraphs (1), (e)(2)(i) through (vi), (e)(2)(x) and (xi), and (e)(3) through (6) of this section are applicable beginning on October 7, 2021. Paragraphs (e)(2)(vi), (viii), and (ix) of this section regarding the certified IDR entity's controls to prevent and detect improper financial activities, and procedures to retain the certified IDR

entity fee and administrative fee are applicable upon the effective date of the rule.

(8) Section 54.9816–8T(f) is applicable with respect to plan years beginning on or after January 1, 2022. Section 54.9816–8(f)(1)(v)(F) regarding reporting of information relating to the Federal IDR process is applicable with respect to items or services furnished on or after October 25, 2022, for plan years beginning on or after January 1, 2022.

(9) Paragraph (g) of this section regarding the extension of time periods for extenuating circumstances is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule.

(10) Until the relevant applicability date for the requirements of this section, plans, issuers, providers, facilities, providers of air ambulance services and certified IDR entities are required to continue to comply with the corresponding section of §§ 54.9816–8 and 54.9816–8T in effect on October 25, 2022.

(i) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions of paragraphs (b)(1), (c)(2)(ii), (c)(4), (d)(2), and (g)(1) of this section are intended to be severable from one another, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in those paragraphs. The provisions in §§ 54.9816–8 and 54.9816–8T are intended to be severable from the provisions in §§ 54.9816–6A, 54.9816–6, 54.9816–6T, and 54.9816–9, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in §§ 54.9816–6A, 54.9816–6, 54.9816–6T, and 54.9816–9.

■ 10. Section 54.9816–8T is amended by:

■ a. Revising paragraphs (a)(2)(i), (b)(1) through (3), (c)(1)(i) and (c)(2);

■ b. Redesignating paragraphs (c)(3) through (c)(4) as (c)(4) through (c)(5);

■ c. Adding new paragraph (c)(3);

■ d. Revising newly redesignated paragraphs (c)(4)(i) introductory text, (c)(4)(i)(B) through (D), (c)(4)(ii), (c)(5)(i)

introductory text, (c)(5)(ii), (iii) and (iv), (c)(5)(vi)(B), (c)(5)(vii)(A) introductory text, and (c)(5)(vii)(B) and (C);

■ e. Revising paragraphs (d) introductory text, (e)(2)(vi), (viii) and (ix), and (g); and

■ f. Adding paragraphs (h) and (i).

The revisions and additions read as follows:

§ 54.9816–8T Independent dispute resolution process. (temporary)

(a) * * *

(2) * * *

(i) *Batched items and services*—For further guidance, see § 54.9816–8(a)(2)(i);

* * * * *

(b) * * *

(1) *Determination of payment amount through open negotiation.* For further guidance, see § 54.9816–8(b)(1);

(2) *Initiating the Federal IDR process.* For further guidance, see § 54.9816–8(b)(2);

(3) *Manner.* For further guidance, see § 54.9816–8(b)(3).

(c) * * *

(1) * * *

(i) *Preliminary selection of the certified IDR entity.* For further guidance, see § 54.9816–8(c)(1).

* * * * *

(2) *Federal IDR process eligibility review.* For further guidance, see § 54.9816–8(c)(2).

(3) *Authority to continue negotiations or withdraw.* For further guidance, see § 54.9816–8(c)(3).

(4) * * *

(i) *In general.* For further guidance, see § 54.9816–8(c)(4)(i).

(A) The qualified IDR items and services are billed by the same provider or group of providers, the same facility, or the same provider of air ambulance services. Items and services are billed by the same provider or group of providers, the same facility, or the same provider of air ambulance services if the items or services are billed with the same National Provider Identifier or Tax Identification Number;

(B) For further guidance, see § 54.9816–8(c)(4)(i)(B).

(C) For further guidance, see § 54.9816–8(c)(4)(i)(C).

(D) For further guidance, see § 54.9816–8(c)(4)(i)(D).

(ii) *Treatment of bundled payment arrangements.* For further guidance, see § 54.9816–8(c)(4)(ii)

(5) * * *

(i) *Submission of offers.* For further guidance, see § 54.9816–8(c)(5)(i).

* * * * *

(ii) *Payment determination and notification.* For further guidance, see § 54.9816–8(c)(5)(ii).

(A) For further guidance, see § 54.9816–8(c)(5)(ii)(A)

(B) Notify the plan and the provider or facility, as applicable, of the selection of the offer under paragraph (c)(5)(ii)(A) of this section, and provide the written decision required under (c)(5)(vi) of this section.

(iii) *Considerations in determination.* For further guidance, see § 54.9816–8(c)(5)(iii).

(iv) *Examples.* For further guidance, see § 54.9816–8(c)(5)(iv).

* * * * *

(vi) * * *

(B) For further guidance, see § 54.9816–8(c)(5)(vi)(B).

(vii) * * *

(A) *Binding* determination made by a certified IDR entity under paragraph (c)(5)(ii) of this section:

* * * * *

(B) *Suspension of certain subsequent IDR requests.* For further guidance, see § 54.9816–8(c)(5)(vii)(B).

(C) *Subsequent submission of requests permitted.* For further guidance, see § 54.9816–8(c)(5)(vii)(C).

* * * * *

(d) Costs of IDR process. For further guidance, see § 54.9816–8(d);

* * * * *

(e) * * *

(2) * * *

(vi) For further guidance, see § 54.9816–8(e)(2)(vi);

* * * * *

(viii) For further guidance, see § 54.9816–8(e)(2)(viii);

(ix) For further guidance, see § 54.9816–8(e)(2)(ix);

* * * * *

(g) *Extension of time periods for extenuating circumstances.* For further guidance, see § 54.9816–8(g).

(h) *Applicability date.* For further guidance, see § 54.9816–8(h);

(i) *Severability.* For further guidance, see § 54.9816–8(i).

■ 11. Section 54.9816–9 is added to read as follows:

§ 54.9816–9 Federal Independent Dispute Resolution Registry of Group Health Plans, Health Insurance Issuers, and Federal Employees Health Benefits Carriers.

(a) *Establishment of Federal independent dispute resolution registry.* The Secretary, jointly with the Secretary of Health and Human Services and the Secretary of Labor, will establish a Federal IDR registry consisting of the information described in paragraph (b)(2) of this section and will assign a registration number for each group health plan, health insurance issuer offering group or individual health insurance coverage, and Federal

Employees Health Benefits (FEHB) Program carrier. The information contained in the registry will be made available to parties seeking to initiate an open negotiation or a dispute through the Federal IDR portal, and will be searchable, including by registration number.

(b) *Federal IDR registration*—(1) *Registration requirement.* Each group health plan subject to the Federal IDR process must register with the Federal IDR registry as specified by the Secretary in guidance. Initial registration must be completed by the later of the date that is 30 business days after the effective date of the final rule, the date that is 30 business days after the registry becomes available, or the date the group health plan begins offering a group health plan coverage subject to the Federal IDR process.

(2) *Required data elements.* Group health plans subject to the registration requirement must include the following information with their registration:

(i) The legal business name (if any) of the group health plan, and, if applicable, the legal business name of the group health plan sponsor;

(ii) Whether the plan is a self- or fully-insured group health plan subject to ERISA or a self- or fully-insured church plan;

(iii) The State(s) in which the plan is subject to a specified State law, as defined in § 54.9816–3T for any items or services for which the protections of §§ 54.9816–1T, 54.9816–4T, and 54.9816–5T apply;

(iv) The State(s) in which the plan is subject to an All-Payer Model Agreement under section 1115A of the Social Security Act for any items or services to which the protections in §§ 54.9816–1T, 54.9816–4T, and 54.9816–5T, apply;

(v) For self-insured group health plans not otherwise subject to State law, any State(s) in which the group health plan has properly effectuated an election to opt in to a specified State law as defined in § 54.9816–3T, if that State allows a plan not otherwise subject to the State law to opt-in;

(vi) Contact information, including a telephone number and email address, for the appropriate person or office with whom to initiate open negotiations for purposes of determining an amount of payment (including cost sharing) for such item or service;

(vii) The 14-digit Health Insurance Oversight System (HIOS) identifier; or if the 14-digit HIOS identifier has not been assigned, the 5-digit HIOS identifier; or if no HIOS identifier is available, the plan's or the plan sponsor's Employer Identification Number (EIN) and the

plan's plan number (PN), if a PN is available;

(viii) Additional information needed to identify the plan and the applicable Federal and State requirements for determining appropriate out-of-network payment rates for items or services to which the protections against balance billing in this part apply, as specified by the Secretary in guidance; and

(ix) Additional information needed for purposes of administrative fee collection, as specified by the Secretary in guidance.

(3) *Updating disclosures.* A plan must timely report to the Secretary changes to the information required under this section within 30 calendar days after the information changes. A plan must confirm the accuracy of its registration annually in the fourth quarter of each calendar year.

(4) *Third party authority.* The requirements of paragraphs (b)(1) through (3) of this section may be performed by a third party administrator or service provider with authority to act on behalf of the group health plan subject to the Federal IDR process. If the registration requirements are performed by such third party administrator or service provider the group health plan or health insurance issuer offering group or individual health insurance coverage must require that such third party administrator or service provider clearly delineate each group health plan or health insurance issuer offering group health insurance coverage for which it has authority to act. If such third party administrator or service provider fails to provide the information in compliance with the requirements of paragraphs (b)(1) through (3) of this section the plan or issuer will be in violation of the requirements of this section.

(c) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions in § 54.9816–9 are intended to be severable from the provisions in §§ 54.9816–6, 54.9816–6T, 54.9816–8, and 54.9816–8T, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in §§ 54.9816–6, 54.9816–6T, 54.9816–8, and 54.9816–8T.

DEPARTMENT OF LABOR
EMPLOYEE BENEFITS SECURITY
ADMINISTRATION

For the reasons stated in the preamble, the Department of Labor proposes to amend 29 CFR part 2590 as set forth below:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

■ 12. The authority citation for part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Division M, Pub. L. 113–235, 128 Stat. 2130; Secretary of Labor’s Order 1–2011, 77 FR 1088 (Jan. 9, 2012).

Subpart D—Surprise Billing and Transparency Requirements

■ 13. Section 2590.716–3 is amended by adding the definition of “Bundled payment arrangement” in alphabetical order to read as follows:

§ 2590.716–3 Definitions.

* * * * *

Bundled payment arrangement means an arrangement under which—

(1) A provider, facility, or provider of air ambulance services bills for multiple items or services furnished to a single patient under a single service code that represents multiple items or services (for example, a Diagnosis-Related Group (DRG) code); or

(2) A plan or issuer makes an initial payment or notice of denial of payment to a provider, facility, or provider of air ambulance services under a single service code that represents multiple items or services furnished to a single patient (for example, a DRG code).

* * * * *

■ 14. Section 2590.716–6 is amended by:

- a. Revising paragraphs (d) introductory text and (d)(1)(iv);
- b. Redesignating paragraph (d)(1)(v) as paragraph (d)(1)(vi);
- c. Adding a new paragraph (d)(1)(v);
- d. Revising paragraph (d)(2) introductory text; and
- e. Adding paragraph (g).

The revisions and additions read as follows:

§ 2590.716–6 Methodology for calculating qualifying payment amount.

* * * * *

(d) *Information to be shared about the qualifying payment amount.* In cases in which the recognized amount, with respect to an item or service furnished by a nonparticipating provider or nonparticipating emergency facility, is the qualifying payment amount or the amount billed by the provider or facility, or if the amount on which cost sharing is based with respect to air ambulance services furnished by a nonparticipating provider of air ambulance services is the qualifying payment amount or the amount billed by the provider of air ambulance services, the plan or issuer must provide to the provider, facility, or provider of air ambulance services, as applicable, in writing, in paper or electronic form—

(1) * * *

(iv) A statement that—

(A) If the provider, facility, or provider of air ambulance services, as applicable, wishes to initiate a 30-business-day open negotiation period for purposes of determining the out-of-network rate, the provider, facility, or provider of air ambulance services must:

(1) Contact the appropriate person or office to initiate open negotiation within 30 business days of receiving the initial payment or notice of denial of payment, and

(2) For disclosures required to be provided on or after [DATE 90 DAYS AFTER PUBLICATION OF FINAL REGULATIONS IN THE **FEDERAL REGISTER**] and once the open negotiation notice can be submitted through the Federal IDR portal, notify the Secretary as described under § 2590.716–8(b)(1)(i); and

(B) If the 30-business-day open negotiation period does not result in an agreement on the amount of payment the provider, facility, or provider of air ambulance services may generally initiate the Federal IDR process within 4 business days after the end of the open negotiation period;

(v) For disclosures required to be provided on or after [date 90 days after publication of final regulations in the **Federal Register**], the legal business name of the group health plan (if any) or issuer, the legal business name of the plan sponsor (if applicable), and the registration number assigned under § 2590.716–9, if the plan or issuer is registered under § 2590.716–9.

(2) In a timely manner upon the request of the provider, facility, or provider of air ambulance services:

* * * * *

(g) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be

construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions in § 2590.716–6 are intended to be severable from the provisions in §§ 2590.716–6A, 2590.716–8, and 2590.716–9, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in §§ 2590.716–6A, 2590.716–8, and 2590.716–9.

■ 15. Section 2590.716–6A is added to subpart D to read as follows:

§ 2590.716–6A Use of Claim Adjustment Reason Codes and Remittance Advice Remark Codes.

(a) *In general.* When providing any paper or electronic remittance advice to an entity that does not have a contractual relationship directly or indirectly with a group health plan or a health insurance issuer offering group or individual health insurance coverage with respect to the furnishing of the item or service under the plan or coverage in response to a claim for payment for health care items and services furnished by that entity, the plan or issuer must use claim adjustment reason codes (CARCs) and remittance advice remark codes (RARCs) (see 45 CFR 162.1602 and 162.1603) as specified in guidance issued by the Secretaries of the Treasury, Labor, and Health and Human Services, or as required under any applicable adopted standards and operating rules under 45 CFR part 162, to communicate information related to whether the claim is or is not subject to the provisions of this subpart and 45 CFR part 149, subpart E.

(b) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions in § 2590.716–6A are intended to be severable from the provisions in §§ 2590.716–6, 2590.716–8, and 2590.716–9, from any grant of

forbearance from removal resulting from this subpart, and from any provision referenced in §§ 2590.716–6, 2590.716–8, and 2590.716–9.

■ 16. Section 2590.716–8 is amended by:

- a. Revising paragraphs (a)(2)(i), (b)(1)(i), and (b)(1)(ii)(A);
- b. Removing and reserving paragraph (b)(1)(ii)(B);
- c. Adding paragraph (b)(1)(iii);
- d. Revising paragraph (b)(2)(i);
- e. Redesignating paragraph (b)(2)(ii) as (b)(2)(i)(A);
- f. Adding and reserving paragraph (b)(2)(i)(B);
- g. Redesignating paragraph (b)(2)(iii) as (b)(2)(ii);
- h. Revising newly redesignated paragraph (b)(2)(ii)(A);
- i. Reserving newly redesignated paragraph (b)(2)(ii)(B);
- j. Removing newly redesignated paragraph (b)(2)(ii)(C);
- k. Adding paragraphs (b)(2)(iii) and (b)(3);
- l. Revising paragraph (c)(1);
- m. Redesignating paragraphs (c)(2) through (4) as paragraphs (c)(3) through (5), respectively;
- n. Adding a new paragraph (c)(2);
- o. Revising newly redesignated paragraphs (c)(3), (c)(4)(i) introductory text, (c)(4)(i)(B) through (D), (c)(4)(ii), (c)(5)(i) introductory text, (c)(5)(ii) introductory text,
- p. Adding paragraphs (c)(5)(ii)(A)(1) and (2) and removing the reference to “(c)(4)” and adding in its place “(c)(5)” in newly redesignated paragraphs (c)(5)(ii)(A) introductory text and (B);;
- q. Revising paragraphs (c)(5)(vii)(B) and (C);;
- r. Revising paragraphs (d), (e)(2)(vi), (viii), and (ix), (g) and (h);
- s. Adding paragraph (i).

The revisions and additions read as follows:

§ 2590.716–8 Independent dispute resolution process.

- (a) * * *
- (2) * * *

(i) *Batched qualified IDR items and services* means multiple qualified IDR items or services that are considered jointly as part of one payment determination by a certified IDR entity for purposes of the Federal IDR process in accordance with paragraph (c)(4) of this section.

* * * * *

- (b) * * *
- (1) * * *

(i) *In general.* With respect to an item or service that meets the requirements of paragraph (a)(2)(xi)(A) of this section, the provider, facility, or provider of air ambulance services, or the group health

plan or health insurance issuer offering group or individual health insurance coverage may, during the 30-business-day period beginning on the day the provider, facility, or provider of air ambulance services receives an initial payment or notice of denial of payment regarding the item or service, initiate an open negotiation period for purposes of determining the out-of-network rate for such item or service. To initiate the open negotiation period, a party must submit a written open negotiation notice with the content specified in paragraph (b)(1)(ii) of this section to the other party and to the Secretary in the manner specified in paragraph (b)(3) of this section. The 30-business-day open negotiation period begins on the day on which the party first submits the open negotiation notice and the remittance advice documentation specified in paragraph (b)(1)(ii)(A)(12) of this section to the other party and the Secretary. The party in receipt of the open negotiation notice must provide to the other party and to the Secretary in the manner specified in paragraph (b)(3) of this section as soon as practicable, but no later than the 15th business day of the 30-business-day open negotiation period, a written notice and supporting documentation in response to the open negotiation notice, as specified in paragraph (b)(1)(iii)(A) of this section.

(ii) * * *

(A) *Content.* The open negotiation notice must include, with respect to the item or service that is the subject of the open negotiation notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address) as provided with the claim form submitted by the provider, facility, or air ambulance provider to the plan or issuer, and the National Provider Identifier (NPI);

(2) Information sufficient to identify the plan or issuer, including the plan’s or issuer’s registration number, as required under § 2590.716–9, if the plan or issuer is registered under § 2590.716–9, or an attestation from the party submitting the open negotiation notice that the plan or issuer was not registered prior to the date it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the party submitting the

open negotiation notice is a plan or issuer, the plan type (for example, self-insured or fully-insured);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the party submitting the open negotiation notice, and an attestation that the third party has the authority to act on behalf of the party it represents in the open negotiation;

(4) Information sufficient to identify the item or service, including: the date(s) the item or service was furnished and, if the party submitting the open negotiation notice is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for the item or service from the plan or issuer; the type of item or service (specifically, whether the item or service is an emergency service as defined in § 2590.716–4(c)(2)(i) or (ii), a non-emergency service as described in § 2590.716–5(b), or an air ambulance service as defined in § 2590.716–3); whether the service is a professional service or facility-based service; the State where the item or service was furnished; the claim number; the service code; and information to identify the location where the item or service was furnished (such as, place of service code or bill type code);

(5) The initial payment amount (including \$0 if, for example, payment is denied);

(6) The qualifying payment amount, if provided with the initial payment or notice of denial of payment or if the party submitting the open negotiation notice is a plan or issuer;

(7) An offer of an out-of-network rate for each item or service;

(8) If the party submitting the open negotiation notice is a plan or issuer, the amount of cost sharing imposed for the item or service, if any;

(9) If the party submitting the open negotiation notice is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 149.420(c) through (i);

(10) A statement that the provider, facility, or provider of air ambulance services was a nonparticipating provider, nonparticipating emergency facility, or nonparticipating provider of air ambulance services on the date the item or service was furnished;

(11) General information listed in the standard open negotiation notice developed by the Secretary pursuant to

paragraph (b)(3) of this section describing the open negotiation period and the Federal IDR process (including a description of the purpose of the open negotiation period and Federal IDR process and key deadlines in the open negotiation period and Federal IDR process); and

(12) A copy of the initial payment or notice of denial of payment or other remittance advice that is required to include the disclosures under § 2590.716–6(d)(1), with respect to the item or service.

(B) [Reserved]

(iii) *Open negotiation response notice.*

(A) *Content.* The response to the open negotiation notice must include, with respect to the item or service that is the subject of the open negotiation response notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address) as provided with the claim form submitted by the provider, facility, or provider of air ambulance services to the plan or issuer, and the NPI;

(2) Information sufficient to identify the plan or issuer, including the plan's or issuer's registration number, as required under § 2590.716–9 if the plan or issuer is registered under § 2590.716–9, or an attestation from the party submitting the open negotiation response notice that the plan or issuer was not registered prior to the date it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the party submitting the open negotiation response notice is a plan or issuer, the plan type (for example, self-insured or fully-insured);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the party submitting the open negotiation response notice, and an attestation that the third party has the authority to act on behalf of the party it represents in the open negotiation;

(4) Information sufficient to identify the item or service included in the open negotiation notice, including the date(s) the item or service was furnished, and if the party submitting the open negotiation response notice is a

provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer, and the claim number;

(5) If the party submitting the open negotiation response notice is a plan or issuer, a statement as to whether it agrees that the initial payment amount (including \$0 if, for example, payment is denied) and the qualifying payment amount reflected in the open negotiation notice accurately reflects the initial payment amount and qualifying payment amount disclosed with the initial payment for the item or service, and if not, or if the open negotiation notice indicates that qualifying payment amount was not communicated by the plan or issuer with the initial payment or notice of denial of payment or other remittance advice, the initial payment amount (including \$0 if, for example, payment is denied) and/or qualifying payment amount it believes to be correct, and documentation to support the statement (for example, the remittance advice confirming the qualifying payment amount);

(6) If the party submitting the open negotiation response notice is a plan or issuer, the amount of cost sharing imposed for the item or service, if any;

(7) A counteroffer for an out-of-network rate for each item or service or an acceptance of the other party's offer;

(8) If the party submitting the open negotiation response notice is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 149.420(c) through (i);

(9) With respect to each item or service, either a statement and supporting documentation that explains why the item or service is not subject to the Federal IDR process or a statement agreeing that the item or service is subject to the Federal IDR process;

(10) A statement as to whether any of the information provided in the open negotiation notice is inaccurate and the basis for the statement, as well as supporting documentation; and

(11) A statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the party submitting the open negotiation notice under paragraph (b)(1)(ii)(A)(12) of this section is accurate, and if inaccurate, a copy of the accurate initial payment, or notice of denial of payment, or other remittance advice required to include the disclosures under § 2590.716–6(d)(1), with respect to the item or service.

(B) [Reserved]

(2) * * *

(i) *In general.* Either party may initiate the Federal IDR process with respect to a qualified IDR item or service for which the parties do not agree upon an out-of-network rate by the last day of the open negotiation period provided for under paragraph (b)(1) of this section. To initiate the Federal IDR process, a party (the initiating party) must submit a written notice of IDR initiation, consistent with paragraph (b)(2)(ii) of this section, to the other party to the dispute (the non-initiating party), and to the Secretary in the manner specified in paragraph (b)(3) of this section, during the 4-business-day period beginning on the first business day after the last day of the open negotiation period (unless it is otherwise required to be submitted in the timeframe specified in paragraph (c)(5)(vii)(C) of this section). The date of IDR initiation is the date that the Secretary receives the notice of IDR initiation described in paragraph (b)(2)(ii) of this section.

* * * * *

(B) [Reserved]

(ii) * * *

(A) *Content.* The notice of IDR initiation must include, with respect to the item or service that is the subject of the notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address), and the NPI; and if the initiating party is a provider, facility, or provider of air ambulance services, the Tax Identification Number (TIN);

(2) Information sufficient to identify the plan or issuer, including the plan's or issuer's registration number, as required under § 2590.716–9 if the plan or issuer is registered under § 2590.716–9, or an attestation from the initiating party that the plan or issuer was not registered prior to the date that it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the initiating party is a plan or issuer, the plan type (for example, self-insured or fully-insured) and TIN (or, in the case of a plan that does not have a TIN, the TIN of the plan sponsor);

(3) The name and contact information (including the legal business name, email address, phone number, and

mailing address) for any third party representing the initiating party, and an attestation that the third party has the authority to act on behalf of the party it represents in the Federal IDR process;

(4) Information sufficient to identify whether the dispute being initiated includes batched or bundled qualified IDR items or services as described in paragraph (c)(4) of this section;

(5) Information sufficient to identify the qualified IDR item or service that is the subject of the notice of IDR initiation, including the date(s) the qualified IDR item or service was furnished; if the initiating party is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer; the date the open negotiation period under paragraph (b)(1) of this section began; the type of item or service (specifically, whether the qualified IDR item or service is an emergency service as defined in § 2590.716–4(c)(2)(i) or (ii), a non-emergency service as described in § 2590.716–5(b), or an air ambulance service as defined in § 2590.716–3); whether the service is a professional service or facility-based service; the State where the item or service was furnished; the claim number; the service code; and information to identify the location the item or service was furnished (including place of service code or bill type code);

(6) The initial payment amount (including \$0 if, for example, payment is denied);

(7) The qualifying payment amount, if provided with the initial payment or notice of denial of payment or if the initiating party is a plan or issuer;

(8) If the initiating party is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 149.420(c) through (i);

(9) A statement that the provider, facility, or provider of air ambulance services was a nonparticipating provider, nonparticipating emergency facility, or nonparticipating provider of air ambulance services on the date the item or service was furnished;

(10) Attestation that the item or service under dispute is a qualified IDR item or service, and the basis for the attestation;

(11) General information listed in the standard notice of IDR initiation developed by the Secretary pursuant to paragraph (b)(3) of this section describing the Federal IDR process

(including a description of the purpose of the Federal IDR process and key deadlines in the Federal IDR process);

(12) A copy of the initial payment or notice of denial of payment or other remittance advice that is required to include the disclosures under § 2590.716–6(d)(1), with respect to the item or service;

(13) Preferred certified IDR entity; and

(14) A statement describing the key aspects of the claim, such as patient acuity or level of training of the provider, facility, or provider of air ambulance services that furnished the qualified IDR item or service, discussed by the parties during open negotiation that relate to the payment for the disputed claim, whether the reasons for initiating the Federal IDR process are different from the aspects of the claim discussed during the open negotiation period, and an explanation of why the party is initiating the Federal IDR process, including any of the permissible considerations described in §§ 2590.716–8(c)(5)(iii) and 2590.717–2(b)(2) that serve as the party's basis for initiating the Federal IDR process.

(B) [Reserved]

(iii) *Notice of IDR initiation response.* The non-initiating party must provide to the initiating party and to the Secretary in the manner specified in paragraph (b)(3) of this section within 3 business days after the date of IDR initiation, a written notice and supporting documentation in response to the notice of IDR initiation, as specified in paragraph (b)(2)(iii)(A) of this section.

(A) *Content.* The notice of IDR initiation response must include, with respect to the item or service that is the subject of the notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address), and the NPI; and if the non-initiating party is a provider, facility, or provider of air ambulance services, the TIN;

(2) Information sufficient to identify the plan or issuer, including the plan's or issuer's registration number, as required under § 2590.716–9 if the plan or issuer is registered under § 2590.716–9 or an attestation from the non-initiating party that the plan or issuer was not registered prior to the date that it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or

issuer as provided with the initial payment or notice of denial of payment; and if the non-initiating party is a plan or issuer, the plan type (for example, self-insured or fully-insured) and TIN (or, in the case of a plan that does not have a TIN, the TIN of the plan sponsor);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the non-initiating party, and an attestation that the third party has the authority to act on behalf of the party it represents in the Federal IDR process;

(4) Information sufficient to identify each item or service included in the notice of IDR initiation, including the date(s) the item or service was furnished. If the non-initiating party is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer, and the claim number;

(5) If the non-initiating party is a plan or issuer, a statement as to whether the non-initiating party agrees that the initial payment (including \$0 if, for example, payment is denied) and the qualifying payment amount reflected in the notice of IDR initiation is accurate for the item or service that is the subject of the dispute, and if not, the initial payment amount (including \$0 if, for example, payment is denied) and/or qualifying payment amount it believes to be correct, and documentation to support the statement (for example, the remittance advice confirming the qualifying payment amount);

(6) If the non-initiating party is a plan or issuer, the amount of cost sharing imposed for the item or service, if any;

(7) If the non-initiating party is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 149.420(c) through (i);

(8) With respect to each item or service that is the subject of the dispute, either an attestation that the item or service is a qualified IDR item or service, or for each item or service that the non-initiating party asserts is not a qualified IDR item or service, an explanation and documentation to support the statement;

(9) A statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the initiating party under paragraph (b)(2)(ii)(A)(12) of this section is accurate, and if inaccurate, a copy of

the accurate initial payment or notice of denial of payment or other remittance advice required to include the disclosures under § 2590.716–6(d)(1), with respect to the item or service;

(10) A statement as to whether any of the information provided in the notice of IDR initiation is inaccurate and the basis for the statement as well as any supporting documentation; and

(11) A statement as to whether the non-initiating party agrees or objects to the initiating party's preferred certified IDR entity. If the non-initiating party objects to the initiating party's preferred certified IDR entity, the notice of IDR initiation response must include the name of an alternative preferred certified IDR entity and, if applicable, an explanation of any conflict of interest with the initiating party's preferred certified IDR entity.

(B) [Reserved].

(3) *Manner.* A party furnishing notices as required under paragraphs (b)(1)(ii) and (iii), and (b)(2)(ii) and (iii) of this section must furnish the notices using the standard forms developed by the Secretary and must furnish the notices and supporting documentation to the other party and the Secretary, through the Federal IDR portal.

(c) * * *

(1) *Selection of certified IDR entity—*
(i) *Preliminary selection of the certified IDR entity.* Within 3 business days after the date of IDR initiation, the non-initiating party must agree or object to the preferred certified IDR entity identified in the notice of IDR initiation, as described in paragraph

(b)(2)(iii)(A)(11) of this section.

(A) If the non-initiating party agrees, or fails to object, to the selection of the initiating party's preferred certified IDR entity in the manner described in paragraph (b)(2)(iii)(A)(11) of this section and within the timeframe specified in paragraph (c)(1)(i) of this section, the initiating party's preferred certified IDR entity will be considered jointly selected on the third business day after the date of IDR initiation.

(B) If the non-initiating party objects to the selection of the initiating party's preferred certified IDR entity by designating an alternative preferred certified IDR entity in the manner described in paragraph (b)(2)(iii)(A)(11) of this section and within the timeframe specified in paragraph (c)(1)(i) of this section, the initiating party may then agree or object to the non-initiating party's alternative preferred certified IDR entity by submitting the notice of certified IDR entity selection in the manner specified in paragraph (c)(1)(i)(D) of this section. If the initiating party agrees to the non-

initiating party's alternative preferred certified IDR entity within 3 business days after the date of IDR initiation, or if the non-initiating party submits the notice of IDR initiation response on or before the second business day after the date of IDR initiation and the initiating party fails to respond within 3 business days after the date of IDR initiation, the alternative preferred certified IDR entity will be considered jointly selected by the parties. If the non-initiating party submits the notice of IDR initiation response on the third business day after the date of IDR initiation and the initiating party does not agree on the same day, selection will proceed under paragraph (c)(1)(i)(C) of this section.

(C) If a certified IDR entity is not jointly selected under paragraph (c)(1)(i)(A) or (B) of this section, either party may select an alternative preferred certified IDR entity by submitting the notice of certified IDR entity selection in the manner specified in paragraph (c)(1)(i)(D) of this section, until the earlier of the date that the parties agree on the alternative preferred certified IDR entity or the deadline for joint selection, which is 3 business days after the date of IDR initiation. Once a party submits a notice of certified IDR entity selection, it may not submit another notice of certified IDR entity selection until after it receives a responding notice of certified IDR entity selection from the other party.

(1) If a party submits a notice of certified IDR entity selection to the other party on the first or second day after the date of IDR initiation and the party in receipt of the notice agrees or fails to object to the alternative preferred certified IDR entity by the third business day after the date of IDR initiation, the alternative preferred certified IDR entity will be considered jointly selected by the parties.

(2) If a party submits a notice of certified IDR entity selection to the other party on the third business day after the date of IDR initiation and the party last in receipt of the notice agrees to the alternative preferred certified IDR entity on the same day, the alternative preferred certified IDR entity will be considered jointly selected by the parties.

(3) If a party submits a notice of certified IDR entity selection to the other party on the third business day after the date of IDR initiation and the party last in receipt of the notice does not agree to the alternative preferred certified IDR entity on the same day, the parties will have failed to jointly select a certified IDR entity.

(D) To notify the other party and the Secretary of an agreement or objection

to an alternative preferred certified IDR entity under paragraph (c)(1)(i)(C) of this section, a party must submit the notice of certified IDR entity selection. The party must furnish the notice of certified IDR entity selection using the standard form developed by the Secretary and must furnish the notice to the other party and the Secretary through the Federal IDR portal within 3 business days after the date of IDR initiation. However, in the event the conditions under paragraph (c)(1)(ii) of this section apply, the party may notify the Secretary of an agreement or objection to an alternative preferred certified IDR entity in accordance with paragraph (c)(1)(ii) of this section. The notice of certified IDR entity selection must include a statement indicating the party's agreement with or objection to the other party's alternative preferred certified IDR entity and, if applicable, an explanation of any conflict of interest with the alternative preferred certified IDR entity. If the party in receipt of a notice of certified IDR entity selection objects to the other party's alternative preferred certified IDR entity and the party submits a notice of certified IDR entity selection by the end of the third business day after the date of IDR initiation, that party's notice of certified IDR entity selection reflecting the objection must include the name of another alternative preferred certified IDR entity.

(ii) *Failure to jointly select a certified IDR entity.* If the parties fail to jointly select a certified IDR entity within 3 business days after the date of IDR initiation, the Secretary will select a certified IDR entity. The parties will have failed to jointly select a certified IDR entity if, by the end of the third business day after the date of IDR initiation, the party last in receipt of the notice of IDR initiation response or the notice of certified IDR entity selection has objected to the other party's alternative preferred certified IDR entity, or if the notice of IDR initiation response or the notice of certified IDR entity selection is submitted to the other party on the third business day after the date of IDR initiation and the party in receipt of the notice does not agree to the alternative preferred certified IDR entity within 3 business days after the date of IDR initiation.

(A) In selecting the certified IDR entity, the Secretary will first confirm whether a party submitted the notice of IDR initiation response or the notice of certified IDR entity selection with an alternative preferred certified IDR entity on the third business day after the date of IDR initiation without the other party's agreement to the selection. If

either notice was provided on the third business day after the date of IDR initiation without the other party's agreement to the alternative preferred certified IDR entity by the end of third business day after the date of IDR initiation, the Secretary will provide the party last in receipt of the applicable notice 2 additional business days to agree or object to the other party's alternative preferred certified IDR entity selection.

(1) If the party last in receipt of the notice of IDR initiation response or the notice of certified IDR entity selection agrees with the other party's alternative preferred certified IDR entity and notifies the Secretary of the agreement or fails to notify the Secretary of its objection in the Federal IDR portal by the fifth business day after the date of IDR initiation, the Secretary will select the final alternative preferred certified IDR entity selected in the applicable notice. In disputes where the applicable notice was submitted on the third business day after the date of IDR initiation, the party last in receipt of the notice will not be allowed to select another alternative preferred certified IDR entity.

(2) If the party notifies the Secretary of its objection to the alternative preferred certified IDR entity by the fifth business day after the date of IDR initiation, the Secretary will proceed with the random selection of the certified IDR entity from among the certified IDR entities (other than the preferred certified IDR entity and any alternative preferred certified IDR entity previously selected in such dispute by a party, unless there is no other certified IDR entity available to select) that charge a fee within the allowed range of certified IDR entity fees on the sixth business day after the date of IDR initiation. If there are insufficient certified IDR entities that charge a fee within the allowed range of certified IDR entity fees available to arbitrate the dispute, the Secretary will select a certified IDR entity that has received approval, as described in paragraph (e)(2)(vii)(B) of this section, to charge a fee outside of the allowed range of certified IDR entity fees. In either case, the Secretary will notify the parties of the preliminary selection of the certified IDR entity not later than 6 business days after the date of IDR initiation.

(B) [Reserved].

(iii) *Date of preliminary selection of the certified IDR entity.* The date of preliminary selection of the certified IDR entity will be:

(A) Three business days after the date of IDR initiation if the parties jointly selected a certified IDR entity, as

specified in paragraph (c)(1)(i) of this section; or

(B) Six business days after the date of IDR initiation, if the parties fail to jointly select a certified IDR entity as specified in paragraph (c)(1)(ii) of this section.

(iv) *Final selection of the certified IDR entity—(A) Conflict-of-interest review.* The certified IDR entity preliminarily selected for a dispute must review the selection. The selection of the certified IDR entity will be finalized only if the certified IDR entity attests to the Secretary that it meets the following requirements:

(1) The certified IDR entity does not have a conflict of interest as defined in paragraph (a)(2)(iv) of this section;

(2) The certified IDR entity will only assign personnel to a dispute and make decisions regarding hiring, compensation, termination, promotion, or other similar matters related to personnel assigned to the dispute in a manner that is not based upon the likelihood that the assigned personnel will support a particular party to the dispute; and

(3) The certified IDR entity will not assign any personnel to a dispute who would have any conflicts of interest, as defined in paragraph (a)(2)(iv) of this section, regarding any party to the dispute or whose relationship with a party within the 1 year immediately preceding the assignment to the dispute would violate the restrictions on aiding or advising a former employer or principal in a manner similar to the restrictions set forth in 18 U.S.C. 207(b).

(B) *Failure to meet conflict-of-interest requirements.* If the certified IDR entity notifies the Secretary within 3 business days of the date of preliminary selection of the certified IDR entity that it does not meet the requirements of paragraphs (c)(1)(iv)(A)(1) through (3) of this section or if the certified IDR entity does not respond within 3 business days after the date of preliminary selection of the certified IDR entity, the Secretary will randomly select another certified IDR entity consistent with paragraph (c)(1)(ii) of this section. The Secretary will notify the parties of the new randomly preliminarily selected certified IDR entity no later than 1 business day after the previously selected certified IDR entity notifies the Secretary that it has a conflict of interest or, if the previously selected certified IDR entity fails to respond within 3 business days after the date of preliminary selection of the certified IDR entity, no later than 1 business day after the end of the 3-business-day period.

(C) *Date of final selection of the certified IDR entity.* If the certified IDR entity that has been preliminarily selected attests within 3 business days that it meets the requirements of paragraphs (c)(1)(iv)(A)(1) through (3) of this section, the Secretary will notify the parties of final selection of the certified IDR entity no later than 1 business day after the certified IDR entity attests that it meets the conflict-of-interest requirements. The date of final selection of the certified IDR entity is the date that the Secretary provides this notice to the parties.

(2) *Federal IDR process eligibility review—(i) Federal IDR process eligibility determination by certified IDR entity.* Unless the departmental eligibility review described in paragraph (c)(2)(ii) of this section applies, the selected certified IDR entity must review the information in the notice of IDR initiation, notice of IDR initiation response, and any additional information described in paragraph (c)(2)(iii) of this section, and make a final determination as to whether the item or service is a qualified IDR item or service, as defined in paragraph (a)(2)(xi) of this section, that is eligible for the Federal IDR process. The certified IDR entity must make such a determination and notify the Secretary and both parties no later than 5 business days after the date of final selection of the certified IDR entity. If the certified IDR entity determines that the item or service is not a qualified IDR item or service, the dispute will be closed, and the selected certified IDR entity will not take any action with regard to the dispute.

(ii) *Departmental eligibility review for Federal IDR process eligibility determinations.* When the conditions for the departmental eligibility review set forth in paragraph (c)(2)(ii)(A) of this section are met, the Secretary will conduct the eligibility review and make the eligibility determination instead of the certified IDR entity. If the Secretary determines that the item or service is not a qualified IDR item or service, the dispute will be closed, and the selected certified IDR entity will not take any action with regard to the dispute. If the dispute is found to be eligible, the Secretary will inform the preliminarily selected certified IDR entity of the dispute's eligibility so that it may conduct its conflict-of-interest assessment, and the dispute will otherwise continue through the Federal IDR process, including notification of the eligibility determination to the disputing parties by the preliminarily selected certified IDR entity.

(A) *Application of the departmental eligibility review.* The departmental eligibility review will apply when the Secretary determines that any of the extenuating circumstances described in paragraph (g)(1) of this section require application of the departmental eligibility review to facilitate timely payment determinations or the effective processing of disputes under the Federal IDR process.

(B) *Notification regarding applicability of the departmental eligibility review.* Before invoking the application of the departmental eligibility review, the Secretary will post advance public notification of the date on which the departmental eligibility review will take effect and the reasons for invoking the application of the departmental eligibility review. Before ending the application of the departmental eligibility review, the Secretary will post advance public notification of the date on which the departmental eligibility review will no longer be in effect and the reasons for ending the application of the departmental eligibility review.

(iii) *Request for additional information.* The Secretary or the selected certified IDR entity may request additional information from either party to a dispute at any time, including for the purpose of assessing whether a conflict of interest exists, conducting an eligibility determination, or making a payment determination.

(A) Upon request, a party must submit the additional information within 5 business days to the Secretary or the selected certified IDR entity, as applicable, through the Federal IDR portal. Following a request for additional information, the time period for the applicable stage of the Federal IDR process will be tolled until the earlier of the date either all of the requested information is provided or the 5-business-day period expires, and each subsequent timeframe in the Federal IDR process will be determined based on the date of completion of the stage of the Federal IDR process that was tolled for provision of the requested information.

(B) If a party fails to submit the additional information as required, the related determination, including the eligibility determination, conflict-of-interest review, or payment determination will be made without the requested information unless a good-cause extension of the 5-business-day period, as specified in paragraph (g)(1)(i) of this section, has been provided, and the party subsequently submits the additional information requested within the extended period.

(3) *Authority to continue negotiations or withdraw—(i) Authority to continue to negotiate.* If the parties to the Federal IDR process agree on an out-of-network rate for a qualified IDR item or service after providing the notice of IDR initiation to the Secretary required under paragraph (b)(2)(ii) of this section, but before the certified IDR entity has made its payment determination, the amount agreed to by the parties for the qualified IDR item or service will be treated as the out-of-network rate for the qualified IDR item or service. To the extent the amount exceeds the initial payment amount and any cost sharing paid or required to be paid by the participant or beneficiary, or there was an initial denial of payment, payment must be made directly by the plan or issuer to the nonparticipating provider, nonparticipating facility, or nonparticipating provider of air ambulance services not later than 30 business days after the agreement is reached. In no instance may either party seek additional payment from the participant or beneficiary, including in instances in which the out-of-network rate exceeds the qualifying payment amount. The initiating party must send a notification to the Secretary and to the certified IDR entity (if selected) electronically, through the Federal IDR portal, as soon as possible, but no later than 3 business days after the date of the agreement. The notification must include the dispute number, a statement of the out-of-network rate for the qualified IDR item or service, and signatures from authorized signatories for both parties.

(ii) *Withdrawals.* A dispute may be withdrawn from the Federal IDR process by the initiating party, the Secretary, or a certified IDR entity before a payment determination is made if one of the following conditions is met:

(A) The initiating party provides notification through the Federal IDR portal to the Secretary and the certified IDR entity (if selected) that both parties to the dispute agree to withdraw the dispute from the Federal IDR process without agreement on an out-of-network rate. The notification must include the dispute number, a statement about both parties' agreement to withdraw and signatures from authorized signatories for both parties.

(B) The initiating party provides a standard withdrawal request notice through the Federal IDR portal to the Secretary, the certified IDR entity (if selected), and the non-initiating party of its request to withdraw the dispute from the Federal IDR process and the non-initiating party notifies the Secretary, certified IDR entity (if selected), and the

initiating party through the Federal IDR portal of its agreement to withdraw from the Federal IDR process within 5 business days of the initiating party's request. If the non-initiating party fails to respond within 5 business days of the initiating party's request, the non-initiating party will be considered to have agreed to the withdrawal, and the dispute will be withdrawn.

(C) The certified IDR entity or Secretary cannot determine eligibility because both parties to the dispute are unresponsive to any requests for additional information to determine eligibility as described in paragraph (c)(2)(iii) of this section, or

(D) The certified IDR entity cannot make a payment determination because both parties to the dispute have failed to submit an offer as described in paragraph (c)(5)(i) of this section.

(4) *Treatment of batched qualified IDR items and services—(i) In general.* A certified IDR entity may consider up to 25 qualified IDR items and services jointly as part of one payment determination that is subject to the certified IDR entity fee for batched determinations only if the qualified IDR items and services meet the requirements of this paragraph (c)(4)(i):

* * * * *

(B) Payment for the qualified IDR items and services is required to be made by the same group health plan or health insurance issuer. For group or individual health insurance coverage, this requirement is satisfied if the same issuer is required to make payment for the qualified IDR items and services, even if the qualified IDR items and services relate to claims from different group health plans or individual market policies. For self-insured group health plans, this requirement is satisfied if the same self-insured group health plan is required to make payment for the qualified IDR items and services, including when the plan makes payments through a third party administrator; the requirement is not satisfied if multiple self-insured group health plans are required to make payments for the qualified IDR items and services, even if those group health plans make payments through the same third party administrator;

(C) The qualified IDR items and services meet any of the following criteria under which multiple qualified IDR items and services relate to the treatment of a similar condition and therefore are permitted to be considered jointly as a single payment determination for purposes of encouraging efficiencies (including minimizing costs) in the Federal IDR process:

(1) The qualified IDR items or services were furnished to a single patient during the same patient encounter. For purposes of this section, a single patient encounter is defined as a patient encounter on one or more consecutive days during which the qualified IDR items or services were furnished to the same patient and billed on the same claim form; or

(2) The qualified IDR items and services were furnished to one or more patients and were billed under the same service code or a comparable code under a different procedural coding system, such as Current Procedural Terminology (CPT) codes with modifiers, if applicable, Healthcare Common Procedure Coding System (HCPCS) codes with modifiers, if applicable, or Diagnosis-Related Group (DRG) codes with modifiers, if applicable; or

(3) For anesthesiology, radiology, pathology, and laboratory qualified IDR items and services, the qualified IDR items and services were furnished to one or more patients and were billed under service codes belonging to the same Category I CPT code range, as specified in guidance published by the Secretary; and

(D) All the qualified IDR items and services were furnished within the same 30-business-day period following the date on which the first item or service included in the batched determination was furnished and were the subjects of a 30-business-day open negotiation period that ended within 4 business days of IDR initiation, except as provided in paragraph (c)(5)(vii) of this section.

(ii) *Treatment of bundled payment arrangements.* Qualified IDR items and services that meet the definition of a bundled payment arrangement under § 2590.716–3 may be submitted and considered as a single payment determination, and the certified IDR entity must make a single payment determination for the multiple qualified IDR items and services included in the bundled payment arrangement. Bundled payment arrangements as defined in § 2590.716–3 and submitted under this paragraph (c)(4)(ii) are subject to the certified IDR entity fee for single determinations.

(5) * * *

(i) *Submission of offers.* Not later than 10 business days after the date of final selection of the certified IDR entity as described in paragraph (c)(1)(iv)(C) of this section (or not later than 10 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section, when the Secretary

determines that any of the extenuating circumstances described in paragraph (g)(1)(ii) of this section apply), the plan or issuer and the provider, facility, or provider of air ambulance services:

* * * * *

(ii) *Payment determination and notification.* Not later than 30 business days after the date of final selection of the certified IDR entity as described in paragraph (c)(1)(iv)(C) of this section (or not later than 30 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section, when the Secretary determines that any of the extenuating circumstances described in paragraph (g) of this section apply), the certified IDR entity must:

(A) * * *

(1) *Prevailing party.* In the case of single determinations, the party whose offer is selected by the certified IDR entity is considered the prevailing party. In the case of batched determinations, the party with the most determinations in its favor is considered the prevailing party; if each party prevails in an equal number of determinations, neither party will be considered the prevailing party, and the certified IDR entity fee will be split evenly between the parties.

(2) *Non-prevailing party.* In the case of single determinations, the party whose offer is not selected by the certified IDR entity is considered the non-prevailing party. In the case of batched determinations, the party with the fewest determinations in its favor is considered the non-prevailing party.

* * * * *

(vii) *Effects of determination.*

(A) * * *

(B) *Suspension of certain subsequent IDR requests.* In the case of a determination made by a certified IDR entity under paragraph (c)(5)(ii) of this section, the party that submitted the initial notification under paragraph (b)(2) of this section may not submit a subsequent notification involving the same other party with respect to a claim for the same item or service that was the subject of the initial notification during the 90-calendar-day period following the determination.

(C) *Subsequent submission of requests permitted.* If the end of the open negotiation period specified in paragraph (b)(1) of this section occurs during the 90-calendar-day suspension period regarding claims for the same item or service that were the subject of the initial notice of IDR determination as described in paragraph (c)(5)(vi) of this section, either party may initiate the Federal IDR process for those claims by submitting a notification as specified in

paragraph (b)(2) of this section during the 30-business-day period beginning on the day after the last day of the 90-calendar-day suspension period.

* * * * *

(d) *Costs of IDR process—(1) Certified IDR entity fee—(i) Timing of payment of certified IDR entity fee.* Each party to a dispute for which there is a final selection of the certified IDR entity and a determination that the dispute is eligible for the Federal IDR process in accordance with paragraph (c)(2) of this section must pay to the certified IDR entity the predetermined certified IDR entity fee charged by the certified IDR entity. The certified IDR entity fee must be paid no later than the date a party submits its offer to the certified IDR entity, in accordance with paragraph (c)(5)(i) of this section.

(ii) *Failure to timely pay certified IDR entity fee.* If a party fails to pay the certified IDR entity fee as specified in paragraph (d)(1)(i) of this section, that party's offer will not be considered received. Such party will continue to be responsible for payment of the certified IDR entity fee.

(iii) *Method of allocation of the certified IDR entity fee after a payment determination.* After making a payment determination, the certified IDR entity shall retain the certified IDR entity fee described under paragraph (d)(1)(i) of this section paid by the non-prevailing party as defined in paragraph (c)(5)(ii)(A)(2) of this section. The certified IDR entity must return the fee paid by the prevailing party, as defined in paragraph (c)(5)(ii)(A)(1) of this section, within 30 business days following the date of the certified IDR entity's payment determination. In the event of a batched dispute in which each party prevails in an equal number of determinations, the certified IDR entity fee will be split evenly between the parties. In that case, the certified IDR entity must return half the fee paid by each party within 30 business days following the date of the certified IDR entity's payment determination.

(iv) *Method of allocation of the certified IDR entity fee upon agreement or withdrawal after an eligibility determination.* For a dispute for which there is a final selection of the certified IDR entity and a determination that the dispute is eligible for the Federal IDR process in accordance with paragraph (c)(2) of this section, unless directed otherwise by both parties, the certified IDR entity is required to return half of each party's certified IDR entity fee within 30 business days of the date both parties notify the certified IDR entity that they have:

(A) Reached an agreement on an out-of-network rate for qualified IDR items or services before the certified IDR entity has made its payment determination, as described in paragraph (c)(3)(i) of this section; or

(B) Withdrawn the dispute before the certified IDR entity has made its payment determination, as described in paragraph (c)(3)(ii) of this section.

(v) *Method of allocation of the certified IDR entity fee upon agreement or withdrawal before an eligibility determination.* When the parties reach an agreement on an out-of-network rate or withdraw a dispute for which there is a final selection of the certified IDR entity, but for which no eligibility determination has yet been made, unless directed otherwise by both parties, the certified IDR entity is required to return each party's full certified IDR entity fee within 30 business days of the date both parties notify the certified IDR entity that they have agreed on an out-of-network rate or agreed to withdraw the dispute.

(2) *Administrative fee—(i) In general.* Each party to a dispute for which a certified IDR entity is selected under paragraph (c)(1) of this section must pay a non-refundable administrative fee to the Secretary for participating in the Federal IDR process.

(A) *Timing of payment of administrative fee.* The initiating party must pay the administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity as described in paragraph (c)(1)(iii) of this section. The non-initiating party must pay the administrative fee within 2 business days of the date the non-initiating party receives notice that an eligibility determination for the Federal IDR process has been reached by either the certified IDR entity or the Departments in accordance with paragraph (c)(2) of this section.

(B) *Agreements and withdrawals.* In the case of an agreement, as described in paragraph (c)(3)(i) of this section, or a withdrawal, as described in paragraph (c)(3)(ii) of this section, the administrative fee will not be returned to the parties if preliminary selection of the certified IDR entity has occurred, as described in paragraph (c)(1)(i) of this section; if not yet collected, the administrative fee must still be paid, except as provided in paragraph (d)(2)(i)(C) of this section for a dispute closed for nonpayment by an initiating party.

(C) *Failure to pay administrative fee.* If the initiating party fails to pay the administrative fee in accordance with paragraph (d)(2)(i)(A) of this section, the

dispute will be closed due to nonpayment and neither party will be responsible for the administrative fee. If the non-initiating party fails to pay the administrative fee in accordance with paragraph (d)(2)(i)(A) of this section, that party's offer will not be considered received and the non-initiating party will continue to be responsible for payment of the administrative fee.

(D) *Collection of unpaid fees.* Any party that fails to pay the administrative fee owed in accordance with paragraph (d)(2)(i)(A) of this section is obligated to pay the administrative fee otherwise due and owing, except as provided in paragraph (d)(2)(i)(C) of this section for a dispute closed for nonpayment by an initiating party. The Secretary will pursue collection from a party to a dispute of any administrative fee that is not timely paid pursuant to applicable debt collection authorities.

(ii) *Administrative fee amount.* The administrative fee amount and method of payment will be established through notice and comment rulemaking in a manner such that the total administrative fees paid for a year, including administrative fees reduced under paragraph (d)(2)(iii) of this section, are estimated to be equal to the projected amount of expenditures made by the Secretaries of the Treasury, Labor, and Health and Human Services for the year in carrying out the Federal IDR process.

(A) For disputes initiated on or after the later of the effective date of Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges final rules or January 1, 2024, the administrative fee amount is \$150 per party per dispute, which will remain in effect until changed by subsequent rulemaking.

(B) [Reserved]

(iii) *Reducing the administrative fee amount.* For disputes initiated on or after January 1, 2025—

(A) The Secretary may reduce the administrative fee for both parties in accordance with paragraph (d)(2)(iii)(C) of this section when the highest offer made by either party during open negotiation for the dispute is less than the threshold established in notice and comment rulemaking pursuant to paragraph (d)(2)(ii) of this section. For a dispute that satisfies the requirements for a reduced administrative fee in accordance with this paragraph and for which a determination has been made that the dispute is eligible for the Federal IDR process in accordance with paragraph (c)(2) of this section, the administrative fee amount may be reduced to 50 percent of the

administrative fee amount as described in paragraph (d)(2)(ii) of this section for each party to the dispute. For a dispute that satisfies the requirements for a reduced administrative fee in accordance with this paragraph and for which a determination has been made that the dispute is ineligible for the Federal IDR process in accordance with paragraph (c)(2) of this section, the administrative fee amount may be reduced to 50 percent of the administrative fee amount as described in paragraph (d)(2)(ii) of this section for the initiating party and to 20 percent of the administrative fee amount for the non-initiating party.

(B) The Secretary may reduce the administrative fee for a non-initiating party in accordance with paragraph (d)(2)(iii)(C) of this section when the dispute is determined to be ineligible for the Federal IDR process in accordance with paragraph (c)(2) of this section. For a dispute that satisfies the requirements for a reduced administrative fee in accordance with this paragraph, the administrative fee amount for the non-initiating party may be reduced to 20 percent of the administrative fee amount as described in paragraph (d)(2)(ii) of this section.

(C) The reduced administrative fee amounts provided for in paragraphs (d)(2)(iii)(A) and (d)(2)(iii)(B) of this section shall be established in notice and comment rulemaking and will remain in effect until changed by subsequent rulemaking, pursuant to paragraph (d)(2)(ii) of this section.

(e) * * *

(2) * * *

(vi) Meet appropriate indicators of fiscal integrity and stability by demonstrating that the certified IDR entity has a system of safeguards and controls in place to prevent and detect improper financial activities by its employees and agents to assure fiscal integrity and accountability for all certified IDR entity fees and administrative fees (if applicable) received, held, and disbursed and by submitting 3 years of financial statements or, if not available, other information to demonstrate fiscal stability of the certified IDR entity;

* * * * *

(viii) Have a procedure in place to retain the certified IDR entity fees described in paragraph (d)(1) of this section paid by both parties in a trust or escrow account and to return the certified IDR entity fee paid by the prevailing party or a portion of each party's certified IDR entity fee in the case of an agreement described in paragraph (c)(3)(i) of this section, a

withdrawal described in paragraph (c)(3)(ii) of this section, or a circumstance described under paragraph (d)(1)(iii) of this section, within 30 business days following the date of the determination;

(ix) Have a procedure in place to retain the administrative fees (if applicable) described in paragraph (d)(2) of this section and to remit the administrative fees to the Secretary in accordance with the timeframe and procedures set forth in guidance published by the Secretary;

* * * * *

(g) *Extension of time periods for extenuating circumstance*—(1) *In general.* The time periods specified in this section (other than the time for payment, if applicable, under paragraph (c)(5)(ix) of this section) may be extended in extenuating circumstances at the Secretary's discretion. Extenuating circumstances include, but are not limited to when:

(i) With respect to a specific dispute, the Secretary determines that the parties or certified IDR entity cannot meet applicable timeframes due to matters beyond the control of one or both parties or the certified IDR entity, or for other good cause. The certified IDR entity or either party may also submit a request for an extension due to extenuating circumstances to the Secretary through the Federal IDR portal. The requesting certified IDR entity or party must attest that it will take prompt action to ensure that the certified IDR entity's payment determination under this section may be made as soon as administratively practicable under the circumstances; or

(ii) The Secretary determines that the parties or certified IDR entity cannot meet applicable timeframes due to systematic delays in processing disputes under the Federal IDR process, such as an unforeseen volume of disputes or Federal IDR portal system failures. Extensions provided due to extenuating circumstances caused by an unforeseen volume of disputes will be applied to the timeframe for eligibility determinations under paragraph (c)(2) of this section. Extensions provided due to extenuating circumstances caused by systems failures within the Federal IDR portal will be applied to the Federal IDR process timeframe(s) determined relevant by the Secretary. The Secretary will post a public notice regarding any extensions of time periods pursuant to this paragraph (g)(1)(ii).

(A) *Timeframe following an extension to eligibility determination.* When an extension to the eligibility determination timeframe pursuant to

paragraph (g)(1)(ii) of this section is in effect, the start date of the subsequent timeframes in the Federal IDR process will be determined based on the date of completion of the eligibility determination by the certified IDR entity or the Secretary.

(1) *Submission of offers.* The parties must submit their offers and certified IDR entity fees to the certified IDR entity not later than 10 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section.

(2) *Payment Determination.* The certified IDR entity must make the payment determination and notification of the payment determination to the parties not later than 30 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section.

(B) *Timeframe following an extension to other timeframes in the Federal IDR process.* When an extension to any timeframe within the Federal IDR process, other than the eligibility timeframe, is in effect pursuant to paragraph (g)(1)(ii) of this section, the start date of each subsequent timeframe in the Federal IDR process will be determined based on the date of completion of the process for which the extension was granted.

(2) [Reserved]

(h) *Applicability date.* (1) Paragraph (a) of this section is applicable with respect to plan years beginning on or after January 1, 2022, except that the provisions regarding IDR entity certification at paragraphs (a) and (e) of this section are applicable beginning on October 7, 2021, and the revised definition for batched qualified IDR items and services at paragraph (a)(2)(i) of this section is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule.

(2) Paragraph (b) of this section is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule.

(3) Paragraph (c)(1) of this section, regarding the selection of a certified IDR entity, is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule, except that paragraphs (c)(1)(iv)(A)(1) through (3) of this section, regarding the conflict-of-interest standards, are applicable with respect to plan years beginning on or after January 1, 2022.

(4) Paragraph (c)(2) of this section, regarding the Federal IDR process eligibility review and paragraph (c)(3) of this section regarding the authority to continue negotiations or withdraw are applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule, and paragraph (c)(4) of this section regarding the treatment of batched and bundled qualified IDR items and services is applicable 90 days after the effective date of the rule.

(5) Paragraphs (c)(5)(i) and (ii), and (c)(5)(vii)(B) and (C) of this section regarding the deadlines for the submission of offers, payment determination and notification, suspension of certain subsequent IDR requests, and subsequent submission of requests submitted are applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule. Paragraphs (c)(5)(iii) and (iv) of this section regarding considerations in payment determinations and the related examples and paragraph (c)(5)(vi)(B) of this section regarding written decisions are applicable with respect to items or services furnished on or after October 25, 2022, for plan years beginning on or after January 1, 2022. Paragraphs (c)(5)(v) through (c)(5)(vi)(A), (c)(5)(vii)(A), and (c)(5)(viii) and (ix) are applicable with respect to plan years beginning on or after January 1, 2022.

(6) Paragraph (d) of this section regarding the costs of the IDR process is applicable to disputes initiated on or after January 1, 2025.

(7) Paragraph (e) of this section is applicable with respect to plan years beginning on or after January 1, 2022, except that the provisions regarding IDR entity certification at paragraphs (e)(1), (e)(2)(i) through (vi), (e)(2)(x) and (xi), and (e)(3) through (6) of this section are applicable beginning on October 7, 2021. Paragraphs (e)(2)(vi), (viii), and (ix) of this section regarding the certified IDR entity's controls to prevent and detect improper financial activities, and procedures to retain the certified IDR entity fee and administrative fee are applicable upon the effective date of the rule.

(8) Paragraph (f) of this section is applicable with respect to plan years beginning on or after January 1, 2022, except that paragraph (f)(1)(v)(F) of this section regarding reporting of information relating to the Federal IDR process is applicable with respect to items or services furnished on or after October 25, 2022, for plan years beginning on or after January 1, 2022.

(9) Paragraph (g) of this section regarding the extension of time periods for extenuating circumstances is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule.

(10) Until the relevant applicability date for the requirements of this section, plans, issuers, providers, facilities, providers of air ambulance services and certified IDR entities are required to continue to comply with the corresponding section of § 2590.716–8 in effect on October 25, 2022.

(i) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions of paragraphs (b)(1), (c)(2)(ii), (c)(4), (d)(2), and (g)(1) of this section are intended to be severable from one another, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in those paragraphs. The provisions in § 2590.716–8 are intended to be severable from the provisions in §§ 2590.716–6A, 2590.716–6, and 2590.716–9, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in §§ 2590.716–6A, 2590.716–6, and 2590.716–9.

■ 17. Section 2590.716–9 is added to subpart F to read as follows:

§ 2590.716–9 Federal Independent Dispute Resolution Registry of Group Health Plans, Health Insurance Issuers, and Federal Employees Health Benefits Carriers.

(a) *Establishment of Federal independent dispute resolution registry.* The Secretary, jointly with the Secretary of the Treasury and the Secretary of Health and Human Services, will establish a Federal IDR registry consisting of the information described in paragraph (b)(2) of this section and will assign a registration number for each group health plan, health insurance issuer offering group or individual health insurance coverage, and Federal Employees Health Benefits (FEHB) Program carrier. The information contained in the registry will be made available to parties seeking to initiate an open negotiation or a

dispute through the Federal IDR portal, and will be searchable, including by registration number.

(b) *Federal IDR registration.*—(1) *Registration requirement.* Each group health plan and health insurance issuer offering group health insurance coverage subject to the Federal IDR process must register with the Federal IDR registry as specified by the Secretary in guidance. Initial registration must be completed by the later of the date that is 30 business days after the effective date of the final rule, the date that is 30 business days after the registry becomes available, or the date the group health plan or health insurance issuer begins offering a group health plan or health insurance coverage subject to the Federal IDR process.

(2) *Required data elements.* Group health plans and health insurance issuers offering group health insurance coverage subject to the registration requirement must include the following information with their registration:

(i) The legal business name (if any) of the group health plan, or issuer, and, if applicable, the legal business name of the group health plan sponsor;

(ii) Whether the plan or coverage is a self- or fully-insured group health plan subject to ERISA;

(iii) The State(s) in which the plan or coverage is subject to a specified State law, as defined in § 2590.716–3 for any items or services for which the protections of §§ 2590.716–4, 2590.716–5, and 2590.717–1 apply;

(iv) The State(s) in which the plan or coverage is subject to an All-Payer Model Agreement under section 1115A of the Social Security Act for any items or services to which the protections in §§ 2590.716–4, 2590.716–5, and 2590.717–1 apply;

(v) For self-insured group health plans not otherwise subject to State law, any State(s) in which the group health plan has properly effectuated an election to opt in to a specified State law as defined in § 2590.716–3, if that State allows a plan not otherwise subject to the State law to opt-in;

(vi) Contact information, including a telephone number and email address, for the appropriate person or office to initiate open negotiations for purposes of determining an amount of payment (including cost sharing) for such item or service;

(vii) The 14-digit Health Insurance Oversight System (HIOS) identifier; or if the 14-digit HIOS identifier has not been assigned, the 5-digit HIOS identifier; or if no HIOS identifier is available, the plan's or the plan sponsor's Employer Identification Number (EIN) and the

plan's plan number (PN), if a PN is available;

(viii) Additional information needed to identify the plan or issuer and the applicable Federal and State requirements for determining appropriate out-of-network payment rates for items or services to which the protections against balance billing in this part apply, as specified by the Secretary in guidance; and

(ix) Additional information needed for purposes of administrative fee collection, as specified by the Secretary in guidance.

(3) *Updating disclosures.* A plan or issuer must timely report to the Secretary changes to the information required under this section within 30 calendar days after the information changes. A plan or issuer must confirm the accuracy of its registration annually in the fourth quarter of each calendar year.

(4) *Third party authority.* The requirements of paragraphs (b)(1) through (3) of this section may be performed by a third party administrator or service provider with authority to act on behalf of the group health plan or health insurance issuer offering group health insurance coverage subject to the Federal IDR process. If the registration requirements are performed by such third party administrator or service provider the group health plan or health insurance issuer offering group or individual health insurance coverage must require that such third party administrator or service provider clearly delineate each group health plan or health insurance issuer offering group health insurance coverage for which it has authority to act. If such third party administrator or service provider fails to provide the information in compliance with the requirements of paragraphs (b)(1) through (3) of this section the plan or issuer will be in violation of the requirements of this section.

(c) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions in § 2590.716–9 are intended to be severable from the provisions in §§ 2590.716–6A, 2590.716–6, and 2590.716–8, from any grant of forbearance from removal

resulting from this subpart, and from any provision referenced in §§ 2590.716–6A, 2590.716–6, and 2590.716–8.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

For the reasons stated in the preamble, the Department of Health and Human Services proposes to amend 45 CFR part 149 as set forth below:

PART 149—SURPRISE BILLING AND TRANSPARENCY REQUIREMENTS

■ 18. The authority citation for part 149 continues to read as follows:

Authority: 42 U.S.C. 300gg–92 and 300gg–111 through 300gg–139, as amended.

Subpart A—General Provisions

■ 19. Section 149.30 is amended by adding the definition of “Bundled payment arrangement” in alphabetical order to read as follows:

§ 149.30 Definitions.

* * * * *

Bundled payment arrangement means an arrangement under which—

(1) A provider, facility, or provider of air ambulance services bills for multiple items or services furnished to a single patient under a single service code that represents multiple items or services (for example, a Diagnosis-Related Group (DRG) code); or

(2) A plan or issuer makes an initial payment or notice of denial of payment to a provider, facility, or provider of air ambulance services under a single service code that represents multiple items or services furnished to a single patient (for example, a DRG code).

* * * * *

Subpart B—Requirements Relating to Health Care Access

■ 20. Section 149.100 is added to subpart B to read as follows:

§ 149.100 Use of claim adjustment reason codes and remittance advice remark codes.

(a) *In general.* When providing any paper or electronic remittance advice to an entity that does not have a contractual relationship directly or indirectly with a group health plan or a health insurance issuer offering group or individual health insurance coverage with respect to the furnishing of the item or service under the plan or coverage in response to a claim for payment for health care items and services furnished by that entity, the plan or issuer must use claim adjustment reason codes (CARCs) and remittance advice remark codes (RARCs) (see 45 CFR 162.1602 and

162.1603) as specified in guidance issued by the Secretaries of the Treasury, Labor, and Health and Human Services, or as required under any applicable adopted standards and operating rules under 45 CFR part 162, to communicate information related to whether the claim is or is not subject to the provisions of this subpart and subparts E and F of this part.

(b) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions in § 149.100 are intended to be severable from the provisions in §§ 149.140, 149.510, and 149.530, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in §§ 149.140, 149.510, and 149.530.

■ 21. Section 149.140 is amended by:

- a. Revising paragraphs (d) introductory text and (d)(1)(iv);
- b. Redesignating paragraph (d)(1)(v) as paragraph (d)(1)(vi);
- c. Adding a new paragraph (d)(1)(v);
- d. Revising paragraph (d)(2) introductory text; and
- e. Adding paragraph (h).

The revisions and additions read as follows:

§ 149.140 Methodology for calculating qualifying payment amount.

* * * * *

(d) *Information to be shared about the qualifying payment amount.* In cases in which the recognized amount, with respect to an item or service furnished by a nonparticipating provider or nonparticipating emergency facility, is the qualifying payment amount or the amount billed by the provider or facility, or if the amount on which cost sharing is based with respect to air ambulance services furnished by a nonparticipating provider of air ambulance services is the qualifying payment amount or the amount billed by the provider of air ambulance services, the plan or issuer must provide to the provider, facility, or provider of air ambulance services, as applicable, in writing, in paper or electronic form—

(1) * * *

(iv) A statement that—

(A) If the provider, facility, or provider of air ambulance services, as

applicable, wishes to initiate a 30-business-day open negotiation period for purposes of determining the out-of-network rate, the provider, facility, or provider of air ambulance services must:

(1) Contact the appropriate person or office to initiate open negotiation within 30 business days of receiving the initial payment or notice of denial of payment, and

(2) For disclosures required to be provided on or after [DATE 90 DAYS AFTER PUBLICATION OF FINAL REGULATIONS IN THE FEDERAL REGISTER] and once the open negotiation notice can be submitted through the Federal IDR portal, notify the Secretary as described under § 149.510(b)(1)(i); and

(B) If the 30-business-day open negotiation period does not result in an agreement on the amount of payment the provider, facility, or provider of air ambulance services may generally initiate the Federal IDR process within 4 business days after the end of the open negotiation period;

(v) For disclosures required to be provided on or after [DATE 90 DAYS AFTER PUBLICATION OF FINAL REGULATIONS IN THE FEDERAL REGISTER], the legal business name of the group health plan (if any) or issuer, the legal business name of the plan sponsor (if applicable), and the registration number assigned under § 149.530, if the plan or issuer is registered under § 149.530.

* * * * *

(2) In a timely manner upon the request of the provider, facility, or provider of air ambulance services:

* * * * *

(h) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions in § 149.140 are intended to be severable from the provisions in §§ 149.100, 149.510, and 149.530, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in §§ 149.100, 149.510, and 149.530.

■ 22. Section 149.510 is amended by:

- a. Revising paragraphs (a)(2)(i), (b), and (c)(1);

- b. Redesignating paragraphs (c)(2) through (4) as paragraphs (c)(3) through (5), respectively;
- c. Adding a new paragraph (c)(2);
- d. Revising newly redesignated paragraphs (c)(3), (c)(4)(i) introductory text, (c)(4)(i)(B) through (D), (c)(4)(ii), (c)(5)(i) introductory text, (c)(5)(ii) introductory text;
- e. In newly redesignated paragraphs (c)(5)(ii)(A) and (B), removing the reference to “(c)(4)” and adding in its place “(c)(5)”;
- f. Adding paragraphs (c)(5)(ii)(A)(1) and (2);
- g. Adding paragraphs (c)(5)(vii)(B) and (C);
- h. Revising paragraphs (d), (e)(2)(vi), (viii), and (ix), (g), and (h); and
- i. Adding paragraph (i).

The revisions and additions read as follows:

§ 149.510 Independent dispute resolution process.

(a) * * *

(2) * * *

(i) *Batched qualified IDR items and services* means multiple qualified IDR items or services that are considered jointly as part of one payment determination by a certified IDR entity for purposes of the Federal IDR process in accordance with paragraph (c)(4) of this section.

* * * * *

(b) *Determination of payment amount through open negotiation and initiation of the Federal IDR process*—(1) *Determination of payment amount through open negotiation*—(i) *In general.* With respect to an item or service that meets the requirements of paragraph (a)(2)(xi)(A) of this section, the provider, facility, or provider of air ambulance services, or the group health plan or health insurance issuer offering group or individual health insurance coverage may, during the 30-business-day period beginning on the day the provider, facility, or provider of air ambulance services receives an initial payment or notice of denial of payment regarding the item or service, initiate an open negotiation period for purposes of determining the out-of-network rate for such item or service. To initiate the open negotiation period, a party must submit a written open negotiation notice with the content specified in paragraph (b)(1)(ii) of this section to the other party and to the Secretary in the manner specified in paragraph (b)(3) of this section. The 30-business-day open negotiation period begins on the day on which the party first submits the open negotiation notice and the remittance advice documentation specified in paragraph (b)(1)(ii)(A)(12) of this section

to the other party and the Secretary. The party in receipt of the open negotiation notice must provide to the other party and to the Secretary in the manner specified in paragraph (b)(3) of this section as soon as practicable, but no later than the 15th business day of the 30-business-day open negotiation period, a written notice and supporting documentation in response to the open negotiation notice, as specified in paragraph (b)(1)(iii)(A) of this section.

(ii) *Open negotiation notice*—(A) *Content.* The open negotiation notice must include, with respect to the item or service that is the subject of the open negotiation notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address) as provided with the claim form submitted by the provider, facility, or air ambulance provider to the plan or issuer, and the National Provider Identifier (NPI);

(2) Information sufficient to identify the plan or issuer, including the plan’s or issuer’s registration number, as required under § 149.530, if the plan or issuer is registered under § 149.530, or an attestation from the party submitting the open negotiation notice that the plan or issuer was not registered prior to the date it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the party submitting the open negotiation notice is a plan or issuer, the plan type (for example, self-insured or fully-insured);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the party submitting the open negotiation notice, and an attestation that the third party has the authority to act on behalf of the party it represents in the open negotiation;

(4) Information sufficient to identify the item or service, including: the date(s) the item or service was furnished and, if the party submitting the open negotiation notice is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for the item or service from the plan or issuer; the type of item

or service (specifically, whether the item or service is an emergency service as defined in § 149.110(c)(2)(i) or (ii), a non-emergency service as described in § 149.120(b), or an air ambulance service as defined in § 149.30); whether the service is a professional service or facility-based service; the State where the item or service was furnished; the claim number; the service code; and information to identify the location where the item or service was furnished (such as, place of service code or bill type code);

(5) The initial payment amount (including \$0 if, for example, payment is denied);

(6) The qualifying payment amount, if provided with the initial payment or notice of denial of payment or if the party submitting the open negotiation notice is a plan or issuer;

(7) An offer of an out-of-network rate for each item or service;

(8) If the party submitting the open negotiation notice is a plan or issuer, the amount of cost sharing imposed for the item or service, if any;

(9) If the party submitting the open negotiation notice is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at § 149.410(b) or § 149.420(c) through (i);

(10) A statement that the provider, facility, or provider of air ambulance services was a nonparticipating provider, nonparticipating emergency facility, or nonparticipating provider of air ambulance services on the date the item or service was furnished;

(11) General information listed in the standard open negotiation notice developed by the Secretary pursuant to paragraph (b)(3) of this section describing the open negotiation period and the Federal IDR process (including a description of the purpose of the open negotiation period and Federal IDR process and key deadlines in the open negotiation period and Federal IDR process); and

(12) A copy of the initial payment or notice of denial of payment or other remittance advice that is required to include the disclosures under § 149.140(d)(1), with respect to the item or service.

(B) [Reserved]

(iii) *Open negotiation response notice*—(A) *Content.* The response to the open negotiation notice must include, with respect to the item or service that is the subject of the open negotiation response notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air

ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address) as provided with the claim form submitted by the provider, facility, or provider of air ambulance services to the plan or issuer, and the NPI;

(2) Information sufficient to identify the plan or issuer, including the plan's or issuer's registration number, as required under § 149.530 if the plan or issuer is registered under § 149.530, or an attestation from the party submitting the open negotiation response notice that the plan or issuer was not registered prior to the date it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the party submitting the open negotiation response notice is a plan or issuer, the plan type (for example, self-insured or fully-insured);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the party submitting the open negotiation response notice, and an attestation that the third party has the authority to act on behalf of the party it represents in the open negotiation;

(4) Information sufficient to identify the item or service included in the open negotiation notice, including the date(s) the item or service was furnished, and if the party submitting the open negotiation response notice is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer, and the claim number;

(5) If the party submitting the open negotiation response notice is a plan or issuer, a statement as to whether it agrees that the initial payment amount (including \$0 if, for example, payment is denied) and the qualifying payment amount reflected in the open negotiation notice accurately reflect the initial payment amount and qualifying payment amount disclosed with the initial payment for the item or service, and if not, or if the open negotiation notice indicates that the initial payment amount or qualifying payment amount was not communicated by the plan or issuer with the initial payment or notice of denial of payment or other remittance advice, the initial payment amount

(including \$0 if, for example, payment is denied) and/or qualifying payment amount it believes to be correct, and documentation to support the statement (for example, the remittance advice confirming the qualifying payment amount);

(6) If the party submitting the open negotiation response notice is a plan or issuer, the amount of cost sharing imposed for the item or service, if any;

(7) A counteroffer for an out-of-network rate for each item or service or an acceptance of the other party's offer;

(8) If the party submitting the open negotiation response notice is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at § 149.410(b) or § 149.420(c) through (i);

(9) With respect to each item or service, either a statement and supporting documentation that explains why the item or service is not subject to the Federal IDR process or a statement agreeing that the item or service is subject to the Federal IDR process;

(10) A statement as to whether any of the information provided in the open negotiation notice is inaccurate and the basis for the statement, as well as supporting documentation; and

(11) A statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the party submitting the open negotiation notice under paragraph (b)(1)(ii)(A)(12) of this section is accurate, and if inaccurate, a copy of the accurate initial payment or notice of denial of payment or other remittance advice required to include the disclosures under § 149.140(d)(1), with respect to the item or service.

(B) [Reserved]

(2) *Initiating the Federal IDR process*—(i) *In general.* Either party may initiate the Federal IDR process with respect to a qualified IDR item or service for which the parties do not agree upon an out-of-network rate by the last day of the open negotiation period provided for under paragraph (b)(1) of this section. To initiate the Federal IDR process, a party (the initiating party) must submit a written notice of IDR initiation, consistent with paragraph (b)(2)(ii) of this section, to the other party to the dispute (the non-initiating party), and to the Secretary in the manner specified in paragraph (b)(3) of this section, during the 4-business-day period beginning on the first business day after the last day of the open negotiation period (unless it is otherwise required to be submitted in the timeframe specified in paragraph (c)(5)(vii)(C) of this section). The date of

IDR initiation is the date that the Secretary receives the notice of IDR initiation described in paragraph (b)(2)(ii) of this section.

(A) *Exception for items and services provided by certain nonparticipating providers and facilities.* A party may not initiate the Federal IDR process with respect to an item or service if, with respect to that item or service, the party knows (or reasonably should have known) that the provider or facility provided notice and received consent under §§ 149.410(b) or 149.420(c) through (i).

(B) [Reserved]

(ii) *Notice of IDR initiation*—(A) *Content.* The notice of IDR initiation must include, with respect to the item or service that is the subject of the notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address), and the NPI; and if the initiating party is a provider, facility, or provider of air ambulance services, the Tax Identification Number (TIN);

(2) Information sufficient to identify the plan or issuer, including the plan's or issuer's registration number, as required under § 149.530 if the plan or issuer is registered under § 149.530, or an attestation from the initiating party that the plan or issuer was not registered prior to the date that it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the initiating party is a plan or issuer, the plan type (for example, self-insured or fully-insured) and TIN (or, in the case of a plan that does not have a TIN, the TIN of the plan sponsor);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the initiating party, and an attestation that the third party has the authority to act on behalf of the party it represents in the Federal IDR process;

(4) Information sufficient to identify whether the dispute being initiated includes batched or bundled qualified IDR items or services as described in paragraph (c)(4) of this section;

(5) Information sufficient to identify the qualified IDR item or service that is the subject of the notice of IDR initiation, including the date(s) the

qualified IDR item or service was furnished; if the initiating party is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer; the date the open negotiation period under paragraph (b)(1) of this section began; the type of item or service (specifically, whether the qualified IDR item or service is an emergency service as defined in § 149.110(c)(2)(i) or (ii), a non-emergency service as described in § 149.120(b), or an air ambulance service as defined in § 149.30); whether the service is a professional service or facility-based service; the State where the item or service was furnished; the claim number; the service code; and information to identify the location the item or service was furnished (including place of service code or bill type code);

(6) The initial payment amount (including \$0 if, for example, payment is denied);

(7) The qualifying payment amount, if provided with the initial payment or notice of denial of payment or if the initiating party is a plan or issuer;

(8) If the initiating party is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at 45 CFR 149.410(b) or 149.420(c) through (i);

(9) A statement that the provider, facility, or provider of air ambulance services was a nonparticipating provider, nonparticipating emergency facility, or nonparticipating provider of air ambulance services on the date the item or service was furnished;

(10) Attestation that the item or service under dispute is a qualified IDR item or service, and the basis for the attestation;

(11) General information listed in the standard notice of IDR initiation developed by the Secretary pursuant to paragraph (b)(3) of this section describing the Federal IDR process (including a description of the purpose of the Federal IDR process and key deadlines in the Federal IDR process);

(12) A copy of the initial payment or notice of denial of payment or other remittance advice that is required to include the disclosures under § 149.140(d)(1), with respect to the item or service;

(13) Preferred certified IDR entity; and

(14) A statement describing the key aspects of the claim, such as patient acuity or level of training of the provider, facility, or provider of air ambulance services that furnished the

qualified IDR item or service, discussed by the parties during open negotiation that relate to the payment for the disputed claim, whether the reasons for initiating the Federal IDR process are different from the aspects of the claim discussed during the open negotiation period, and an explanation of why the party is initiating the Federal IDR process, including any of the permissible considerations described in §§ 149.510(c)(5)(iii) and 149.520(b)(2) that serve as the party's basis for initiating the Federal IDR process.

(B) [Reserved]

(iii) *Notice of IDR initiation response.* The non-initiating party must provide to the initiating party and to the Secretary in the manner specified in paragraph (b)(3) of this section within 3 business days after the date of IDR initiation, a written notice and supporting documentation in response to the notice of IDR initiation, as specified in paragraph (b)(2)(iii)(A) of this section.

(A) *Content.* The notice of IDR initiation response must include, with respect to the item or service that is the subject of the notice, information about the item or service and the parties including:

(1) Information sufficient to identify the provider, facility, or provider of air ambulance services, including the name and current contact information (including the legal business name, email address, phone number, and mailing address), and the NPI; and if the non-initiating party is a provider, facility, or provider of air ambulance services, the TIN;

(2) Information sufficient to identify the plan or issuer, including the plan's or issuer's registration number, as required under § 149.530 if the plan or issuer is registered under § 149.530 or an attestation from the non-initiating party that the plan or issuer was not registered prior to the date that it submitted the notice; the legal business name of the plan or issuer, as well as the current contact information (name, email address, phone number, and mailing address) of the plan or issuer as provided with the initial payment or notice of denial of payment; and if the non-initiating party is a plan or issuer, the plan type (for example, self-insured or fully-insured) and TIN (or, in the case of a plan that does not have a TIN, the TIN of the plan sponsor);

(3) The name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the non-initiating party, and an attestation that the third party has the authority to act on behalf of the

party it represents in the Federal IDR process;

(4) Information sufficient to identify each item or service included in the notice of IDR initiation, including the date(s) the item or service was furnished. If the non-initiating party is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer, and the claim number;

(5) If the non-initiating party is a plan or issuer, a statement as to whether the non-initiating party agrees that the initial payment (including \$0 if, for example, payment is denied) and the qualifying payment amount reflected in the notice of IDR initiation is accurate for the item or service that is the subject of the dispute, and if not, the initial payment amount (including \$0 if, for example, payment is denied) and/or qualifying payment amount it believes to be correct, and documentation to support the statement (for example, the remittance advice confirming the qualifying payment amount);

(6) If the non-initiating party is a plan or issuer, the amount of cost sharing imposed for the item or service, if any;

(7) If the non-initiating party is a provider or facility, a statement that the items and services do not qualify for the notice and consent exception described at § 149.410(b) or § 149.420(c) through (i);

(8) With respect to each item or service that is the subject of the dispute, either an attestation that the item or service is a qualified IDR item or service, or for each item or service that the non-initiating party asserts is not a qualified IDR item or service, an explanation and documentation to support the statement;

(9) A statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the initiating party under paragraph (b)(2)(ii)(A)(12) of this section is accurate, and if inaccurate, a copy of the accurate initial payment or notice of denial of payment or other remittance advice required to include the disclosures under § 149.140(d)(1), with respect to the item or service;

(10) A statement as to whether any of the information provided in the notice of IDR initiation is inaccurate and the basis for the statement as well as any supporting documentation; and

(11) A statement as to whether the non-initiating party agrees or objects to the initiating party's preferred certified IDR entity. If the non-initiating party objects to the initiating party's preferred

certified IDR entity, the notice of IDR initiation response must include the name of an alternative preferred certified IDR entity and, if applicable, an explanation of any conflict of interest with the initiating party's preferred certified IDR entity.

(B) [Reserved].

(3) *Manner.* A party furnishing notices as required under paragraphs (b)(1)(ii) and (iii), and (b)(2)(ii) and (iii) of this section must furnish the notices using the standard forms developed by the Secretary and must furnish the notices and supporting documentation to the other party and the Secretary, through the Federal IDR portal.

(c) * * *

(1) *Selection of certified IDR entity—*
(i) *Preliminary selection of the certified IDR entity.* Within 3 business days after the date of IDR initiation, the non-initiating party must agree or object to the preferred certified IDR entity identified in the notice of IDR initiation, as described in paragraph (b)(2)(iii)(A)(11) of this section.

(A) If the non-initiating party agrees, or fails to object, to the selection of the initiating party's preferred certified IDR entity in the manner described in paragraph (b)(2)(iii)(A)(11) of this section and within the timeframe specified in paragraph (c)(1)(i) of this section, the initiating party's preferred certified IDR entity will be considered jointly selected on the third business day after the date of IDR initiation.

(B) If the non-initiating party objects to the selection of the initiating party's preferred certified IDR entity by designating an alternative preferred certified IDR entity in the manner described in paragraph (b)(2)(iii)(A)(11) of this section and within the timeframe specified in paragraph (c)(1)(i) of this section, the initiating party may then agree or object to the non-initiating party's alternative preferred certified IDR entity by submitting the notice of certified IDR entity selection in the manner specified in paragraph (c)(1)(i)(D) of this section. If the initiating party agrees to the non-initiating party's alternative preferred certified IDR entity within 3 business days after the date of IDR initiation, or if the non-initiating party submits the notice of IDR initiation response on or before the second business day after the date of IDR initiation and the initiating party fails to respond within 3 business days after the date of IDR initiation, the alternative preferred certified IDR entity will be considered jointly selected by the parties. If the non-initiating party submits the notice of IDR initiation response on the third business day after the date of IDR initiation and the

initiating party does not agree on the same day, selection will proceed under paragraph (c)(1)(i)(C) of this section.

(C) If a certified IDR entity is not jointly selected under paragraph (c)(1)(i)(A) or (B) of this section, either party may select an alternative preferred certified IDR entity by submitting the notice of certified IDR entity selection in the manner specified in paragraph (c)(1)(i)(D) of this section, until the earlier of the date that the parties agree on the alternative preferred certified IDR entity or the deadline for joint selection, which is 3 business days after the date of IDR initiation. Once a party submits a notice of certified IDR entity selection, it may not submit another notice of certified IDR entity selection until after it receives a responding notice of certified IDR entity selection from the other party.

(1) If a party submits a notice of certified IDR entity selection to the other party on the first or second day after the date of IDR initiation and the party in receipt of the notice agrees or fails to object to the alternative preferred certified IDR entity by the third business day after the date of IDR initiation, the alternative preferred certified IDR entity will be considered jointly selected by the parties.

(2) If a party submits a notice of certified IDR entity selection to the other party on the third business day after the date of IDR initiation and the party last in receipt of the notice agrees to the alternative preferred certified IDR entity on the same day, the alternative preferred certified IDR entity will be considered jointly selected by the parties.

(3) If a party submits a notice of certified IDR entity selection to the other party on the third business day after the date of IDR initiation and the party last in receipt of the notice does not agree to the alternative preferred certified IDR entity on the same day, the parties will have failed to jointly select a certified IDR entity.

(D) To notify the other party and the Secretary of an agreement or objection to an alternative preferred certified IDR entity under paragraph (c)(1)(i)(C) of this section, a party must submit the notice of certified IDR entity selection. The party must furnish the notice of certified IDR entity selection using the standard form developed by the Secretary and must furnish the notice to the other party and the Secretary through the Federal IDR portal within 3 business days after the date of IDR initiation. However, in the event the conditions under paragraph (c)(1)(ii) of this section apply, the party may notify the Secretary of an agreement or

objection to an alternative preferred certified IDR entity in accordance with paragraph (c)(1)(ii) of this section. The notice of certified IDR entity selection must include a statement indicating the party's agreement with or objection to the other party's alternative preferred certified IDR entity and, if applicable, an explanation of any conflict of interest with the alternative preferred certified IDR entity. If the party in receipt of a notice of certified IDR entity selection objects to the other party's alternative preferred certified IDR entity and the party submits a notice of certified IDR entity selection by the end of the third business day after the date of IDR initiation, that party's notice of certified IDR entity selection reflecting the objection must include the name of another alternative preferred certified IDR entity.

(ii) *Failure to jointly select a certified IDR entity.* If the parties fail to jointly select a certified IDR entity within 3 business days after the date of IDR initiation, the Secretary will select a certified IDR entity. The parties will have failed to jointly select a certified IDR entity if, by the end of the third business day after the date of IDR initiation, the party last in receipt of the notice of IDR initiation response or the notice of certified IDR entity selection has objected to the other party's alternative preferred certified IDR entity, or if the notice of IDR initiation response or the notice of certified IDR entity selection is submitted to the other party on the third business day after the date of IDR initiation and the party in receipt of the notice does not agree to the alternative preferred certified IDR entity within 3 business days after the date of IDR initiation.

(A) In selecting the certified IDR entity, the Secretary will first confirm whether a party submitted the notice of IDR initiation response or the notice of certified IDR entity selection with an alternative preferred certified IDR entity on the third business day after the date of IDR initiation without the other party's agreement to the selection. If either notice was provided on the third business day after the date of IDR initiation without the other party's agreement to the alternative preferred certified IDR entity by the end of third business day after the date of IDR initiation, the Secretary will provide the party last in receipt of the applicable notice 2 additional business days to agree or object to the other party's alternative preferred certified IDR entity selection.

(1) If the party last in receipt of the notice of IDR initiation response or the notice of certified IDR entity selection

agrees with the other party's alternative preferred certified IDR entity and notifies the Secretary of the agreement or fails to notify the Secretary of its objection in the Federal IDR portal by the fifth business day after the date of IDR initiation, the Secretary will select the final alternative preferred certified IDR entity selected in the applicable notice. In disputes where the applicable notice was submitted on the third business day after the date of IDR initiation, the party last in receipt of the notice will not be allowed to select another alternative preferred certified IDR entity.

(2) If the party notifies the Secretary of its objection to the alternative preferred certified IDR entity by the fifth business day after the date of IDR initiation, the Secretary will proceed with the random selection of the certified IDR entity from among the certified IDR entities (other than the preferred certified IDR entity and any alternative preferred certified IDR entity previously selected in such dispute by a party, unless there is no other certified IDR entity available to select) that charge a fee within the allowed range of certified IDR entity fees on the sixth business day after the date of IDR initiation. If there are insufficient certified IDR entities that charge a fee within the allowed range of certified IDR entity fees available to arbitrate the dispute, the Secretary will select a certified IDR entity that has received approval, as described in paragraph (e)(2)(vii)(B) of this section, to charge a fee outside of the allowed range of certified IDR entity fees. In either case, the Secretary will notify the parties of the preliminary selection of the certified IDR entity not later than 6 business days after the date of IDR initiation.

(B) [Reserved].

(iii) *Date of preliminary selection of the certified IDR entity.* The date of preliminary selection of the certified IDR entity will be:

(A) Three business days after the date of IDR initiation if the parties jointly selected a certified IDR entity, as specified in paragraph (c)(1)(i) of this section; or

(B) Six business days after the date of IDR initiation, if the parties fail to jointly select a certified IDR entity as specified in paragraph (c)(1)(ii) of this section.

(iv) *Final selection of the certified IDR entity—(A) Conflict-of-interest review.* The certified IDR entity preliminarily selected for a dispute must review the selection. The selection of the certified IDR entity will be finalized only if the certified IDR entity attests to the

Secretary that it meets the following requirements:

(1) The certified IDR entity does not have a conflict of interest as defined in paragraph (a)(2)(iv) of this section;

(2) The certified IDR entity will only assign personnel to a dispute and make decisions regarding hiring, compensation, termination, promotion, or other similar matters related to personnel assigned to the dispute in a manner that is not based upon the likelihood that the assigned personnel will support a particular party to the dispute; and

(3) The certified IDR entity will not assign any personnel to a dispute who would have any conflicts of interest, as defined in paragraph (a)(2)(iv) of this section, regarding any party to the dispute or whose relationship with a party within the 1 year immediately preceding the assignment to the dispute would violate the restrictions on aiding or advising a former employer or principal in a manner similar to the restrictions set forth in 18 U.S.C. 207(b).

(B) *Failure to meet conflict-of-interest requirements.* If the certified IDR entity notifies the Secretary within 3 business days of the date of preliminary selection of the certified IDR entity that it does not meet the requirements of paragraphs (c)(1)(iv)(A)(1) through (3) of this section or if the certified IDR entity does not respond within 3 business days after the date of preliminary selection of the certified IDR entity, the Secretary will randomly select another certified IDR entity consistent with paragraph (c)(1)(ii) of this section. The Secretary will notify the parties of the new randomly preliminarily selected certified IDR entity no later than 1 business day after the previously selected certified IDR entity notifies the Secretary that it has a conflict of interest or, if the previously selected certified IDR entity fails to respond within 3 business days after the date of preliminary selection of the certified IDR entity, no later than 1 business day after the end of the 3-business-day period.

(C) *Date of final selection of the certified IDR entity.* If the certified IDR entity that has been preliminarily selected attests within 3 business days that it meets the requirements of paragraphs (c)(1)(iv)(A)(1) through (3) of this section, the Secretary will notify the parties of final selection of the certified IDR entity no later than 1 business day after the certified IDR entity attests that it meets the conflict-of-interest requirements. The date of final selection of the certified IDR entity is the date that the Secretary provides this notice to the parties.

(2) *Federal IDR process eligibility review—(i) Federal IDR process eligibility determination by certified IDR entity.* Unless the departmental eligibility review described in paragraph (c)(2)(ii) of this section applies, the selected certified IDR entity must review the information in the notice of IDR initiation, notice of IDR initiation response, and any additional information described in paragraph (c)(2)(iii) of this section, and make a final determination as to whether the item or service is a qualified IDR item or service, as defined in paragraph (a)(2)(xi) of this section, that is eligible for the Federal IDR process. The certified IDR entity must make such a determination and notify the Secretary and both parties no later than 5 business days after the date of final selection of the certified IDR entity. If the certified IDR entity determines that the item or service is not a qualified IDR item or service, the dispute will be closed, and the selected certified IDR entity will not take any action with regard to the dispute.

(ii) *Departmental eligibility review for Federal IDR process eligibility determinations.* When the conditions for the departmental eligibility review set forth in paragraph (c)(2)(ii)(A) of this section are met, the Secretary will conduct the eligibility review and make the eligibility determination instead of the certified IDR entity. If the Secretary determines that the item or service is not a qualified IDR item or service, the dispute will be closed, and the selected certified IDR entity will not take any action with regard to the dispute. If the dispute is found to be eligible, the Secretary will inform the preliminarily selected certified IDR entity of the dispute's eligibility so that it may conduct its conflict-of-interest assessment, and the dispute will otherwise continue through the Federal IDR process, including notification of the eligibility determination to the disputing parties by the preliminarily selected certified IDR entity.

(A) *Application of the departmental eligibility review.* The departmental eligibility review will apply when the Secretary determines that any of the extenuating circumstances described in paragraph (g)(1) of this section require application of the departmental eligibility review to facilitate timely payment determinations or the effective processing of disputes under the Federal IDR process.

(B) *Notification regarding applicability of the departmental eligibility review.* Before invoking the application of the departmental eligibility review, the Secretary will

post advance public notification of the date on which the departmental eligibility review will take effect and the reasons for invoking the application of the departmental eligibility review. Before ending the application of the departmental eligibility review, the Secretary will post advance public notification of the date on which the departmental eligibility review will no longer be in effect and the reasons for ending the application of the departmental eligibility review.

(iii) *Request for additional information.* The Secretary or the selected certified IDR entity may request additional information from either party to a dispute at any time, including for the purpose of assessing whether a conflict of interest exists, conducting an eligibility determination, or making a payment determination.

(A) Upon request, a party must submit the additional information within 5 business days to the Secretary or the selected certified IDR entity, as applicable, through the Federal IDR portal. Following a request for additional information, the time period for the applicable stage of the Federal IDR process will be tolled until the earlier of the date either all of the requested information is provided or the 5-business-day period expires, and each subsequent timeframe in the Federal IDR process will be determined based on the date of completion of the stage of the Federal IDR process that was tolled for provision of the requested information.

(B) If a party fails to submit the additional information as required, the related determination, including the eligibility determination, conflict-of-interest review, or payment determination will be made without the requested information unless a good-cause extension of the 5-business-day period, as specified in paragraph (g)(1)(i) of this section, has been provided, and the party subsequently submits the additional information requested within the extended period.

(3) *Authority to continue negotiations or withdraw*—(i) *Authority to continue to negotiate.* If the parties to the Federal IDR process agree on an out-of-network rate for a qualified IDR item or service after providing the notice of IDR initiation to the Secretary required under paragraph (b)(2)(ii) of this section, but before the certified IDR entity has made its payment determination, the amount agreed to by the parties for the qualified IDR item or service will be treated as the out-of-network rate for the qualified IDR item or service. To the extent the amount exceeds the initial payment amount and any cost sharing

paid or required to be paid by the participant, beneficiary, or enrollee, or there was an initial denial of payment, payment must be made directly by the plan or issuer to the nonparticipating provider, nonparticipating facility, or nonparticipating provider of air ambulance services not later than 30 business days after the agreement is reached. In no instance may either party seek additional payment from the participant, beneficiary, or enrollee, including in instances in which the out-of-network rate exceeds the qualifying payment amount. The initiating party must send a notification to the Secretary and to the certified IDR entity (if selected) electronically, through the Federal IDR portal, as soon as possible, but no later than 3 business days after the date of the agreement. The notification must include the dispute number, a statement of the out-of-network rate for the qualified IDR item or service, and signatures from authorized signatories for both parties.

(ii) *Withdrawals.* A dispute may be withdrawn from the Federal IDR process by the initiating party, the Secretary, or a certified IDR entity before a payment determination is made if one of the following conditions is met:

(A) The initiating party provides notification through the Federal IDR portal to the Secretary and the certified IDR entity (if selected) that both parties to the dispute agree to withdraw the dispute from the Federal IDR process without agreement on an out-of-network rate. The notification must include the dispute number, a statement about both parties' agreement to withdraw and signatures from authorized signatories for both parties.

(B) The initiating party provides a standard withdrawal request notice through the Federal IDR portal to the Secretary, the certified IDR entity (if selected), and the non-initiating party of its request to withdraw the dispute from the Federal IDR process and the non-initiating party notifies the Secretary, certified IDR entity (if selected), and the initiating party through the Federal IDR portal of its agreement to withdraw from the Federal IDR process within 5 business days of the initiating party's request. If the non-initiating party fails to respond within 5 business days of the initiating party's request, the non-initiating party will be considered to have agreed to the withdrawal, and the dispute will be withdrawn.

(C) The certified IDR entity or Secretary cannot determine eligibility because both parties to the dispute are unresponsive to any requests for additional information to determine

eligibility as described in paragraph (c)(2)(iii) of this section, or

(D) The certified IDR entity cannot make a payment determination because both parties to the dispute have failed to submit an offer as described in paragraph (c)(5)(i) of this section.

(4) * * *

(i) *In general.* A certified IDR entity may consider up to 25 qualified IDR items and services jointly as part of one payment determination that is subject to the certified IDR entity fee for batched determinations only if the qualified IDR items and services meet the requirements of this paragraph (c)(4)(i):

* * * * *

(B) Payment for the qualified IDR items and services is required to be made by the same group health plan or health insurance issuer. For group or individual health insurance coverage, this requirement is satisfied if the same issuer is required to make payment for the qualified IDR items and services, even if the qualified IDR items and services relate to claims from different group health plans or individual market policies. For self-insured group health plans, this requirement is satisfied if the same self-insured group health plan is required to make payment for the qualified IDR items and services, including when the plan makes payments through a third party administrator; the requirement is not satisfied if multiple self-insured group health plans are required to make payments for the qualified IDR items and services, even if those group health plans make payments through the same third party administrator;

(C) The qualified IDR items and services meet any of the following criteria under which multiple qualified IDR items and services relate to the treatment of a similar condition and therefore are permitted to be considered jointly as a single payment determination for purposes of encouraging efficiencies (including minimizing costs) in the Federal IDR process:

(1) The qualified IDR items or services were furnished to a single patient during the same patient encounter. For purposes of this section, a single patient encounter is defined as a patient encounter on one or more consecutive days during which the qualified IDR items or services were furnished to the same patient and billed on the same claim form; or

(2) The qualified IDR items and services were furnished to one or more patients and were billed under the same service code or a comparable code under a different procedural coding

system, such as Current Procedural Terminology (CPT) codes with modifiers, if applicable, Healthcare Common Procedure Coding System (HCPCS) codes with modifiers, if applicable, or Diagnosis-Related Group (DRG) codes with modifiers, if applicable; or

(3) For anesthesiology, radiology, pathology, and laboratory qualified IDR items and services, the qualified IDR items and services were furnished to one or more patients and were billed under service codes belonging to the same Category I CPT code range, as specified in guidance published by the Secretary; and

(D) All the qualified IDR items and services were furnished within the same 30-business-day period following the date on which the first item or service included in the batched determination was furnished and were the subjects of a 30-business-day open negotiation period that ended within 4 business days of IDR initiation, except as provided in paragraph (c)(5)(vii) of this section.

(ii) *Treatment of bundled payment arrangements.* Qualified IDR items and services that meet the definition of a bundled payment arrangement under § 149.30 may be submitted and considered as a single payment determination, and the certified IDR entity must make a single payment determination for the multiple qualified IDR items and services included in the bundled payment arrangement. Bundled payment arrangements as defined in § 149.30 and submitted under this paragraph (c)(4)(ii) are subject to the certified IDR entity fee for single determinations.

(5) * * *

(i) *Submission of offers.* Not later than 10 business days after the date of the final selection of the certified IDR entity as described in paragraph (c)(1)(iv)(C) of this section (or not later than 10 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section, when the Secretary determines that any of the extenuating circumstances described in paragraph (g)(1)(ii) of this section apply), the plan or issuer and the provider, facility, or provider of air ambulance services:

* * * * *

(ii) *Payment determination and notification.* Not later than 30 business days after the date of the final selection of the certified IDR entity as described in paragraph (c)(1)(iv)(C) of this section (or not later than 30 business days after the qualified IDR items and services are determined eligible as described in

paragraph (c)(2) of this section, when the Secretary determines that any of the extenuating circumstances described in paragraph (g) of this section apply), the certified IDR entity must:

(A) * * *

(1) *Prevailing party.* In the case of single determinations, the party whose offer is selected by the certified IDR entity is considered the prevailing party. In the case of batched determinations, the party with the most determinations in its favor is considered the prevailing party; if each party prevails in an equal number of determinations, neither party will be considered the prevailing party, and the certified IDR entity fee will be split evenly between the parties.

(2) *Non-prevailing party.* In the case of single determinations, the party whose offer is not selected by the certified IDR entity is considered the non-prevailing party. In the case of batched determinations, the party with the fewest determinations in its favor is considered the non-prevailing party.

* * * * *

(vii) *Effects of determination.*

(A) * * *

(B) *Suspension of certain subsequent IDR requests.* In the case of a determination made by a certified IDR entity under paragraph (c)(5)(ii) of this section, the party that submitted the initial notification under paragraph (b)(2) of this section may not submit a subsequent notification involving the same other party with respect to a claim for the same item or service that was the subject of the initial notification during the 90-calendar-day period following the determination.

(C) *Subsequent submission of requests permitted.* If the end of the open negotiation period specified in paragraph (b)(1) of this section occurs during the 90-calendar-day suspension period regarding claims for the same item or service that were the subject of the initial notice of IDR determination as described in paragraph (c)(5)(vi) of this section, either party may initiate the Federal IDR process for those claims by submitting a notification as specified in paragraph (b)(2) of this section during the 30-business-day period beginning on the day after the last day of the 90-calendar-day suspension period.

* * * * *

(d) *Costs of IDR process—(1) Certified IDR entity fee—(i) Timing of payment of certified IDR entity fee.* Each party to a dispute for which there is a final selection of the certified IDR entity and a determination that the dispute is eligible for the Federal IDR process in accordance with paragraph (c)(2) of this section must pay to the certified IDR

entity the predetermined certified IDR entity fee charged by the certified IDR entity. The certified IDR entity fee must be paid no later than the date a party submits its offer to the certified IDR entity, in accordance with paragraph (c)(5)(i) of this section.

(ii) *Failure to timely pay certified IDR entity fee.* If a party fails to pay the certified IDR entity fee as specified in paragraph (d)(1)(i) of this section, that party's offer will not be considered received. Such party will continue to be responsible for payment of the certified IDR entity fee.

(iii) *Method of allocation of the certified IDR entity fee after a payment determination.* After making a payment determination, the certified IDR entity shall retain the certified IDR entity fee described under paragraph (d)(1)(i) of this section paid by the non-prevailing party as defined in paragraph (c)(5)(ii)(A)(2) of this section. The certified IDR entity must return the fee paid by the prevailing party, as defined in paragraph (c)(5)(ii)(A)(1) of this section, within 30 business days following the date of the certified IDR entity's payment determination. In the event of a batched dispute in which each party prevails in an equal number of determinations, the certified IDR entity fee will be split evenly between the parties. In that case, the certified IDR entity must return half the fee paid by each party within 30 business days following the date of the certified IDR entity's payment determination.

(iv) *Method of allocation of the certified IDR entity fee upon agreement or withdrawal after an eligibility determination.* For a dispute for which there is a final selection of the certified IDR entity and a determination that the dispute is eligible for the Federal IDR process in accordance with paragraph (c)(2) of this section, unless directed otherwise by both parties, the certified IDR entity is required to return half of each party's certified IDR entity fee within 30 business days of the date both parties notify the certified IDR entity that they have:

(A) Reached an agreement on an out-of-network rate for qualified IDR items or services before the certified IDR entity has made its payment determination, as described in paragraph (c)(3)(i) of this section; or

(B) Withdrawn the dispute before the certified IDR entity has made its payment determination, as described in paragraph (c)(3)(ii) of this section.

(v) *Method of allocation of the certified IDR entity fee upon agreement or withdrawal before an eligibility determination.* When the parties reach an agreement on an out-of-network rate

or withdraw a dispute for which there is a final selection of the certified IDR entity, but for which no eligibility determination has yet been made, unless directed otherwise by both parties, the certified IDR entity is required to return each party's full certified IDR entity fee within 30 business days of the date both parties notify the certified IDR entity that they have agreed on an out-of-network rate or agreed to withdraw the dispute.

(2) *Administrative fee.* (i) *In general.* Each party to a dispute for which a certified IDR entity is selected under paragraph (c)(1) of this section must pay a non-refundable administrative fee to the Secretary for participating in the Federal IDR process.

(A) *Timing of payment of administrative fee.* The initiating party must pay the administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity as described in paragraph (c)(1)(iii) of this section. The non-initiating party must pay the administrative fee within 2 business days of the date the non-initiating party receives notice that an eligibility determination for the Federal IDR process has been reached by either the certified IDR entity or the Departments in accordance with paragraph (c)(2) of this section.

(B) *Agreements and withdrawals.* In the case of an agreement, as described in paragraph (c)(3)(i) of this section, or a withdrawal, as described in paragraph (c)(3)(ii) of this section, the administrative fee will not be returned to the parties if preliminary selection of the certified IDR entity has occurred, as described in paragraph (c)(1)(i) of this section; if not yet collected, the administrative fee must still be paid, except as provided in paragraph (d)(2)(i)(C) of this section for a dispute closed for nonpayment by an initiating party.

(C) *Failure to pay administrative fee.* If the initiating party fails to pay the administrative fee in accordance with paragraph (d)(2)(i)(A) of this section, the dispute will be closed due to nonpayment and neither party will be responsible for the administrative fee. If the non-initiating party fails to pay the administrative fee in accordance with paragraph (d)(2)(i)(A) of this section, that party's offer will not be considered received and the non-initiating party will continue to be responsible for payment of the administrative fee.

(D) *Collection of unpaid fees.* Any party that fails to pay the administrative fee owed in accordance with paragraph (d)(2)(i)(A) of this section is obligated to pay the administrative fee otherwise

due and owing, except as provided in paragraph (d)(2)(i)(C) of this section for a dispute closed for nonpayment by an initiating party. The Secretary will pursue collection from a party to a dispute of any administrative fee that is not timely paid pursuant to applicable debt collection authorities, after netting any amounts owed by the Federal Government in accordance with § 156.1215 of this Title, as applicable.

(ii) *Administrative fee amount.* The administrative fee amount and method of payment will be established through notice and comment rulemaking in a manner such that the total administrative fees paid for a year, including administrative fees reduced under paragraph (d)(2)(iii) of this section, are estimated to be equal to the projected amount of expenditures made by the Secretaries of the Treasury, Labor, and Health and Human Services for the year in carrying out the Federal IDR process.

(A) For disputes initiated on or after the later of the effective date of Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges final rules or January 1, 2024, the administrative fee amount is \$150 per party per dispute, which will remain in effect until changed by subsequent rulemaking.

(B) [Reserved]

(iii) *Reducing the administrative fee amount.* For disputes initiated on or after January 1, 2025—

(A) The Secretary may reduce the administrative fee for both parties in accordance with paragraph (d)(2)(iii)(C) of this section when the highest offer made by either party during open negotiation for the dispute is less than the threshold established in notice and comment rulemaking pursuant to paragraph (d)(2)(ii) of this section. For a dispute that satisfies the requirements for a reduced administrative fee in accordance with this paragraph and for which a determination has been made that the dispute is eligible for the Federal IDR process in accordance with paragraph (c)(2) of this section, the administrative fee amount may be reduced to 50 percent of the administrative fee amount as described in paragraph (d)(2)(ii) of this section for each party to the dispute. For a dispute that satisfies the requirements for a reduced administrative fee in accordance with this paragraph and for which a determination has been made that the dispute is ineligible for the Federal IDR process in accordance with paragraph (c)(2) of this section, the administrative fee amount may be reduced to 50 percent of the

administrative fee amount as described in paragraph (d)(2)(ii) of this section for the initiating party and to 20 percent of the administrative fee amount for the non-initiating party.

(B) The Secretary may reduce the administrative fee for a non-initiating party in accordance with paragraph (d)(2)(iii)(C) of this section when the dispute is determined to be ineligible for the Federal IDR process in accordance with paragraph (c)(2) of this section. For a dispute that satisfies the requirements for a reduced administrative fee in accordance with this paragraph, the administrative fee amount for the non-initiating party may be reduced to 20 percent of the administrative fee amount as described in paragraph (d)(2)(ii) of this section.

(C) The reduced administrative fee amounts provided for in paragraphs (d)(2)(iii)(A) and (d)(2)(iii)(B) of this section shall be established in notice and comment rulemaking and will remain in effect until changed by subsequent rulemaking, pursuant to paragraph (d)(2)(ii) of this section.

(e) * * *

(2) * * *

(vi) Meet appropriate indicators of fiscal integrity and stability by demonstrating that the certified IDR entity has a system of safeguards and controls in place to prevent and detect improper financial activities by its employees and agents to assure fiscal integrity and accountability for all certified IDR entity fees and administrative fees (if applicable) received, held, and disbursed and by submitting 3 years of financial statements or, if not available, other information to demonstrate fiscal stability of the certified IDR entity;

* * * * *

(viii) Have a procedure in place to retain the certified IDR entity fees described in paragraph (d)(1) of this section paid by both parties in a trust or escrow account and to return the certified IDR entity fee paid by the prevailing party or a portion of each party's certified IDR entity fee in the case of an agreement described in paragraph (c)(3)(i) of this section, a withdrawal described in paragraph (c)(3)(ii) of this section, or a circumstance described under paragraph (d)(1)(iii) of this section, within 30 business days following the date of the determination;

(ix) Have a procedure in place to retain the administrative fees (if applicable) described in paragraph (d)(2) of this section and to remit the administrative fees to the Secretary in accordance with the timeframe and

procedures set forth in guidance published by the Secretary;

* * * * *

(g) * * *

(1) *In general.* The time periods specified in this section (other than the time for payment, if applicable, under paragraph (c)(5)(ix) of this section) may be extended in extenuating circumstances at the Secretary's discretion. Extenuating circumstances include, but are not limited to when:

(i) With respect to a specific dispute, the Secretary determines that the parties or certified IDR entity cannot meet applicable timeframes due to matters beyond the control of one or both parties or the certified IDR entity, or for other good cause. The certified IDR entity or either party may also submit a request for an extension due to extenuating circumstances to the Secretary through the Federal IDR portal. The requesting certified IDR entity or party must attest that it will take prompt action to ensure that the certified IDR entity's payment determination under this section may be made as soon as administratively practicable under the circumstances; or

(ii) The Secretary determines that the parties or certified IDR entity cannot meet applicable timeframes due to systematic delays in processing disputes under the Federal IDR process, such as an unforeseen volume of disputes or Federal IDR portal system failures. Extensions provided due to extenuating circumstances caused by an unforeseen volume of disputes will be applied to the timeframe for eligibility determinations under paragraph (c)(2) of this section. Extensions provided due to extenuating circumstances caused by systems failures within the Federal IDR portal will be applied to the Federal IDR process timeframe(s) determined relevant by the Secretary. The Secretary will post a public notice regarding any extensions of time periods pursuant to this paragraph (g)(1)(ii).

(A) *Timeframe following an extension to eligibility determination.* When an extension to the eligibility determination timeframe pursuant to paragraph (g)(1)(ii) of this section is in effect, the start date of the subsequent timeframes in the Federal IDR process will be determined based on the date of completion of the eligibility determination by the certified IDR entity or the Secretary.

(1) *Submission of offers.* The parties must submit their offers and certified IDR entity fees to the certified IDR entity not later than 10 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section.

(2) *Payment Determination.* The certified IDR entity must make the payment determination and notification of the payment determination to the parties not later than 30 business days after the qualified IDR items and services are determined eligible as described in paragraph (c)(2) of this section.

(B) *Timeframe following an extension to other timeframes in the Federal IDR process.* When an extension to any timeframe within the Federal IDR process, other than the eligibility timeframe, is in effect pursuant to paragraph (g)(1)(ii) of this section, the start date of each subsequent timeframe in the Federal IDR process will be determined based on the date of completion of the process for which the extension was granted.

(2) [Reserved]

(h) *Applicability date.* (1) Paragraph (a) of this section is applicable with respect to plan years (or in the individual market, policy years) beginning on or after January 1, 2022, except that the provisions regarding IDR entity certification at paragraphs (a) and (e) of this section are applicable beginning on October 7, 2021, and the revised definition for batched qualified IDR items and services at paragraph (a)(2)(i) of this section is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule.

(2) Paragraph (b) of this section is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule.

(3) Paragraph (c)(1) of this section, regarding the selection of a certified IDR entity, is applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule, except that paragraphs (c)(1)(iv)(A)(1) through (3) of this section, regarding the conflict-of-interest standards, are applicable with respect to plan years (or in the individual market, policy years) beginning on or after January 1, 2022.

(4) Paragraph (c)(2) of this section, regarding the Federal IDR process eligibility review and paragraph (c)(3) of this section regarding the authority to continue negotiations or withdraw are applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule and paragraph (c)(4) of this section regarding the treatment of batched and bundled qualified IDR items and

services is applicable 90 days after the effective date of the rule.

(5) Paragraphs (c)(5)(i) and (ii), and (c)(5)(vii)(B) and (C) of this section regarding the deadlines for the submission of offers, payment determination and notification, suspension of certain subsequent IDR requests, and subsequent submission of requests submitted are applicable to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule. Paragraphs (c)(5)(iii) and (iv) of this section regarding considerations in payment determinations and the related examples and paragraph (c)(5)(vi)(B) of this section regarding written decisions are applicable with respect to items or services furnished on or after October 25, 2022, for plan years (or in the individual market policy years) beginning on or after January 1, 2022. Paragraphs (c)(5)(v) through (c)(5)(vi)(A), (c)(5)(vii)(A), and (c)(5)(viii) and (ix) are applicable with respect to plan years (or in the individual market, policy years) beginning on or after January 1, 2022.

(6) Paragraph (d) of this section regarding the costs of the IDR process is applicable to disputes initiated on or after January 1, 2025.

(7) Paragraph (e) of this section is applicable with respect to plan years (or in the individual market, policy years) beginning on or after January 1, 2022, except that the provisions regarding IDR entity certification at paragraphs (e)(1), (e)(2)(i) through (vi), (e)(2)(x) and (xi), and (e)(3) through (6) of this section are applicable beginning on October 7, 2021. Paragraphs (e)(2)(vi), (viii), and (ix) of this section regarding the certified IDR entity's controls to prevent and detect improper financial activities, and procedures to retain the certified IDR entity fee and administrative fee are applicable upon the effective date of the rule.

(8) Paragraph (f) of this section is applicable with respect to plan years (or in the individual market, policy years) beginning on or after January 1, 2022, except that paragraph (f)(1)(v)(F) of this section regarding reporting of information relating to the Federal IDR process is applicable with respect to items or services furnished on or after October 25, 2022, for plan years (or in the individual market policy years) beginning on or after January 1, 2022.

(9) Paragraph (g) of this section regarding the extension of time periods for extenuating circumstances is applicable to disputes with open negotiation periods beginning on or

after the later of August 15, 2024, or 90 days after the effective date of the rule.

(10) Until the relevant applicability date for the requirements of this section, plans, issuers, providers, facilities, providers of air ambulance services and certified IDR entities are required to continue to comply with the corresponding section of § 149.510 in effect on October 25, 2022.

(i) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions of paragraphs (b)(1), (c)(2)(ii), (c)(4), (d)(2), and (g)(1) of this section are intended to be severable from one another, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in those paragraphs. The provisions in § 149.510 are intended to be severable from the provisions in §§ 149.100, 149.140, and 149.530, from any grant of forbearance from removal resulting from this subpart, and from any provision referenced in §§ 149.100, 149.140, and 149.530.

■ 23. Section 149.530 is added to subpart F to read as follows:

§ 149.530 Federal independent dispute resolution registry of group health plans, health insurance issuers, and Federal Employees Health Benefits Carriers.

(a) *Establishment of Federal independent dispute resolution registry.* The Secretary, jointly with the Secretary of the Treasury and the Secretary of Labor, will establish a Federal IDR registry consisting of the information described in paragraph (b)(2) of this section and will assign a registration number for each group health plan, health insurance issuer offering group or individual health insurance coverage, and Federal Employees Health Benefits (FEHB) Program carrier. The information contained in the registry will be made available to parties seeking to initiate an open negotiation or a dispute through the Federal IDR portal, and will be searchable, including by registration number.

(b) *Federal IDR registration—(1) Registration requirement.* Each group health plan and health insurance issuer offering group or individual health

insurance coverage subject to the Federal IDR process must register with the Federal IDR registry as specified by the Secretary in guidance. Initial registration must be completed by the later of the date that is 30 business days after the effective date of the final rule, the date that is 30 business days after the registry becomes available, or the date the group health plan or health insurance issuer begins offering a group health plan or individual health insurance coverage subject to the Federal IDR process.

(2) *Required data elements.* Group health plans and health insurance issuers offering group or individual health insurance coverage subject to the registration requirement must include the following information with their registration:

(i) The legal business name (if any) of the group health plan, issuer, or FEHB carrier and, if applicable, the legal business name of the group health plan sponsor;

(ii) Whether the plan or coverage is a self- or fully-insured group health plan subject to ERISA, individual health insurance coverage, a plan offered by a FEHB carrier, a self- or fully-insured non-Federal governmental plan, or a self- or fully-insured church plan;

(iii) The State(s) in which the plan or coverage is subject to a specified State law, as defined in § 149.30 for any items or services for which the protections of §§ 149.110, 149.120, and 149.130 apply;

(iv) The State(s) in which the plan or coverage is subject to an All-Payer Model Agreement under section 1115A of the Social Security Act for any items or services to which the protections in §§ 149.110, 149.120, and 149.130, apply;

(v) For self-insured group health plans not otherwise subject to State law, any State(s) in which the group health plan has properly effectuated an election to opt in to a specified State law as defined in § 149.30, if that State allows a plan not otherwise subject to the State law to opt-in; and for FEHB plans that adopt a specified State law pursuant to their FEHB carrier's contract terms, any State(s) in which they have made such an adoption;

(vi) Contact information, including a telephone number and email address, for the appropriate person or office to initiate open negotiations for purposes of determining an amount of payment (including cost sharing) for such item or service;

(vii) The 14-digit Health Insurance Oversight System (HIOS) identifier; or if the 14-digit HIOS identifier has not been assigned, the 5-digit HIOS identifier; or if no HIOS identifier is available, the plan's or the plan sponsor's Employer

Identification Number (EIN) and the plan's plan number (PN), if a PN is available, or for FEHB carriers, the applicable contract number(s) and plan code(s);

(viii) Additional information needed to identify the plan or issuer and the applicable Federal and State requirements for determining appropriate out-of-network payment rates for items or services to which the protections against balance billing in this part apply, as specified by the Secretary in guidance, or such additional information needed with respect to FEHB carriers as specified by OPM in guidance; and

(ix) Additional information needed for purposes of administrative fee collection, as specified by the Secretary in guidance, or such additional information needed with respect to FEHB carriers as specified by OPM in guidance.

(3) *Updating disclosures.* A plan or issuer must timely report to the Secretary changes to the information required under this section within 30 calendar days after the information changes. A plan or issuer must confirm the accuracy of its registration annually in the fourth quarter of each calendar year.

(4) *Third party authority.* The requirements of paragraphs (b)(1) through (3) of this section may be performed by a third party administrator or service provider with authority to act on behalf of the group health plan or health insurance issuer offering group or individual health insurance coverage subject to the Federal IDR process. If the registration requirements are performed by such third party administrator or service provider the group health plan or health insurance issuer offering group or individual health insurance coverage must require that such third party administrator or service provider clearly delineate each group health plan or health insurance issuer offering group health insurance coverage for which it has authority to act. If such third party administrator or service provider fails to provide the information in compliance with the requirements of paragraphs (b)(1) through (3) of this section the plan or issuer will be in violation of the requirements of this section.

(c) *Severability.* (1) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this

section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

(2) The provisions in § 149.530 are intended to be severable from the

provisions in §§ 149.100, 149.140, and 149.510, from any grant of forbearance from removal resulting from this subpart, and from any provision

referenced in §§ 149.100, 149.140, and 149.510.

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Part IV

Department of Labor

Employee Benefits Security Administration

29 CFR Parts 2510, et al.

Retirement Security Rule: Definition of an Investment Advice Fiduciary;
Proposed Rule

DEPARTMENT OF LABOR

Employee Benefits Security
Administration

29 CFR Part 2510

RIN 1210-AC02

Retirement Security Rule: Definition of
an Investment Advice Fiduciary

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: This document contains a proposed amendment to the regulation defining when a person renders “investment advice for a fee or other compensation, direct or indirect” with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a “fiduciary” in the Employee Retirement Income Security Act of 1974 (Title I of ERISA or the Act). The proposal also would amend the parallel regulation defining for purposes of Title II of ERISA, a “fiduciary” of a plan defined in Internal Revenue Code (Code) section 4975, including an individual retirement account. The Department also is publishing elsewhere in today’s **Federal Register** proposed amendments to Prohibited Transaction Exemption 2020-02 (Improving Investment Advice for Workers & Retirees) and to several other existing administrative exemptions from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of ERISA.

DATES:

Public Comments. Comments are due on or before January 2, 2024.

Public Hearing. The Department anticipates holding a public hearing approximately 45 days following the date of publication in the **Federal Register**. Specific information regarding the date, location, and submission of requests to testify will be published in the **Federal Register**.

ADDRESSES: You may submit written comments, identified by RIN 1210-AC02, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for sending comments.
- *Mail:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, DC 20210, Attention: Definition of Fiduciary—RIN 1210-AC02.

Instructions: All submissions must include the agency name and Regulatory

Identifier Number (RIN) for this rulemaking. If you submit comments electronically, do not submit paper copies.

Warning: Do not include any personally identifiable information or confidential business information that you do not want publicly disclosed. Comments are public records posted on the internet as received and can be retrieved by most internet search engines.

Docket: For access to the docket to read background documents, including the plain-language summary of the proposed rule of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023, or comments, go to the Federal eRulemaking Portal at <https://www.regulations.gov>. Comments will be available to the public, without charge, online at <http://www.regulations.gov> and <http://www.dol.gov/agencies/ebsa> and at the Public Disclosure Room, Employee Benefits Security Administration, Room N-1513, 200 Constitution Ave, NW, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT:

- *For questions regarding the proposed rule:* contact Luisa Grillo-Chope, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), 202-693-8510. (Not a toll-free number).
- *For questions regarding the prohibited transaction exemptions:* contact Susan Wilker, Office of Exemption Determinations, EBSA, 202-693-8540. (Not a toll-free number).
- *For questions regarding the Regulatory Impact Analysis:* contact James Butikofer, Office of Research and Analysis, EBSA, 202-693-8434. (Not a toll-free number).

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning Title I of ERISA and employee benefit plans may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline, at 1-866-444-EBSA (3272) or visit the Department of Labor’s website (<http://www.dol.gov/agencies/ebsa>).

SUPPLEMENTARY INFORMATION:**A. Executive Summary**

The Department of Labor is proposing a new regulatory definition of an investment advice fiduciary for purposes of Title I and Title II of the Employee Retirement Income Security Act (ERISA). As compared to the existing regulatory definition, which dates to 1975, the proposal better reflects the text and the purposes of the

statute and better protects the interests of retirement investors, consistent with the mission of the Department’s Employee Benefits Security Administration to ensure the security of the retirement, health, and other workplace-related benefits of America’s workers and their families.

The Department proposes that a person would be an investment advice fiduciary under Title I and Title II of ERISA if they provide investment advice or make an investment recommendation to a retirement investor (*i.e.*, a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary); the advice or recommendation is provided “for a fee or other compensation, direct or indirect,” as defined in the proposed rule; and the person makes the recommendation in one of the following contexts:

- The person either directly or indirectly (*e.g.*, through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;
- The person either directly or indirectly (*e.g.*, through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest; or
- The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.

The proposal is designed to ensure that ERISA’s fiduciary standards uniformly apply to all advice that retirement investors receive concerning investment of their retirement assets in a way that ensures that retirement investors’ reasonable expectations are honored when receiving advice from financial professionals who hold themselves out as trusted advice providers. The Department’s proposal fills an important gap in those advice relationships where advice is not currently required to be provided in the retirement investor’s best interest, and the investor may not be aware of that fact.

Together with proposed amendments to administrative exemptions from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of ERISA published elsewhere in this issue of the **Federal Register**, the

proposal is intended to protect the interests of retirement investors by requiring investment advice providers to adhere to stringent conduct standards and mitigate their conflicts of interest. The proposals' compliance obligations are generally consistent with the best interest obligations set forth in the Securities and Exchange Commission's (SEC's) Regulation Best Interest and its Commission Interpretation Regarding Standard of Conduct for Investment Advisers (SEC Investment Adviser Interpretation), each released in 2019.

The Department anticipates that the most significant benefits of the proposals will stem from the uniform application of the ERISA fiduciary standard and exemption conditions to investment advice to retirement investors. Under the proposals, advice providers would be subject to a common fiduciary standard that would reduce retirement investor exposure to conflicted advice that erodes investment returns and would be obligated to adhere to protective conflict-mitigation requirements.¹ Requiring advice providers to compete under a common fiduciary standard will be especially beneficial with respect to those transactions that currently are not uniformly covered by fiduciary protections consistent with ERISA's high standards, including recommendations to roll over assets from a workplace retirement plan to an IRA (e.g., in those cases in which the advice provider is not subject to Federal securities law standards and, as is often the case, does not have an ongoing and preexisting relationship with the customer); investment recommendations with respect to many commonly purchased retirement annuities, such as fixed index annuities; and investment recommendations to plan fiduciaries.

B. Background

1. Title I and Title II of ERISA and the 1975 Rule

ERISA² is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."³ Under the statutory framework, Title I of ERISA imposes duties and restrictions on individuals who are "fiduciaries" with respect to employee benefit plans. In particular, fiduciaries to Title I plans must adhere to duties of prudence and

loyalty. ERISA section 404 provides that Title I plan fiduciaries must act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," and they also must discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries."⁴

These fiduciary duties, which are rooted in the common law of trusts, are reinforced by prohibitions against transactions involving conflicts of interest because of the dangers such transactions pose to plans and their participants. The prohibited transaction provisions of ERISA, including Title II of ERISA which is codified in the Internal Revenue Code (Code), "categorically bar[]" plan fiduciaries from engaging in transactions deemed "likely to injure the pension plan."⁵ These prohibitions broadly forbid a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account," and "receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."⁶ Congress also gave the Department authority to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.⁷

Title II of ERISA, codified in the Code,⁸ governs the conduct of fiduciaries to plans defined in Code section 4975(e)(1), which includes IRAs.⁹ Some plans defined in Code

section 4975(e)(1) are also covered by Title I of ERISA, but the definitions of such plans are not identical. Although Title II, as codified in the Code, does not directly impose specific duties of prudence and loyalty on fiduciaries as in ERISA section 404(a), it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.¹⁰ Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984,¹¹ the Department was generally granted authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975.¹²

Many of the protections, duties, and liabilities in both Title I and Title II of ERISA hinge on fiduciary status; therefore, the determination of who is a "fiduciary" is of central importance. ERISA includes a statutory definition of a fiduciary at section 3(21)(A), which provides that a person is a fiduciary with respect to a plan to the extent the person (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.¹³ The same

described in Code section 4975(e)(1)(B)–(F), and includes individual retirement accounts, individual retirement annuities, health savings accounts, and certain other tax-advantaged trusts and plans. However, for purposes of any rollover of assets between a Title I Plan and an IRA described in this preamble, the term "IRA" includes only an account or annuity described in Code section 4975(e)(1)(B) or (C). Additionally, while the Department uses the term "retirement investor" throughout this document to describe advice recipients, that is not intended to suggest that the fiduciary definition would apply only with respect to employee pension benefit plans and IRAs that are retirement savings vehicles. As discussed herein, the rule would apply with respect to plans as defined in Title I and Title II of ERISA that make investments. In this regard, see also proposed paragraph (f)(11) that provides that the term "investment property" "does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component."

¹⁰ 26 U.S.C. 4975(c)(1); *cf. id.* at 4975(f)(5), which defines "correction" with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been in if the person had acted "under the highest fiduciary standards."

¹¹ Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

¹² 5 U.S.C. App. (2018).

¹³ ERISA section 3(21)(A), 29 U.S.C. 1002(21)(A).

¹ The references in this document to a "fiduciary" are intended to mean an ERISA fiduciary unless otherwise stated.

² 29 U.S.C. 1001, *et seq.*

³ *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

⁴ ERISA section 404, 29 U.S.C. 1104.

⁵ *Harris Trust Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241–42 (2000) (citation and quotation marks omitted).

⁶ ERISA section 406(b)(1), (3), 29 U.S.C. 1106(b)(1), (3).

⁷ ERISA section 408(a), 29 U.S.C. 1108(a).

⁸ This proposal includes some references to the Code in the context of discussions of Title II of ERISA involving specific provisions codified in the Code. The Department understands that references to the Code are useful but emphasizes that both Title I and Title II are covered by the same definition of fiduciary and the same general framework of prohibited transactions, and that, under both Title I and Title II, fiduciaries must comply with the conditions of an available prohibited transaction exemption in order to engage in an otherwise prohibited transaction.

⁹ For purposes of the proposed rule, the term "IRA" is defined as any account or annuity

definition of a fiduciary is in Code section 4975(e)(3).¹⁴

These statutory definitions broadly assign fiduciary status for purposes of Title I and Title II of ERISA. Thus, “any authority or control” over plan assets is sufficient to confer fiduciary status, and any person who renders “investment advice for a fee or other compensation, direct or indirect” is an investment advice fiduciary, regardless of whether they have direct control over the plan’s assets, and regardless of their status under another statutory or regulatory regime. In the absence of fiduciary status, persons who provide investment advice would neither be subject to Title I of ERISA’s fundamental fiduciary standards, nor responsible under Title I and Title II of ERISA for avoiding prohibited transactions. The broad statutory definition, prohibitions on conflicts of interest, and core fiduciary obligations of prudence and loyalty (as applicable) all reflect Congress’ recognition in 1974, when it passed ERISA, of the fundamental importance of investment advice to protect the interests of retirement savers.

In 1975, shortly after ERISA was enacted, the Department issued a regulation at 29 CFR 2510.3–21(c)(1) that defined the circumstances under which a person renders “investment advice” to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA, such that said person would be a fiduciary under ERISA.¹⁵ The regulation narrowed the plain and expansive language of section 3(21)(A)(ii), creating a five-part test that must be satisfied in order for a person to be treated as a fiduciary by reason of rendering investment advice. Under the five-part test, a person is a fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The Department of the Treasury issued a virtually identical regulation under Code section 4975(e)(3), at 26 CFR 54.4975–9(c)(1), which applies to plans defined in Code section 4975.¹⁶

Since 1975, the retirement plan landscape has changed significantly, with a shift from defined benefit plans (in which decisions regarding investment of plan assets are primarily made by professional asset managers) to defined contribution/individual account plans such as 401(k) plans (in which decisions regarding investment of plan assets are often made by plan participants themselves). In 1975, IRAs had only recently been created (by ERISA itself), and 401(k) plans did not yet exist. Retirement assets were principally held in pension funds controlled by large employers and professional money managers. Now, IRAs and participant-directed plans, such as 401(k) plans, have become more common retirement vehicles as opposed to traditional pension plans, and rollovers of employee benefit plan assets to IRAs are commonplace. Individuals, regardless of their financial literacy, have thus become increasingly responsible for their own retirement savings.

The shift toward individual control over retirement investing (and the associated shift of risk to individuals) has been accompanied by a dramatic increase in the variety and complexity of financial products and services, which has widened the information gap between investment advice providers and their clients. Plan participants and other retirement investors may be unable to assess the quality of the advice they receive or be aware of and guard against the investment advice provider’s conflicts of interest. However, as a result of the five-part test in the 1975 rule, many investment professionals, consultants, and financial advisers have no obligation to adhere to the fiduciary standards in Title I of ERISA or to the prohibited transaction rules, despite the critical role they play in guiding plan and IRA investments. In many situations, this disconnect serves to undermine the reasonable expectations of retirement investors in today’s marketplace; a retirement investor may reasonably expect that the advice they are receiving is fiduciary advice even when it is not. If these investment advice providers are not fiduciaries under Title I or Title II of ERISA, they do not have obligations under Federal pension law to either avoid prohibited transactions or comply with the protective conditions in a prohibited transaction exemption (PTE).

Recently, other regulators have recognized the need for change in the

regulation of investment recommendations and have imposed enhanced conduct standards on financial professionals that make investment recommendations, including broker-dealers and insurance agents. As a result, the regulatory landscape today is very different than it was even five years ago. In 2019, the SEC adopted Regulation Best Interest, which established an enhanced best interest standard of conduct applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers.¹⁷ The SEC also issued its SEC Investment Adviser Interpretation, which addressed the conduct standards applicable to investment advisers under the Investment Advisers Act of 1940 (Advisers Act).¹⁸ As the SEC has repeatedly stated, “key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act.”¹⁹ In this connection, the SEC has also stressed that Regulation Best Interest “aligns the standard of conduct with retail customers’ reasonable expectations[.]”²⁰

In 2020, the National Association of Insurance Commissioners (NAIC) also revised its Suitability In Annuity Transactions Model Regulation to provide that insurance agents must act in the consumer’s best interest, as defined by the Model Regulation, when making a recommendation of an annuity. Under the Model Regulation, insurers would also be expected to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.²¹ The goal of the NAIC working group was “to seek clear, enhanced standards for annuity sales so consumers understand the products they purchase, are made aware of any material conflicts of interest, and are assured those selling the products do not place their financial

¹⁷ Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33318 (July 12, 2019).

¹⁸ Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669 (July 12, 2019).

¹⁹ Regulation Best Interest release, 84 FR 33318, 33330 (July 12, 2019).

²⁰ *Id.* at 33318.

²¹ Available at www.naic.org/store/free/MDL-275.pdf.

¹⁴ 26 U.S.C. 4975(e)(3).

¹⁵ 40 FR 50842 (Oct. 31, 1975).

¹⁶ 40 FR 50840 (Oct. 31, 1975). The issuance of this regulation pre-dated The Reorganization Plan

No. 4 of 1978, and thus authority to issue this regulatory definition under Title II of ERISA was still with the Department of the Treasury.

interests above consumers' interests."²² According to the NAIC, as of August 23, 2023, 43 jurisdictions have implemented the revisions to the model regulation.²³

These regulatory efforts reflect the understanding that broker-dealers and insurance agents commonly make recommendations to their customers for which they are compensated as a regular part of their business; that investors rely upon these recommendations; and that regulatory protections are important to ensure that the advice is in the best interest of the retail customer, in the case of broker-dealers, or consumers, in the case of insurance agents.²⁴ After careful review of the existing regulatory landscape, the Department too has concluded that existing regulations should be revised to reflect current realities in light of the text and purposes of Title I of ERISA and the Code.

In the current landscape, the existing 1975 regulation no longer serves ERISA's purpose to protect the interests of retirement investors, especially given the growth of participant-directed investment arrangements and IRAs, the conflicts of interest associated with investment recommendations, and the pressing need for plan participants, IRA owners, and their beneficiaries to receive sound advice from sophisticated financial advisers when making critical investment decisions in an increasingly complex financial marketplace. As the SEC and NAIC recognized, many different types of financial professionals, including insurance agents, broker-dealers, advisers subject to the Advisers Act, and others, make recommendations to investors for which they are compensated, and investors rightly rely upon these recommendations with an expectation that they are receiving advice that is in

their interest. Like these other regulators, the Department has concluded that it is appropriate to revisit the existing regulatory structure to ensure that it properly and uniformly protects the financial interests of retirement investors as Congress intended. As reflected in this regulatory package, after evaluation of the types of investment advisory relationships that should give rise to ERISA fiduciary status, the Department has concluded that it is appropriate to revise the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in the manner set forth herein.

2. Prior Rulemakings

The Department began the process of reexamining the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in 2010. After issuing two notices of proposed rules, conducting multiple days of public hearings, and over six years of deliberations, on April 8, 2016, the Department replaced the 1975 regulation with a new regulatory definition (the "2016 Final Rule"), which applied under Title I and Title II of ERISA.²⁵ In the preamble to the 2016 Final Rule, the Department noted that the 1975 five-part test had been created in a very different context and

investment advice marketplace. The Department expressed concern that specific elements of the five-part test—which are not found in the text of Title I or Title II of ERISA—worked to defeat retirement investors' legitimate expectations when they received investment advice from trusted advice providers in the modern marketplace for financial advice.

The Department identified the "regular basis" element²⁶ in the five-part test as a particularly important example of the 1975 regulation's shortcomings. The Department stated that the requirement that advice be provided on a "regular basis" had failed to draw a sensible line between fiduciary and non-fiduciary conduct and had undermined the Act's protective purpose. The Department pointed to examples of transactions in which a discrete instance of advice can be of critical importance to the plan, such as a one-time purchase of a group annuity to cover all of the benefits promised to substantially all of a plan's participants for the rest of their lives when a defined benefit plan terminates, or a plan's expenditure of hundreds of millions of dollars on a single real estate transaction based on the recommendation of a financial adviser hired for purposes of that one transaction.

The Department likewise expressed concern that the requirements in the 1975 regulation of a "mutual agreement, arrangement, or understanding" that advice would serve as "a primary basis for investment decisions" had encouraged investment advice providers in the current marketplace to use fine print disclaimers as potential means of avoiding ERISA fiduciary status, even as they marketed themselves as providing tailored or individualized advice based on the retirement investor's best interest. Additionally, the Department noted that the "primary basis" element of the five-part test appeared in tension with the statutory text and purposes of Title I and Title II of ERISA. If, for example, a prudent plan fiduciary hires multiple specialized advisers for an especially complex transaction, it should be able to rely upon any or all of the consultants that it hired to render advice regardless of arguments about whether one could characterize the advice, in some sense, as primary, secondary, or tertiary.

In adopting the 2016 Final Rule, the Department presented an economic

²⁵ *Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 81 FR 20946 (Apr. 8, 2016). The Department issued its first proposal to amend the regulatory definition of an investment advice fiduciary in 2010. 75 FR 65263 (Oct. 22, 2010). The first proposed rulemaking provided for a 90-day comment period, from October 22, 2010, through January 20, 2011. The comment period was extended for 14 days. The Department held a public hearing in Washington, DC, on March 1–2, 2011, after which the Department welcomed public comment for 15 days in order for commenters to supplement hearing testimony or otherwise provide additional comments. That proposal was withdrawn, and the Department issued a second proposal in 2015 along with related proposed prohibited transaction exemptions and proposed amendments to existing exemptions. 80 FR 21928 (Apr. 20, 2015). The 2015 proposal and proposed related exemptions initially provided for 75-day comment periods, ending on July 6, 2015, but the Department extended the comment periods to July 21, 2015. Before finalizing the 2015 proposals, the Department held a public hearing in Washington, DC on August 10–13, 2015, at which over 75 speakers testified. The transcript of the hearing was made available on September 8, 2015, and the Department provided additional opportunity for interested persons to submit comments on the proposal and proposed related exemptions or on the transcript until September 24, 2015. A total of over 3,000 comment letters were received on the 2015 proposals. There were also over 300,000 submissions made as part of 30 separate petitions submitted on the proposals. These comments and petitions, which came from consumer groups, plan sponsors, financial services companies, academics, elected government officials, trade and industry associations, and others, were both in support of and in opposition to the 2015 proposals.

²² See <https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard>.

²³ NAIC Annuity Suitability & Best Interest Standard web page, <https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard>.

²⁴ The SEC stated in the Regulation Best Interest release that "there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations." 84 FR 33318, 33319 (July 12, 2019). The NAIC Model Regulation, section 6.5.M defines a recommendation as "advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice." Section 5.B., defines "cash compensation" as "any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer." (Emphasis added).

²⁶ This refers to the requirement in the 1975 regulation that, in order for fiduciary status to attach, investment advice must be provided by the person "on a regular basis." 29 CFR 2510.3–21(c)(1)(ii)(B).

analysis demonstrating that investment advice providers are compensated in ways that create conflicts of interest, which can bias investment advice and erode plan and IRA investment results.²⁷ The Department noted that many of the consultants and advisers who provide investment-related advice and recommendations received compensation from the financial institutions whose investment products they recommend, and that this can give the consultants and advisers a strong bias, conscious or unconscious, to favor investments that provide them greater compensation rather than those that may be most appropriate for the retirement investors. The Department also found that consolidation of the financial services industry and developments in compensation arrangements multiplied the opportunities for self-dealing and reduced the transparency of fees. Most significantly, the Department explained in its analysis that, in the absence of the 2016 Final Rule, the underperformance associated with conflicts of interest in the mutual funds segment alone could have cost IRA investors between \$95 billion and \$189 billion over the following 10 years and between \$202 billion and \$404 billion over the following 20 years. While these projected losses were substantial, they represented only a portion of what IRA investors stood to lose as a result of conflicted investment advice.

The Department expected that compliance with the 2016 Final Rule would deliver large gains for retirement investors by reducing these losses. The Department cited evidence that holding broker-dealer representatives to fiduciary standards at the State level does not impair access to their services. Additionally, the Department noted that financial services firms already were moving toward more fee-based advice models, considering flatter compensation models, and integrating technology. The Department anticipated that the rule would accelerate these types of innovations for the benefit of plan and IRA investors.

The 2016 Final Rule defined an investment advice fiduciary for purposes of Title I or Title II of ERISA in a way that would apply fiduciary status in a wider array of advice relationships than the five-part test in the 1975 regulation. The 2016 Final Rule generally covered: (1)

recommendations by a person who represents or acknowledges that they are acting as a fiduciary within the meaning of ERISA; (2) advice rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the retirement investor; and, most expansively, (3) recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

One main issue highlighted in the 2016 Final Rule involved the protection of retirement investors in the context of recommendations to roll over assets from workplace retirement plans to IRAs.²⁸ As the Department noted, decisions to take a benefit distribution or engage in rollover transactions are among the most, if not the most, important financial decisions that plan participants and beneficiaries and IRA owners and beneficiaries are called upon to make. The Department explained that when an individual is a participant in a workplace retirement plan, their employer or other plan sponsor has both the incentive and the fiduciary duty to facilitate sound investment choices, while in an IRA, both good and bad investment choices are more numerous, and investment advice providers often operate under conflicts of interest. The Department illustrated the consequence of these rollovers to both individuals and investment advice providers, by pointing out that rollovers from employee benefit plans to IRAs were expected to approach \$2.4 trillion cumulatively from 2016 through 2020.²⁹ Investment advice providers have a strong economic incentive to recommend that investors roll over assets into one of their institutions' IRAs, whether from a plan or from an IRA account at another financial institution, or even between different account types. The 2016 Final Rule also specifically superseded a 2005 Advisory Opinion, 2005–23A (commonly known as the Deseret Letter) which had opined that it is not fiduciary investment advice under Title I of ERISA to make a recommendation as to distribution options from an employee benefit plan, even if accompanied by a recommendation as to where the distribution would be invested.³⁰

On the same date it published the 2016 Final Rule, the Department also published two new administrative class exemptions from the prohibited transaction provisions of Title I and Title II of ERISA: the Best Interest Contract Exemption (BIC Exemption)³¹ and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption).³² The Department granted the new exemptions with the objective of promoting the provision of investment advice that is in the best interest of retail investors such as plan participants and beneficiaries, IRA owners and beneficiaries, and certain plan fiduciaries, including small plan sponsors.

The new exemptions included conditions designed to protect the interests of the retirement investors receiving advice. The exemptions required investment advice fiduciaries to adhere to the following “Impartial Conduct Standards”: providing advice in retirement investors’ best interest; charging no more than reasonable compensation; and making no misleading statements about investment transactions and other important matters. In the case of IRAs and non-Title I plans, the exemption required these standards to be set forth in an enforceable contract with the retirement investor, which also was required to include certain warranties and disclosures. The exemption further provided that parties could not rely on the exemption if they included provisions in their contracts disclaiming liability for compensatory remedies or waiving or qualifying retirement investors’ right to pursue a class action or other representative action in court. In conjunction with the new exemptions, the Department also made amendments to pre-existing exemptions, namely PTEs 75–1, 77–4, 80–83, 83–1, 84–24 and 86–128, to require compliance with the Impartial Conduct Standards and to make certain other changes.³³

3. Litigation Over the 2016 Rulemaking

The 2016 Final Rule and related new and amended exemptions (collectively, the 2016 Rulemaking) was challenged in multiple lawsuits. In *National Association for Fixed Annuities v. Perez*, a district court in the District of

²⁷ U.S. Department of Labor, Fiduciary Investment Advice Regulatory Impact Analysis (2016), available at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

²⁸ See 81 FR 20946, 20964 (Apr. 8, 2016).

²⁹ *Id.* at 20949 fn. 7 (citing Cerulli Associates, “U.S. Retirement Markets 2015”).

³⁰ *Id.*

³¹ 81 FR 21002 (Apr. 8, 2016).

³² 81 FR 21089 (Apr. 8, 2016).

³³ 81 FR 21139 (Apr. 8, 2016); 81 FR 21147 (Apr. 8, 2016); 81 FR 21181 (Apr. 8, 2016); 81 FR 21208 (Apr. 8, 2016).

Columbia upheld the 2016 Rulemaking in the context of a broad challenge on multiple grounds.³⁴ Among other things, the court found that the 2016 Final Rule comports with both the text and the purpose of ERISA, and it noted “if anything, it is the five-part test—and not the current rule—that is difficult to reconcile with the statutory text. Nothing in the phrase ‘renders investment advice’ suggests that the statute applies only to advice provided ‘on a regular basis.’”³⁵ Relatedly, in *Market Synergy v. United States Department of Labor*, the U.S. Court of Appeals for the Tenth Circuit affirmed a district court’s decision similarly upholding the 2016 Rulemaking as it applied to fixed indexed annuities.³⁶

On March 15, 2018, however, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) overturned a district court’s decision upholding the validity of the 2016 Final Rule³⁷ and vacated the 2016 Rulemaking *in toto*, in *Chamber of Commerce v. United States Department of Labor* (*Chamber*).³⁸ The Fifth Circuit held that the 2016 Final Rule conflicted with ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). Specifically, the Fifth Circuit found that the 2016 Final Rule swept too broadly and extended to relationships that lacked “trust and confidence,” which the court stated were hallmarks of the common law fiduciary relationship that Congress intended to incorporate into the statutory definitions. The court concluded that “all relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties’ underlying

relationship of trust and confidence—and nothing in the statute ‘requires’ departing from the touchstone.”³⁹

In addition to holding that the 2016 Final Rule conflicted with the statutory definitions in Title I and Title II of ERISA, the Fifth Circuit in *Chamber* also determined that the 2016 Rulemaking failed to honor the difference in the Department’s authority over employee benefit plans under Title I of ERISA and IRAs under Title II, by imposing “novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties.”⁴⁰ These included the conditions of the BIC Exemption and Principal Transactions Exemption that required financial institutions and individual fiduciary advisers to enter into contracts with their customers with specific duties, warranties, and disclosures, and forbade damages limitations and class action waivers.⁴¹ Under the Code, IRA investors do not have a private right of action.⁴² Instead, the primary remedy for a violation of the prohibited transaction provisions under the Code is the assessment of an excise tax.⁴³ In the Fifth Circuit’s view, the Department had effectively exceeded its authority by giving IRA investors the ability to bring a private cause of action that Congress had not authorized.⁴⁴

4. Field Assistance Bulletin No. 2018–02

In response to the Fifth Circuit’s vacatur of the 2016 Rulemaking, on May 7, 2018, the Department issued Field Assistance Bulletin 2018–02, Temporary Enforcement Policy on Prohibited

Transactions Rules Applicable to Investment Advice Fiduciaries (FAB 2018–02).⁴⁵ FAB 2018–02 announced that, pending further guidance, the Department would not pursue prohibited transaction claims against fiduciaries who were working diligently and in good faith to comply with the Impartial Conduct Standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules. In adopting the temporary enforcement policy, the Department cited uncertainty about fiduciary obligations and the scope of exemptive relief following the court’s opinion that could disrupt existing investment advice arrangements to the detriment of retirement plans, retirement investors, and financial institutions, as well as the significant resources some financial institutions had devoted towards compliance with the BIC Exemption and the Principal Transactions Exemption.

5. Subsequent Actions by the Department

On July 7, 2020, the Department proposed a new prohibited transaction class exemption under Title I and Title II of ERISA for investment advice fiduciaries with respect to employee benefit plans and IRAs, called “Improving Investment Advice for Workers & Retirees.”⁴⁶ The proposal stated it was in response to informal industry feedback seeking a permanent administrative class exemption based on FAB 2018–02.⁴⁷ On the same day, the Department issued a technical amendment to the Code of Federal Regulations (CFR) reinserting the 1975 regulation, reflecting the Fifth Circuit’s vacatur of the 2016 Final Rule.⁴⁸ The technical amendment also reinserted into the CFR Interpretive Bulletin 96–1 (IB 96–1) relating to participant investment education, which had been removed and largely incorporated into the text of the 2016 Final Rule. Additionally, the Department updated its website to reflect the fact that the pre-existing prohibited transaction exemptions that had been amended in the 2016 Rulemaking had been restored to their pre-amendment form, and also to reflect that the Department had withdrawn the Deseret Letter.

On December 18, 2020, the Department adopted the Improving

³⁴ *Nat’l Ass’n. for Fixed Annuities v. Perez*, 217 F.Supp.3d 1 (D.D.C. 2016) [hereinafter *NAFA*]. On December 15, 2016, the U.S. Court of Appeals for the District of Columbia denied an emergency request to stay application of the definition or the exemptions pending an appeal of the district court’s ruling. *Nat’l Ass’n. for Fixed Annuities v. Perez*, No. 16–5345, 2016 BL 452075 (D.C. Cir. 2016).

³⁵ *NAFA*, 217 F. Supp. 3d at 23, 27–28.

³⁶ 885 F.3d 676 (10th Cir. 2018); see *Thrivent Financial for Lutherans v. Acosta*, No. 16–CV–03289, 2017 WL 5135552 (D. Minn. Nov. 3, 2017) (granting the Department’s motion for a stay and the plaintiff’s motion for a preliminary injunction, with respect to Thrivent’s suit challenging the BIC Exemption’s bar on class action waivers as exceeding the Department’s authority and as unenforceable under the Federal Arbitration Act).

³⁷ *Chamber of Commerce v. Hugler*, 231 F. Supp. 3d 152 (N.D. Tex. Feb. 8, 2017) (finding, among other things, that in the 2016 Final Rule, the Department reasonably removed the “regular basis” requirement; and noting, “if anything, however, the five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA.”).

³⁸ See *Chamber*, 885 F.3d 360 (5th Cir. 2018). *But see id.* at 391 (“Noting in the phrase ‘renders investment advice for a fee or other compensation’ suggests that the statute applies only in the limited context accepted by the panel majority.”) (Stewart, C.J., dissenting).

³⁹ *Id.* at 369 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)); see *id.* at 376 (“In short, whether one looks at DOL’s original regulation, the SEC, Federal and state legislation governing investment adviser fiduciary status vis-à-vis broker-dealers, or case law tying investment advice for a fee to ongoing relationships between adviser and client, the answer is the same: ‘investment advice for a fee’ was widely interpreted hand in hand with the relationship of trust and confidence that characterizes fiduciary status.”). *But see id.* at 392 (“One area in which Congress has departed from the common law of trusts is with the statutory definition of ‘fiduciary.’ ERISA does not define ‘fiduciary’ ‘in terms of formal trusteeship, but in functional terms of control and authority over the plan,’ . . . thus expanding the universe of persons subject to fiduciary duties . . .”) (Stewart, C.J., dissenting) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993)). As discussed herein, in the period since the Fifth Circuit decision, the SEC and the National Association of Insurance Commissioners (NAIC) have moved forward with strengthened standards for recommendations provided by broker-dealers and insurance agents, respectively.

⁴⁰ *Id.* at 384.

⁴¹ *Id.*

⁴² See *id.*

⁴³ Code section 4975(a), (b).

⁴⁴ *Chamber*, 885 F.3d 360, 384–85 (5th Cir. 2018); see Code section 4975.

⁴⁵ Available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02>.

⁴⁶ 85 FR 40834 (July 7, 2020).

⁴⁷ *Id.* at 40835.

⁴⁸ 85 FR 40589 (July 7, 2020).

Investment Advice for Workers & Retirees exemption as PTE 2020–02.⁴⁹ The exemption provides relief that is similar in scope to the BIC Exemption and the Principal Transactions Exemption, but it does not include contract or warranty provisions. The exemption expressly covers prohibited transactions resulting from both rollover advice and advice on how to invest assets within a plan or IRA, and imposes new conditions on investment advice fiduciaries providing such advice. In particular, PTE 2020–02 mirrors the core of the BIC and Principal Transaction exemptions' requirements of best interest standards of conduct and policies and procedures to ensure the advice is provided consistent with those standards.

The preamble to PTE 2020–02 also included the Department's interpretation of when advice to roll over assets from an employee benefit plan to an IRA would constitute fiduciary investment advice under the 1975 regulation's five-part test. As in the 2016 Rulemaking, the Department again made clear in 2020 that rollover recommendations were a central concern in the regulation of fiduciary investment advice. Accordingly, the Department emphasized the importance to a retirement investor of the rollover decision, as well as the fact that investment advice providers may have a strong economic incentive to recommend that investors roll over assets into one of their institutions' IRAs.

The preamble interpretation confirmed the Department's continued view that the Deseret Letter was incorrect, and that a recommendation to roll assets out of a Title I Plan is advice with respect to moneys or other property of the plan and, if provided by a person who satisfies all of the requirements of the regulatory test, constitutes fiduciary investment advice. The preamble interpretation also discussed when a recommendation to roll over assets from an employee benefit plan to an IRA would satisfy the "regular basis" requirement. Additionally, the preamble set forth the Department's interpretation of the 1975 regulation's requirement of "a mutual agreement, arrangement, or understanding" that the investment advice will serve as "a primary basis for investment decisions." In April 2021, the Department issued Frequently Asked Questions (FAQs) that, among

other things, summarized aspects of the preamble interpretation.⁵⁰

The Department's preamble interpretation and certain FAQs were challenged in two lawsuits filed after the issuance of PTE 2020–02.⁵¹ On February 13, 2023, the U.S. District Court for the Middle District of Florida issued an opinion vacating the policy referenced in FAQ 7 (entitled "When is advice to roll over assets from an employee benefit plan to an IRA considered to be on a 'regular basis'?" and remanded it to the Department for future proceedings.⁵² On June 30, 2023, a magistrate judge in the Northern District of Texas filed a report with the judge's findings, conclusions, and recommendations, including that the court should vacate portions of PTE 2020–02 that permit consideration of actual or expected Title II investment advice relationships when determining Title I fiduciary status.⁵³

6. Other Regulatory Developments

U.S. Securities and Exchange Commission

Since the vacatur of the Department's 2016 Rulemaking, other regulators have considered and adopted enhanced standards of conduct for investment professionals as a method of addressing, among other things, conflicts of interest. At the Federal level, on June 5, 2019, the SEC finalized a regulatory package relating to conduct standards for broker-dealers and investment advisers. The package included Regulation Best Interest, which established a best interest standard applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers.⁵⁴ The SEC also issued its SEC Investment Adviser Interpretation regarding the conduct standards applicable to investment

advisers under the Advisers Act.⁵⁵ As part of the package, the SEC adopted new Form CRS, which requires registered investment advisers under the Advisers Act and registered broker-dealers to provide retail investors with a short relationship summary with specified information (SEC Form CRS).⁵⁶

According to the SEC, these actions were designed to enhance and clarify the standards of conduct applicable to broker-dealers and investment advisers, help retail investors better understand and compare the services offered and make an informed choice of the relationship best suited to their needs and circumstances, and foster greater consistency in the level of protections provided by each regime, particularly at the point in time that a recommendation is made.⁵⁷

The SEC's Regulation Best Interest enhanced the broker-dealer standard of conduct "beyond existing suitability obligations."⁵⁸ According to the SEC, this

[A]lign[ed] the standard of conduct with retail customers' reasonable expectations by requiring broker-dealers, among other things, to: Act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the interests of the retail customer; and address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where [the SEC has] determined that disclosure is insufficient to reasonably address the conflict, to mitigate or, in certain instances, eliminate the conflict.⁵⁹

Regulation Best Interest's "best interest obligation" includes a Disclosure Obligation, a Care Obligation, a Conflict of Interest Obligation, and a Compliance Obligation. The Care Obligation requires broker-dealers, in making recommendations, to exercise reasonable diligence, care, and skill to:

- Understand the potential risks, rewards, and costs associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers;
- Have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that

⁵⁰ New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions, <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption>.

⁵¹ *Compl., Am. Sec. Ass'n. v. U.S. Dep't of Labor*, No. 8:22–CV–330VMC–CPT, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023); *Compl., Fed'n of Ams. for Consumer Choice v. U.S. Dep't of Labor*, No. 3:22–CV–00243–K–BT (N.D. Tex. Feb. 2, 2022).

⁵² *Am. Sec. Ass'n. v. U.S. Dep't of Labor*, 2023 WL 1967573, at * 22–23.

⁵³ See Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Fed'n of Ams. for Consumer Choice v. U.S. Dep't of Labor*, No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at * 27–29 (N.D. Tex. June 30, 2023) [hereinafter *FACC*]. As of the date of this proposal, the district court judge has not yet taken action regarding the magistrate judge's report and recommendations.

⁵⁴ 84 FR 33318 (July 12, 2019).

⁵⁵ 84 FR 33669 (July 12, 2019).

⁵⁶ Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019).

⁵⁷ Regulation Best Interest release, 84 FR 33318, 33321 (July 12, 2019).

⁵⁸ *Id.* at 33318.

⁵⁹ *Id.*

⁴⁹ 85 FR 82798 (Dec. 18, 2020).

retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation and does not place the financial or other interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; and

- Have a reasonable basis to believe that a series of recommended transactions, even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile and does not place the financial or other interest of the broker, dealer, or such natural person making the series of recommendations ahead of the interest of the retail customer.⁶⁰

The Conflict of Interest Obligation requires the broker-dealer to establish, maintain and enforce written policies and procedures reasonably designed to:

- Identify and at a minimum disclose, or eliminate, all conflicts of interest associated with such recommendations;
- Identify and mitigate any conflicts of interest associated with such recommendations that create an incentive for a natural person who is an associated person of a broker or dealer to place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer;
- Identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended to a retail customer and any conflicts of interest associated with such limitations, and prevent such limitations and associated conflicts of interest from causing the broker, dealer, or a natural person who is an associated person of the broker or dealer to make recommendations that place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; and
- Identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.⁶¹

A conflict of interest is defined as “an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer—consciously or unconsciously—to make a recommendation that is not disinterested.”⁶²

The SEC stated that “[t]he Commission has crafted Regulation Best Interest to draw on key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act, while providing specific requirements to address certain aspects of the relationships between broker-dealers and their retail customers.”⁶³ The SEC

emphasized that, “[i]mportantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor.”⁶⁴ The SEC also noted that the standard of conduct cannot be satisfied through disclosure alone.⁶⁵

The best interest standard in the SEC's Regulation Best Interest applies to broker-dealers and their associated persons when they make a recommendation to a retail customer of any “securities transaction or an investment strategy involving securities (including account recommendations).” According to the SEC, this language encompasses recommendations to roll over or transfer assets in a workplace retirement plan account to an IRA, and recommendations to take a plan distribution.⁶⁶ However, the SEC also stated that while Regulation Best Interest applies to advice regarding a person's own retirement account such as a 401(k) account or IRA, it does not cover advice to workplace retirement plans themselves or to their legal representatives when they are receiving advice on the plan's behalf.⁶⁷

The SEC Investment Adviser Interpretation, published simultaneously with Regulation Best Interest, reaffirmed and in some cases clarified aspects of the fiduciary duty of an investment adviser under the Investment Advisers Act.⁶⁸ The SEC stated that “an investment adviser's fiduciary duty under the Investment Advisers Act comprises both a duty of care and a duty of loyalty.”⁶⁹ According to the SEC, “[t]his fiduciary duty is based on equitable common law principles and is fundamental to advisers' relationships with their clients under the Advisers Act.”⁷⁰ The fiduciary duty under the Federal securities laws requires an adviser “to adopt the principal's goals, objectives, or ends.”⁷¹ The SEC stated:

This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. In other words, the investment adviser cannot

place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the “best interest” of its client at all times.⁷²

The SEC further stated, “[t]he investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship.”⁷³

The SEC also adopted a new required disclosure of a “Form CRS Relationship Summary,” under which registered investment advisers under the Advisers Act and broker-dealers must provide retail investors with certain information about the nature of their relationship with their financial professional. One of the purposes of the Form CRS is to help retail investors better understand and compare the services and relationships that investment advisers and broker-dealers offer in a way that is distinct from other required disclosures under the Federal securities laws.⁷⁴ Form CRS also includes a link to a dedicated page on the SEC's investor education website, *Investor.gov*, which offers educational information about broker-dealers and investment advisers, and other materials.⁷⁵

State Legislative and Regulatory Developments

Also, since the vacatur of the Department's 2016 Rulemaking, there have been legislative and regulatory developments at the State level involving conduct standards. The Massachusetts Securities Division amended its regulations to apply a fiduciary conduct standard under which broker-dealers and their agents must “[m]ake recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer.”⁷⁶

⁷² *Id.* (footnote omitted).

⁷³ *Id.* at 33670. See also *id.* n 17 citing authorities where the Commission previously recognized the broad scope of section 206 of the Advisers Act in a variety of contexts.

⁷⁴ 84 FR 33492, 33493 (July 12, 2019).

⁷⁵ *Id.* SEC staff has since issued guidance on Regulation Best Interest, Form CRS, and related interpretations, including staff bulletins on care obligations, conflicts of interest, and account recommendations for retail investors, which are available at <https://www.sec.gov/regulation-best-interest>.

⁷⁶ 950 Mass. Code Regs. 12.204 & 12.207 as amended effective March 6, 2020; see Consent Order, *In the Matter of Scottrade, Inc.*, No. E-2017-0045 (June 30, 2020); see also *Enft Section of Massachusetts Sec. Div. of Office of Sec'y of Commonwealth v. Scottrade, Inc.*, 327 F. Supp. 3d 345, 352 (D. Mass. 2018) (discussing enforcement actions under Massachusetts securities and other consumer protection laws). A challenge to the regulation was rejected by the Massachusetts Supreme Judicial Court. See *Robinhood Fin. LLC v. Sec'y of Commonwealth of Mass.*, No. SJ-C-13381, 2023 WL 5490571 (Mass. Aug. 25, 2023).

⁶⁰ *Id.* at 33372.

⁶¹ *Id.* at 33476.

⁶² 17 CFR 240.151-1.

⁶³ Regulation Best Interest release, 84 FR 33318, 33320 (July 12, 2019).

⁶⁴ *Id.* at 33321.

⁶⁵ *Id.* at 33390.

⁶⁶ *Id.* at 33337.

⁶⁷ *Id.* at 33343-44.

⁶⁸ 84 FR 33669 (July 12, 2019).

⁶⁹ *Id.* at 33671 (footnote omitted).

⁷⁰ *Id.* at 33670.

⁷¹ *Id.* at 33671.

The NAIC Model Regulation, updated in 2020, provides that insurance agents must act in the consumer's "best interest," as defined by the Model Regulation, when making a recommendation of an annuity, and insurers must establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.⁷⁷ According to the NAIC, as of August 23, 2023, 43 jurisdictions have implemented the revisions to the model regulation.⁷⁸

The NAIC Model Regulation includes a best interest obligation comprised of a care obligation, a disclosure obligation, a conflict of interest obligation, and a documentation obligation, applicable to an insurance producer.⁷⁹ If these specific obligations are met, the producer is treated as satisfying the overarching best interest standard as expressed in the NAIC Model Regulation. The care obligation states that the producer, in making a recommendation, must exercise reasonable diligence, care and skill to:

- Know the consumer's financial situation, insurance needs and financial objectives;
- Understand the available recommendation options after making a reasonable inquiry into options available to the producer;
- Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives over the life of the product, as evaluated in light of the consumer profile information; and
- Communicate the basis or bases of the recommendation.⁸⁰

The conflict of interest obligation requires the producer to "identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest."⁸¹ "Material conflict of interest" is defined as "a financial interest of the producer in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation," but the definition expressly carves out "cash compensation or non-cash

compensation" from treatment as sources of conflicts of interest.⁸² The NAIC Model Regulation also provides that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA.⁸³

The NAIC expressly disclaimed that its standard creates fiduciary obligations, and the obligations in the Model Regulation differ in significant respects from those applicable to broker-dealers in the SEC's Regulation Best Interest.⁸⁴ For example, in addition to disregarding compensation as a source of conflicts of interest, the specific care, disclosure, conflict of interest, and documentation requirements do not expressly incorporate the obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with their terms is treated as meeting the "best interest" standard. Similarly, the Model Regulation's care obligation does not repeat the "best interest" requirement but instead includes a requirement to "have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives" ⁸⁵ Additionally, the obligation to comply with the "best interest" standard is limited to the individual producer, as opposed to the insurer responsible for supervising the producer.

These regulatory changes cover many, but not all, of the assets held by retirement plans. Further, the SEC's Regulation Best Interest and the NAIC Model Regulation are each limited in important ways in terms of application to advice provided to ERISA plan fiduciaries although this is not the case with the Advisers Act fiduciary obligations. For example, Regulation Best Interest does not cover advice to workplace retirement plans or their representatives (such as an employee of a small business who is a fiduciary of

the business's 401(k) plan).⁸⁶ The NAIC Model Regulation does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA.⁸⁷ The Department believes that retirement investors and the regulated community are best served by an ERISA fiduciary standard that applies uniformly to all investments that retirement investors may make with respect to their retirement accounts. Amendments to the ERISA regulation are necessary to achieve that result.

7. Coordination With Other Agencies

Under Title I and Title II of ERISA, the Department has primary responsibility for the regulation of fiduciaries' advice to retirement investors. Because of the fundamental importance of retirement investments to workers' financial security and the tax-preferred status of plans and IRAs, Congress defined the scope of fiduciary coverage broadly and imposed stringent obligations on fiduciaries, including prohibitions on conflicted transactions that do not have direct analogues under the securities and insurance laws. The fiduciary standards and prohibited transaction rules set forth in Title I and Title II of ERISA, as applicable, broadly apply to covered fiduciaries, irrespective of the particular investment product they recommend or their status as investment advisers under the Advisers Act, broker-dealers, insurance agents, bankers, or other status. This proposed regulatory approach is designed to ensure that the standards and rules applicable under Title I and Title II of ERISA are broadly uniform as applied to retirement investors across different categories of investment advice providers and advisory relationships.

At the same time, however, many stakeholders have stressed the need to harmonize the Department's efforts with potential rulemaking and rulemaking activities by other regulators, including the SEC's standards of care for providing investment advice and the Commodity Futures Trading Commission's (CFTC) business conduct standards for swap dealers (and comparable SEC standards for security-based swap dealers). In addition, commenters have urged coordination with other agencies regarding IRA products and services.

As the SEC has adopted regulatory standards for broker-dealers that are

⁸² *Id.* at section 5(I).

⁸³ *Id.* at section 4(B)(1).

⁸⁴ Section 6(d) of the Model Regulation provides, "[t]he requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation." In recent insurance industry litigation against the Department, plaintiff Federation of Americans for Consumer Choice, Inc., stated that "[t]here is a world of difference" between the NAIC Model Regulation and ERISA's fiduciary regime. *See* Pls.' (1) Br. In Opp'n to Defs.' Cross-Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, for Summ. J., and (2) Reply Br. in Supp. of Pls. Mot. for Summ. J., 40, *Fed'n of Ams. for Consumer Choice v. U.S. Dep't of Labor*, No. 3:22-CV-00243-K-BT (Nov. 7, 2022) (comparing ERISA's best interest requirement to NAIC Model Regulation 275, Sections 2.B and 6.A.(1)(d)).

⁸⁵ *Id.* at section 6(A)(1)(a)(iii).

⁸⁶ Regulation Best Interest release, 84 FR 33318, 33343-44 (July 12, 2019). Regulation Best Interest would apply, however, to retail customers receiving recommendations for their own retirement accounts. *Id.*

⁸⁷ NAIC Model Regulation, at section 4(B)(1).

⁷⁷ Available at www.naic.org/store/free/MDL-275.pdf.

⁷⁸ NAIC Annuity Suitability & Best Interest Standard web page, <https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard>.

⁷⁹ A producer is defined in section 5.L. of the Model Regulation as "a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities." Section 5.L. further provides that the term producer includes an insurer where no producer is involved.

⁸⁰ NAIC Model Regulation, at section 6(A)(1)(a).

⁸¹ *Id.* at section 6(A)(3).

based on fiduciary principles of care and loyalty also applicable to investment advisers under the Advisers Act, and the NAIC has adopted a model law that includes a best interest standard, the Department believes that it is possible to honor the unique regulatory structure imposed by the law governing tax-preferred retirement investments, adopt a regulatory approach that provides a broadly uniform standard for all retirement investors, as contemplated by Title I and Title II of ERISA, and avoid the imposition of obligations that conflict with investment professionals' obligations under other applicable laws. In particular, in the Department's view, PTE 2020–02 is consistent with the requirements of the SEC's Regulation Best Interest and the fiduciary obligations of investment advisers under the Advisers Act. Therefore, broker-dealers and investment advisers that have already adopted meaningful compliance mechanisms for Regulation Best Interest and the Advisers Act fiduciary duty, respectively, should be able to adapt easily to comply with the PTE.

Nevertheless, to better understand whether the proposed rule and exemptions would subject investment advice providers to requirements that conflict with or add to their obligations under other Federal laws, the Department has continued consulting and coordinating with the SEC; other securities, banking, and insurance regulators; the Department of the Treasury, including the Federal Insurance Office; and the Financial Industry Regulatory Authority (FINRA), the independent regulatory authority of the broker-dealer industry.

The Department has also continued consulting and coordinating with the Department of the Treasury and the Internal Revenue Service (IRS), particularly on the subject of IRAs, and will continue to do so through the rulemaking process. Although the Department has responsibility for issuing regulations and prohibited transaction exemptions under section 4975 of the Code, which applies to IRAs, the IRS maintains general responsibility for enforcing the excise tax applicable to prohibited transactions. The IRS's responsibilities extend to the imposition of excise taxes on fiduciaries who participate in prohibited transactions. As a result, the Department and the IRS share responsibility for addressing self-dealing by investment advice fiduciaries to tax-qualified plans and IRAs.

C. Purpose of the Proposed Rule and Summary of the Major Provisions

1. Purpose of the Proposed Rule

Since the 1975 rule was adopted, developments in retirement savings vehicles and in the investment advice marketplace have altered the way retirement investors interact with investment advice providers. In 1975, retirement plans were primarily defined benefit plans, which were typically managed by sophisticated investment professionals. IRAs were not major market participants and 401(k) plans were not yet in existence. Today, however, plan participants, IRA owners, and their beneficiaries exercise direct authority over their investments, and depend upon a wide range of investment professionals, including broker-dealers, advisers subject to the Advisers Act, insurance agents, and others on how to make complex decisions about the management of retirement assets.

These individual investors have far greater responsibility for decisions about their retirement savings than was true in 1975, when investment professionals directly managed plan investments. Individual investors routinely depend on the quality of the advice they receive from financial professionals who commonly hold themselves out as trusted advice providers. Because these professionals have inherent conflicts of interest, however, there is an ever-present danger that the investment advice the retirement investor receives will be driven, not by the best interest of the investor, but by the financial interests of the investment professional or firm whom they depend upon for advice that is in their interest.

Certainly, when an investment professional satisfies all five conditions of the 1975 regulation with respect to a given instance of advice, the investment professional is properly treated as a fiduciary in accordance with the parties' reasonable understanding of the nature of their relationship. However, the 1975 test, as applied to the current marketplace is underinclusive because it fails to capture many circumstances in which an investor would reasonably believe they were receiving advice from an investment professional who was rendering services to the investor based upon the investor's best interest. The Department's experience in the current marketplace is that the five-part test—in particular, the “regular basis” requirement and the requirement of “a mutual agreement, arrangement, or understanding” that the investment advice will serve as “a primary basis for

investment decisions”—too often work to defeat legitimate retirement investor expectations of impartial advice and allow some advice relationships to occur where there is no best interest standard.

These components of the five-part test are not found in the statute's text, and in today's marketplace, undermine legitimate investor understandings of a professional relationship centered around the investor's best interest. In other words, there are currently many situations where the retirement investor reasonably expects that their relationship with the advice provider is one in which the investor can (and should) place trust and confidence in the recommendation, yet which are not covered by the current regulation. This proposal attempts to reconcile the regulatory text with the both the reasonable expectations of the retirement investor along with the statutory text and purpose.

The proposed revised definition of an investment advice fiduciary under ERISA, as discussed in detail below, is consistent with the express text of the statutory definition and better protects the interests of retirement investors. The proposal comports with the broad language and protective purposes of the statute, while at the same time limiting the treatment of recommendations as ERISA *fiduciary* advice to those objective circumstances in which a retirement investor would reasonably believe that they can rely upon the advice as rendered by an investment professional who is acting in the investor's best interest, rather than merely promoting their own competing financial interests at the investor's expense.

An important premise of Title I and Title II of ERISA is that fiduciaries' conflicts of interest should not be left unchecked, but rather should be carefully regulated through rules requiring adherence to basic fiduciary norms and avoidance of prohibited transactions. The specific duties imposed on fiduciaries by Title I and Title II of ERISA stem from Congress' judgment regarding the best way to protect the public interest in tax-advantaged benefit arrangements that are critical to workers' financial and physical health. In contrast to the Federal securities laws and other regulatory regimes which can permit certain conflicts if prescribed disclosure obligations are met, the statutory prohibited transaction provisions in Title I and Title II of ERISA contemplate a more stringent approach for the protection of these tax-advantaged retirement savings. In this context, an

appropriately constructed regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA is essential.

While Congress enacted ERISA to give special protections to retirement investors based on the central importance of retirement assets to individuals' financial security and the broader marketplace, ERISA's regulation of advice has failed to keep up with changes in the marketplace, in marked contrast to other regulatory regimes. As noted above, the Department's proposal follows the acts of other regulators who have similarly recognized the need to change the standards applicable to investment professionals to reflect current realities. It is appropriate that the Department, too, update its regulation to reflect the current marketplace, and to ensure that ERISA and the Code serve their protective purposes. When Congress enacted ERISA, it chose to impose a uniquely protective regime on the management and oversight of plan assets. The law's aim was to protect the interests of plan participants and beneficiaries by imposing especially high standards on those who exercise functional authority over plan investments, including rendering investment advice for a fee. As many Courts have noted, ERISA's obligations are the "highest known to the law."⁸⁸ The 1975 rule as applied to current market conditions, however, undermines ERISA's protective goals and defeats legitimate investor expectations of professional advice based upon their best interest. As discussed in more detail in the RIA, some retirement investors remain vulnerable to harm from conflicts of interest in the investment advice they receive because of the outdated 1975 regulation. The Department, as opposed to other regulators, remains uniquely positioned to create a regulatory definition of an investment advice fiduciary under ERISA that is uniformly applicable to all the types of investments that retirement investors make.

For example, the Department's proposal fills an important gap regarding advice to plans and plan fiduciaries. Advice from broker-dealers to plans and plan fiduciaries is not protected by the SEC's Regulation Best Interest. And the NAIC Model Regulation does not apply to transactions involving contracts used to fund retirement plans covered by ERISA. The fiduciary advice definition in Title I and Title II of ERISA, however,

extends more broadly to cover advice to plan and IRA fiduciaries as well as plan participants, beneficiaries, and IRA owners and beneficiaries. This provides important protections to the retirement investors saving through these plans. The proposed rule would apply uniformly to advice to retirement investors within the ambit of Title I and Title II of ERISA, as is consistent with the text of the statutory definition which draws no distinctions between these different categories of retirement investors.

The proposal also takes on special importance in creating uniform standards for investment transactions that are not covered by the Federal securities laws. Some types of plan and IRA investments, such as real estate, fixed indexed annuities, certificates of deposit, and other bank products, may not be subject to the SEC's Regulation Best Interest, and there are a number of persons who provide investment advice services that are neither subject to the SEC's Regulation Best Interest nor to the fiduciary obligations in the Advisers Act. An update to the regulatory definition of an investment advice fiduciary, for purposes of Title I and Title II of ERISA, will enhance protections of retirement investors. This approach reflects both the statutory text, which adopts a uniform approach to all assets held in tax-advantaged retirement plans, as well as sound public policy. When investment professionals hold themselves out to retirement investors as making recommendations based on the retirement investors' best interests, their recommendations should be driven by a uniform fiduciary obligation, and not by perceptions that one category of investment product is subject to lower regulatory standards than another.

Since ERISA's enactment, the Department has been expressly given the authority under Title I of ERISA to issue regulations defining terms in Title I and to grant administrative exemptions from the prohibited transactions provisions. Pursuant to the President's Reorganization Plan No. 4 of 1978,⁸⁹ which Congress ratified in 1984,⁹⁰ the Department's authority was expanded to include authority to issue regulations, rulings, and opinions on the definition of a fiduciary with respect to Title II plans under the Code (including IRAs) and to grant administrative prohibited transaction exemptions applicable to them.⁹¹ Thus, the Department has clear

authority to promulgate the regulatory definition of a fiduciary under both Title I and Title II of ERISA, and the Department has taken care in this proposal to honor the text and purposes of Title I and Title II of ERISA.

2. Summary of the Major Provisions of the Proposed Rule

The Department proposes that a person would be an investment advice fiduciary if they provide investment advice or make an investment recommendation to a retirement investor (*i.e.*, a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary, or IRA fiduciary); the advice or recommendation is provided "for a fee or other compensation, direct or indirect," as defined in the proposed rule; and the person provides the advice or makes the recommendation in one of the following contexts:

- The person either directly or indirectly (*e.g.*, through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;
- The person either directly or indirectly (*e.g.*, through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or
- The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.⁹²

⁹² This proposed rule is accompanied by proposals (published elsewhere in the **Federal Register**) related to prohibited transaction exemptive relief. The proposals would amend existing PTEs, including PTE 2020-02, that allow, subject to protective conditions, investment advice fiduciaries to receive compensation and engage in transactions that otherwise would be prohibited. Unlike the PTEs that were a part of the 2016 Rulemaking, these PTEs do not, and the amendments would not, include required contracts or warranties that the Fifth Circuit objected to. These prohibited transaction exemptions also do not exempt a party from *status as a fiduciary*, and therefore, the proposals do not affect the scope of the regulatory definition of an investment advice fiduciary. Rather, the exemption proposals involve an exercise of the statutory authority afforded to the Department by Congress to grant administrative relief from the strict prohibited transaction provisions in Title I and Title II of ERISA for beneficial transactions involving plans and IRAs. See section 408(a) of ERISA (requiring the Department to make findings before granting an exemption that the exemption is administratively feasible, in the interests of the plan or IRA and of its participants and beneficiaries, and protective of

⁸⁸ *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d. Cir. 1982), *cert denied*, 459 U.S. 1069 (1982).

⁸⁹ 5 U.S.C. App. 1 (2018).

⁹⁰ Sec. 1, Public Law 98-532, 98 Stat. 2705 (Oct. 19, 1984).

⁹¹ Sec. 102, 5 U.S.C. App. 1.

It is important to note that each required component of the new proposed regulatory definition would have to be satisfied with respect to any particular recommendation for the recommendation to constitute fiduciary investment advice. In accordance with the statute, fiduciary status is determined on a transactional basis. Under the statutory text, a person is a fiduciary with respect to advice “to the extent . . . [they] render[] investment advice for a fee or other compensation, direct or indirect.” The proposed rule, like the statute, applies fiduciary status on a transaction-by-transaction basis. One is only a fiduciary “to the extent” the person making the recommendation meets the rule’s requirements with respect to the particular advice transaction at issue.

The Department believes the test that it is proposing here better honors the statute and retirement investors’ legitimate expectations of impartial investment advice from trusted advice providers than the 1975 rule, while avoiding the danger of sweeping too broadly and covering recommendations that Congress might not have intended to cover.

The Department’s proposal is also intended to be responsive to the Fifth Circuit’s emphasis on relationships of trust and confidence. The current proposal is much more narrowly tailored than the 2016 Final Rule, which treated as fiduciary advice, any compensated investment recommendation as long as it was directed to a specific retirement investor regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA. In contrast, the proposal provides that fiduciary status would attach only if compensated recommendations are made in certain specified contexts, each of which describes circumstances in which the retirement investor can reasonably place their trust and confidence in the advice provider. The Department believes the approach in this proposal is consistent with the statutory definition that applies fiduciary status on a functional (and therefore, transactional) basis.⁹³

the rights of participants and beneficiaries of such plan or IRA); section 4975(c)(2) of the Code (same).

⁹³ *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). In this regard, the Department notes that the SEC’s Regulation Best Interest also applies on a transactional basis. As stated by the SEC, “the provision of recommendations in a broker-dealer relationship is generally transactional and episodic, and therefore the final rule requires that broker-dealers act in the best interest of their retail customers at the time a recommendation is made and imposes no duty to monitor a customer’s

The proposed regulatory definition of an investment advice fiduciary includes the following paragraphs, which are discussed in greater detail below. Paragraph (c) of the proposed regulation defines the term “investment advice.” Paragraph (d) retains the provision in the existing regulation regarding “execution of securities transactions.” Paragraph (e) defines the phrase “for fee or other compensation, direct or indirect.” Paragraph (f) sets forth definitions used in the regulation. Paragraph (g) addresses applicability of the regulation. Paragraph (h) confirms the continued applicability of State law regulating insurance, banking, and securities.

3. Covered Advice and Recommendations

Paragraph (c)(1) of the proposed regulation provides that a person renders “investment advice” with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities or other investment transaction or any investment strategy involving securities or other investment property to the plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary, or IRA fiduciary, subject to certain specified criteria. Paragraphs (c)(1)(i), (ii), and (iii) set forth three alternative contexts under which covered recommendations would constitute investment advice for purposes of the statutory definitions of an investment advice fiduciary in Title I and Title II of ERISA. As discussed herein, under each of these three contexts, the Department believes that retirement investors could reasonably place their trust and confidence in the advice provider. The proposal also makes clear that fiduciary status under Title I and/or Title II of ERISA may result from recommendations to any of the relevant plan actors, including not only the plan fiduciary, but also plan participants, IRA owners, and their beneficiaries. This is consistent with the Department’s longstanding position that advice to a plan participant or beneficiary is advice to the plan.⁹⁴

Paragraph (c)(1)(i)

In the first context, which is set forth in proposed paragraph (c)(1)(i), a person renders fiduciary “investment advice” within the meaning of ERISA section 3(21) if the person rendering advice

account following a recommendation.” 84 FR 33318, 33331 (July 12, 2019).

⁹⁴ IB 96–1, 29 CFR 2509.96–1. For purposes of this definition, a participant or beneficiary of the plan is not a “plan fiduciary” with respect to the plan.

either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor.

This proposed provision is similar to a provision in the 1975 rule that provides for investment advice fiduciary status if a covered recommendation is made and the person making the recommendation either directly or indirectly has “discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or property for the plan.”⁹⁵ The proposal would broaden this provision by referencing securities or other investment property of the retirement investor, not just an investment through a plan or IRA.

Persons that have discretionary authority or control over the investment of a retirement investor’s assets necessarily are in a relationship of trust and confidence with respect to the retirement investor.⁹⁶ Further, like the 1975 provision, the proposal would extend to circumstances in which the person making the recommendation “indirectly (e.g., through or together with any affiliate)” has discretionary authority or control over securities or other investment property; in this context, the use of “indirectly” generally refers to an arrangement in which an affiliate has discretionary authority or control.

Paragraph (c)(1)(ii)

The second context, in proposed paragraph (c)(1)(ii), sets forth that a person provides fiduciary “investment advice” if the person making the recommendation directly or indirectly (e.g., through or together with an affiliate) makes investment recommendations to investors on a

⁹⁵ See 29 CFR 2510.3–21(c)(1)(ii)(A) and 26 CFR 54.4975–9(c)(1)(ii)(A) (emphasis added). See also paragraph (d) of the proposal, which provides that a person is not a fiduciary merely because they have certain specific discretion in connection with the execution of securities transactions.

⁹⁶ As discussed below, the proposed rule would not impose on a fiduciary an automatic fiduciary obligation to continue to monitor an investment or a retirement investor’s activities to ensure the recommendations remain prudent and appropriate for the plan or IRA. The extent of a monitoring obligation would depend on whether the facts and circumstances indicate that the fiduciary has undertaken that responsibility. A fiduciary that assumes discretion over plan or IRA assets, however, would generally be viewed as assuming a monitoring obligation.

regular basis as part of their business and the recommendation is provided under circumstances indicating the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest.

The proposed provision applies only to advice rendered by a person who makes investment recommendations to investors "on a regular basis as part of their business." As compared to the "regular basis" prong of the 1975 regulation, which the Department believes can work to undermine the current reasonable expectations of retirement investors, this proposed provision is properly focused on whether the advice provider is in the business of providing investment recommendations. The proposal's updated regular basis requirement avoids concerns that the rule could sweep so broadly as to cover, for example, the car dealer who suggests that a consumer finance a purchase by tapping into retirement funds. Retirement investors would not typically view such persons as making investment recommendations based on the retirement investors' individual financial interests, and the rule would not treat them as fiduciaries. Similarly, the human resources employees of a plan sponsor would not be considered investment advice fiduciaries under the proposed regulatory definition, because they do not regularly make investment recommendations to investors as part of their business.⁹⁷

However, the proposal's regular basis requirement would not defeat legitimate investor expectations by automatically excluding one-time advice from treatment as fiduciary investment advice.⁹⁸ For example, the proposed

rule would treat an insurance agent's recommendation to invest a retiree's retirement savings in an annuity as fiduciary advice if the agent regularly makes investment recommendations to investors, and the circumstances indicate that the recommendation is based on the retiree's particular needs and circumstances and may be relied upon for making an investment decision that is in the investor's best interest. Similarly, if the agent told the retiree that they were rendering fiduciary advice, the proposal would treat the recommendation as fiduciary advice even if it was one-time advice. Over time, the Department has become concerned that 1975 regulation's regular basis test served to defeat objective understandings of the nature of the professional relationship and the reliability of the advice as based on the investor's best interest.

By limiting the scope of those who may be an investment advice fiduciary to those who make investment recommendations as a regular part of their business, the Department believes that the proposed definition is appropriately tailored to those advice providers in whom retirement investors may reasonably place their trust and confidence. Whether someone gives investment recommendations on a regular basis as part of their business is an objective test based on the totality of facts and circumstances.⁹⁹ The Department invites comment on this approach, including the extent to which the Department should consider the investor's understandings as to whether the adviser regularly makes investment recommendations as part of their business. The Department seeks comment regarding examples of financial professionals who may be reasonably viewed by investors as

giving investment advice but would not in fact meet the requirements laid out in this provision.

Proposed paragraph (c)(1)(ii) further provides that, to count as fiduciary advice, the recommendation must be provided "under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest."

This provision of the proposal is similar to, but improves upon, the parts of the 1975 regulation that require a "mutual agreement, arrangement or understanding" that the advice will serve as "a primary basis" for the retirement investor's investment decisions. Instead of the "mutual agreement, arrangement, or understanding" requirement—which over time has encouraged investment professionals to hold themselves out as trusted advisers while disclaiming fiduciary status in the fine print—the proposal would focus on the objective "circumstances" surrounding the recommendation, including how the investment professional held themselves out to the retirement investor and described the services offered. The Department believes that the proposed language will better avoid loopholes and fine print disclaimers, while properly focusing on a reasonable understanding of the nature of their relationship.

Further, the proposal does not include the 1975 regulation's "primary basis" requirement, which has proved difficult to interpret and untethered from the extent to which the recommendation was presented as advice upon which the investor could rely in making a decision.¹⁰⁰ Instead, the proposal has a requirement that the circumstances indicate that the recommendation "may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest."

Recommendations that meet this test can be outcome-determinative for the investor and are appropriately treated as fiduciary advice when the elements of the proposed rule are satisfied.

In determining whether proposed paragraph (c)(1)(ii) is satisfied, the Department intends to examine the

other compensation." Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *FACC*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *22 (N.D. Tex. June 30, 2023) (quoting ERISA section 3(21)(A)(ii), 29 U.S.C. 1002(21)(A)(ii)) (emphasis in original).

⁹⁹ The reference to "investment recommendations" here and elsewhere in the proposal does not indicate that the proposal is limited to broker-dealers, or parties who regularly provide advice or make recommendations in the securities or banking industries. The scope of the regulation would extend to recommendations involving securities or other investment property. Therefore, for example, insurance agents who regularly make recommendations to customers with respect to the purchase of annuity contracts would be considered to make investment recommendations to investors on a regular basis as part of their business. Proposed paragraph (f)(11) provides that the term "investment property" does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.

⁹⁷ The Department also would not consider salaries of human resources employees of the plan sponsor to be a fee or other compensation in connection with or as a result of the educational services and materials that they provide to plan participants and beneficiaries. Further, the proposed rule does not alter the principles articulated in ERISA Interpretive Bulletin 75-8, D-2 (29 CFR 2509.75-8) (IB 75-8). IB 75-8 provides that persons who perform purely administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, but who have no power to make decisions as to plan policy, interpretations, practices or procedures, are not fiduciaries with respect to the plan by virtue of those purely ministerial functions.

⁹⁸ As noted by the magistrate judge in *Federation of Americans for Consumer Choice v. United States Dept. of Labor*, the Fifth Circuit's opinion "did not foreclose that Title I duties may reach those fiduciaries who, as aligned with Title I's text, render advice, even for the first time, 'for a fee or

¹⁰⁰ See Preamble to Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees, 85 FR 82798, 82808 (Dec. 18, 2020) (discussing comments on whether the test focuses on "a" primary basis or "the" primary basis).

ways investment advice providers market themselves and describe their services. For example, some stakeholders have previously expressed concern that investment advice providers that adopt titles such as financial consultant, financial planner, and wealth manager, are holding themselves out as acting in positions of trust and confidence while simultaneously disclaiming status as an ERISA fiduciary.¹⁰¹ In the Department's view, an investment advice provider's use of such titles routinely involves holding themselves out as making investment recommendations that will be based on the particular needs or individual circumstances of the retirement investor and may be relied upon as a basis for investment decisions that are in the retirement investor's best interest.

Of course, whether a recommendation is provided under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor and that it may be relied upon as a basis for investment decisions that are in the retirement investor's best interest is only part of the consideration. Even if a recommendation satisfies a portion of the definition, it is not fiduciary investment advice unless each aspect is satisfied (e.g., to satisfy paragraph (c)(1)(ii), the person must also (directly or indirectly) make investment recommendations on a regular basis as part of their business).

The Department invites comments on the extent to which particular titles are commonly perceived to convey that the investment professional is providing individualized recommendations that may be relied upon as a basis for investment decisions in a retirement investor's best interest (and if not, why such titles are used). The Department also requests comment on whether other types of conduct, communication, representation, and terms of engagement of investment advice providers should merit similar treatment.

Paragraph (c)(1)(iii)

The third context identified in the proposal, in proposed paragraph (c)(1)(iii), is if the person making recommendations represents or acknowledges that they are acting as a fiduciary when making investment recommendations. An investment advice provider that acknowledges fiduciary status has expressly agreed that the customer may place trust and confidence in them. Furthermore, as discussed in the Fifth Circuit's opinion,

honesty is a general premise of a common law fiduciary relationship.¹⁰² This provision of the proposal would ensure that parties making a fiduciary representation or acknowledgment cannot subsequently deny their fiduciary status if a dispute arises, but rather must honor their words.

For purposes of the proposal, paragraph (c)(1)(iii) is not limited to the circumstances in which the person specifically represents that they are a fiduciary for purposes of Title I or Title II of ERISA, or specifically cites any particular statutory provisions. It is enough that the investment advice provider told the retirement investor that the investment advice or investment recommendations were or will be made in a fiduciary capacity. As with the other contexts identified in proposed paragraph (c)(1), this is intended to align fiduciary status with the retirement investor's reasonable expectations. A retirement investor who is told by a person that the person will be acting as a fiduciary reasonably and appropriately places their trust and confidence in such a person.

In the retirement context, the Department has stressed the importance of clarity regarding the nature of an advice relationship and has encouraged retirement investors to ask advice providers about their status as an ERISA fiduciary with respect to retirement accounts and seek a written statement of the advice provider's fiduciary status. The Department's FAQs entitled *Choosing the Right Person to Give You Investment Advice: Information for Investors in Retirement Plans and Individual Retirement Accounts* state "A written statement helps ensure that the fiduciary nature of the relationship is clear to both you and the investment advice provider at the time of the transaction, and limits the possibility of miscommunication."¹⁰³

Many retirement investors may receive a written fiduciary acknowledgment due to compliance obligations of an investment advice provider. For example, retirement investors that are plan fiduciaries entering into an investment advice services arrangement on behalf of the plan are likely to receive an acknowledgment of fiduciary status from the provider as part of the disclosure obligations under ERISA section 408(b)(2) and the regulations

thereunder.¹⁰⁴ Further, an upfront written acknowledgment of fiduciary status is a requirement of several prohibited transaction exemptions available to investment advice fiduciaries, including the statutory exemption added by Congress at ERISA section 408(b)(14)¹⁰⁵ and the Department's broad administrative exemption, PTE 2020-02.¹⁰⁶

As discussed in the preamble to PTE 2020-02, the Department believes that parties seeking to provide investment advice to retirement investors and relying on the exemption should, at a minimum, make a conscious up-front determination of whether they are acting as fiduciaries; tell their retirement investor customers that they are rendering advice as fiduciaries; and, based on their conscious decision to act as fiduciaries, implement and follow the exemption's conditions.¹⁰⁷

Disclaimers

Paragraph (c)(1)(v) of the proposal addresses the impact of disclaimers on parties' status as investment advice fiduciaries. The proposed paragraph provides that written statements by a person disclaiming status as a fiduciary under the Act, the Code, or this regulation, or disclaiming any of the conditions set forth in paragraph (c)(1)(ii), will not control to the extent they are inconsistent with the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor. The Department's intent in including this paragraph in the proposal is to permit parties to define the nature of their relationship, but also to ensure that any disclaimer be consistent with oral communications or actions, marketing material, State and Federal law, and other interactions based on all relevant facts and circumstances. When the disclaimer is at odds with the investment advice provider's oral communications, marketing material, State or Federal law, or other interactions, the disclaimer is insufficient to defeat the retirement investor's legitimate expectations.¹⁰⁸

¹⁰⁴ 29 CFR 2550.408b-2(c)(1)(iv)(B).

¹⁰⁵ See ERISA section 408(g)(6)(A)(vii), 29 U.S.C. 1108(g)(6)(A)(vii) ("[T]he fiduciary adviser [must] provide[] to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication) . . . that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice . . .").

¹⁰⁶ Section II(b)(1).

¹⁰⁷ 85 FR 82798, 82827 (Dec. 18, 2020).

¹⁰⁸ This discussion of disclaimers applies to the regulation proposed herein, defining an investment

Continued

¹⁰¹ See *id.* at 82803.

¹⁰² *Chamber*, 885 F.3d 360, 370 (5th Cir. 2018) (citing George M. Turner, *Revocable Trusts* § 3:2 (Sept. 2016 Update)).

¹⁰³ Available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/choosing-the-right-person-to-give-you-investment-advice>.

4. Recommendations Regarding Securities Transactions or Other Investment Transactions or Investment Strategies

The definition of “investment advice” in proposed paragraph (c)(1) requires that there be “a recommendation regarding securities transactions or other investment transactions or investment strategies.”

Recommendation

Whether a person has made a “recommendation” is a threshold element in establishing the existence of fiduciary investment advice. For purposes of the proposed rule, the Department views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action. The analysis would apply equally to a communication that is made orally or in writing and would include electronic communications. The determination of whether a recommendation has been made would be an objective rather than a subjective inquiry.

In this regard, the more individually tailored the communication is to a specific retirement investor or investors about, for example, a security, investment property, or investment strategy, the more likely the communication will be viewed as a recommendation; however, the Department cautions that the fact that a communication is made to a group rather than an individual would not be dispositive of whether a recommendation exists. Additionally, providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Furthermore, a series of actions, taken directly or indirectly (e.g., through or together with any affiliate), that may not constitute a recommendation when each action is viewed individually may amount to a recommendation when considered in the aggregate. Even if an action rises to the level of a recommendation, the advice is only fiduciary investment advice if the rest of the regulatory test is met.

In evaluating whether a recommendation has been made under

advice fiduciary, and would not extend to a circumstance in which a financial professional has investment discretion over a retirement investor's assets.

the proposal, the Department intends to take an approach similar to that taken by the SEC and FINRA in the broker-dealer context. In the SEC's Regulation Best Interest, the SEC stated that it would apply the term as currently interpreted with respect to broker-dealer regulation for purposes of the suitability obligations, to achieve efficiencies for broker-dealers.¹⁰⁹ The Department likewise believes that efficiencies will apply if it adopts a similar approach.

In the Regulation Best Interest release, the SEC stated,

[T]he determination of whether a broker-dealer has made a recommendation that triggers application of Regulation Best Interest should turn on the facts and circumstances of the particular situation and therefore, whether a recommendation has taken place is not susceptible to a bright line definition. Factors considered in determining whether a recommendation has taken place include whether the communication “reasonably could be viewed as a ‘call to action’” and “reasonably would influence an investor to trade a particular security or group of securities.” The more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a “recommendation.”¹¹⁰

The SEC did not include a formal definition of a recommendation in Regulation Best Interest, based on its view that the concept of a recommendation is fact-specific and not conducive to an express definition.¹¹¹ In drafting this proposal, the Department has worked to ensure alignment with the regulatory regimes of the SEC and other regulatory agencies, and is proposing a similar approach.

In the Department's view, the framework established by the SEC for broker-dealers is consistent with ordinary understandings of “advice” and familiar to the broker-dealers that are regulated by the SEC. Accordingly, the Department would consider a recommendation for purposes of the SEC's Regulation Best Interest as a recommendation for purposes of this proposed regulation. The Department seeks comment on whether the approach taken in the proposal is sufficiently clear, or whether an express definition would be preferable.

Definition of the phrase “recommendation of any securities transaction or other investment

¹⁰⁹ Regulation Best Interest release, 84 FR 33318, 33335 (July 12, 2019); *see id.* at fn. 161 (providing citations to relevant FINRA guidance, including on the definition and contours of the term “recommendation”).

¹¹⁰ *Id.*

¹¹¹ *Id.*

transaction or any investment strategy involving securities or other investment property.”

Proposed paragraph (f)(10) defines the phrase “recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property.” This phrase largely parallels the language in the SEC's Regulation Best Interest, which applies to broker-dealers’ “recommendation of any securities transaction or investment strategy involving securities (including account recommendations).”¹¹² The phrase's broader reference to “other investment property” reflects the differences in jurisdiction between the SEC and the Department.

Under proposed paragraph (f)(10), the phrase “recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property” is defined as recommendations:

- As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;
- As to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and
- As to rolling over, transferring, or distributing assets from an employee benefit plan or IRA, including recommendations as to whether to engage in the transaction, and the amount, the form, and the destination of such a rollover, transfer, or distribution.

Components of these proposed covered recommendations are discussed below.

Recommendations Involving Securities, Other Investment Property, and Investment Strategy

Paragraph (f)(10)(i) of the proposal describes, as covered recommendations, recommendations as to “the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or

¹¹² 17 CFR 240.15l–1(a)(1).

distributed from the plan or IRA.” Similar to the SEC and FINRA, the Department intends to interpret “investment strategy” broadly, to include “among others, recommendations generally to use a bond ladder, day trading . . . or margin strategy involving securities, irrespective of whether the recommendations mention particular securities.”¹¹³

The reference to “other investment property” is intended to capture other investments made by plans and IRAs that are not securities. This includes, but would not be limited to, non-securities annuities, banking products, and digital assets (regardless of status as a security). The Department does not see any basis for differentiating advice regarding investments in CDs, including investment strategies involving CDs (e.g., laddered CD portfolios), from other investment products, and therefore would interpret paragraph (f)(10) to cover such recommendations.

The Department proposes that the term investment property, however, not include health insurance policies, disability insurance policies, term life insurance policies, and other property to the extent the policies or property do not contain an investment component. This is confirmed in a proposed definition of “investment property” in paragraph (f)(11). Although there can be situations in which a person recommending group health or disability insurance, for example, effectively exercises such control over the decision that the person is functionally exercising discretionary control over the management or administration of the plan as described in ERISA section 3(21)(A)(i) or section 3(21)(A)(iii), the Department does not believe that the definition of investment advice in ERISA’s statutory text is properly interpreted or understood to cover a recommendation to purchase group health, disability, term life insurance, or similar insurance policies that do not have an investment component.

Recommendations as to How Securities or Other Investment Property Should Be Invested After Rollover, Transfer, or Distribution

Proposed paragraph (f)(10)(i) also references recommendations “as to how securities or other investment property should be invested after the securities or other investment property are rolled

over, transferred, or distributed from the plan or IRA.” This proposed provision addresses an important concern of the Department that investment advice providers should not be able to avoid fiduciary responsibility for a rollover recommendation by focusing solely on the investment of assets *after* they are rolled over from the plan. In many or most cases, a recommendation to a plan participant or beneficiary regarding the investment of securities or other investment property after a rollover, transfer, or distribution involves an implicit recommendation to the participant or beneficiary to engage in the rollover, transfer, or distribution. Certainly, a prudent and loyal fiduciary generally could not make a recommendation on how to invest assets currently held in a plan after a rollover, without even considering the logical alternative of leaving the assets in the plan or evaluating how that option compares with the retirement investor’s likely investment experience post-rollover. A fiduciary would violate ERISA’s 404 obligations if it recommended that a retirement investor roll the money out of the plan without proper consideration of how the money might be invested after the rollover.

Moreover, even in those relatively rare circumstances in which there is no implicit rollover recommendation, advice to a plan participant on how to invest assets currently held in an ERISA-covered plan is “advice with respect to moneys or other property of such plan” within the meaning of section 3(21)(A)(ii) of ERISA, inasmuch as the assets at issue are still held by the plan. The Department requests comments on the proposed language, and on whether this approach will appropriately protect the interests of plan participants and beneficiaries, or whether another approach would be more protective.

Recommendations on Strategies, Management of Securities or Other Investment Property, and Account Types

Paragraph (f)(10)(ii) of the proposed rule describes, as covered recommendations, recommendations as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage versus advisory), or the voting of proxies appurtenant to securities. The statutory text broadly

refers to “investment advice . . . with respect to any moneys or other property of such plan.” Recommendations as to investment management or strategy fall within the most straightforward reading of the statutory text. Accordingly, the proposed regulation makes clear that covered investment advice is not artificially limited solely to recommendations to buy, sell, or hold particular securities or investment property to the exclusion of all the other important categories of investment advice that investment professionals routinely provide.

This provision of the proposed regulation also makes clear that recommendations as to the selection of investment account arrangements would be covered. Accordingly, a recommendation to move from a commission-based account to an advisory fee-based account (or vice versa) would be a covered recommendation. The provision is consistent with the SEC’s Regulation Best Interest and the Advisers Act’s fiduciary obligations.¹¹⁴

Recommendation on the Selection of Other Persons To Provide Investment Advice or Investment Management

Proposed paragraph (f)(10)(ii) extends to recommendations as to “selection of other persons to provide investment advice or investment management services.” Consistent with the Department’s longstanding position, the proposed regulation would cover the recommendation of another person to be entrusted with investment advice or investment management authority over retirement assets. Such recommendations are often critical to the proper management and investment of those assets and are fiduciary in nature if the other conditions of the proposed definition are satisfied. Recommendations of investment advisers or managers are no different than recommendations of investments that the plan or IRA may acquire and are often, by virtue of the track record or

¹¹³ Regulation Best Interest release, 84 FR 33318, 33339 (July 12, 2019) (citing FINRA Rule 2111.03 and FINRA Regulatory Notice 12–25, available at <https://www.finra.org/rules-guidance/notices/12-25>).

¹¹⁴ 17 CFR 240.15l–1(a)(1) (“A broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities (*including account recommendations*) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.”) (emphasis added); SEC Investment Adviser Interpretation, 84 FR at 33674 (“An adviser’s fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.”).

information surrounding the capabilities and strategies that are employed by the recommended fiduciary, inseparable from recommendations as to the types of investments that the plan or IRA will acquire. For example, the assessment of an investment fund manager or management is often a critical part of the analysis of which fund to pick for investing plan or IRA assets.

Under this proposal, the Department does not intend to suggest, however, that a person could become a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other investment property. Touting the quality of one's own advisory or investment management services would not trigger fiduciary obligations. This view is made clear by the language in proposed paragraph (f)(10)(ii) that extends to recommendations of "other persons" to provide investment advice or investment management services.

However, this discussion should not be read to exempt a person from being a fiduciary with respect to any of the investment recommendations covered by proposed paragraphs (c)(1) and defined in proposed paragraph (f)(10). There is a line between an investment advice provider making claims as to the value of its own advisory or investment management services in marketing materials, on the one hand, and making recommendations to retirement investors on how to invest or manage their savings, on the other. An investment advice provider can recommend that a retirement investor enter into an advisory relationship with the provider without acting as a fiduciary. But when the investment advice provider recommends, for example, that the investor pull money out of a plan or invest in a particular fund, that advice may be given in a fiduciary capacity even if part of a presentation in which the provider is also recommending that the person enter into an advisory relationship. As proposed, the complete facts and circumstances surrounding each piece of advice would be considered. The Department believes that this is consistent with the functional fiduciary test laid out in the statute in which an entity is an investment advice fiduciary to the extent that they satisfy the definition. Just because one piece of advice is not fiduciary investment advice (here, the "hire me" recommendation) does not mean that

the rest of the advice is necessarily excluded from the definition (here, the advice to pull money out of the plan and invest in a particular fund). The investment advice fiduciary could not prudently recommend that a plan participant roll money out of a plan into investments that generate a fee for the fiduciary but leave the participant in a worse position than if the participant had left the money in the plan. Thus, when a recommendation to "hire me" effectively includes a recommendation on how to invest or manage plan or IRA assets (e.g., whether to roll assets into an IRA or plan or how to invest assets if rolled over), that recommendation would need to be evaluated separately under the provisions in the proposed regulation.¹¹⁵

Proxy Voting Appurtenant to Ownership of Shares of Corporate Stock

Proposed paragraph (f)(10)(ii) also extends to recommendations as to the "voting of proxies appurtenant to securities." The Department has long viewed the exercise of ownership rights as a fiduciary responsibility; consequently, advice or recommendations on the exercise of proxy or other ownership rights are appropriately treated as fiduciary in nature if the other conditions of the regulation are satisfied.¹¹⁶

Similar to other types of broad, generalized guidance that would not rise to the level of investment advice, however, guidelines or other information on voting policies for proxies that are provided to a broad class of investors without regard to a client's individual interests or investment policy and that are not directed or presented as a recommended policy for the plan or IRA to adopt, would not rise to the level of a covered recommendation under the proposal. Similarly, a recommendation addressed to all shareholders in an SEC-required proxy statement in connection with a shareholder meeting of a company

whose securities are registered under Section 12 of the Exchange Act, for example, soliciting a shareholder vote on the election of directors and the approval of other corporate action, would not, under the proposed rule, constitute fiduciary investment advice from the person who creates or distributes the proxy statement.

Recommendations on Rollovers, Benefit Distributions, or Transfers From Plan or IRA

Proposed paragraph (f)(10)(iii) describes, as a category of covered recommendations, recommendations "as to rolling over, transferring, or distributing assets from an employee benefit plan or IRA, including recommendations as to whether to engage in the transaction, and the amount, the form, and the destination of such a rollover, transfer, or distribution." This aspect of the proposal is consistent with the Department's longstanding interest in protecting retirement investors in the context of a recommendation to roll over employee benefit plan assets to an IRA, as well as other recommendations to roll over, transfer, or distribute assets from a plan or IRA.

The Department continues to believe that decisions to take a benefit distribution or engage in rollover transactions are among the most, if not the most, important financial decisions that plan participants and beneficiaries, and IRA owners and beneficiaries are called upon to make. The Department continues to believe that advice provided in connection with a rollover decision, even if not accompanied by a specific recommendation on how to invest assets, should be treated as fiduciary investment advice. A distribution recommendation involves either advice to change specific investments in the plan or to change fees and services directly affecting the return on those investments. Even if the assets would not be covered by Title I or Title II of ERISA when they are moved outside the plan or IRA, the recommendation to change the plan or IRA investments is investment advice under Title I or Title II of ERISA.

Thus, recommendations on distributions (including rollovers or transfers into another plan or IRA) or recommendations to entrust plan assets to a particular IRA provider would fall within the scope of investment advice in this proposed regulation, and would be covered by Title I of ERISA, including the enforcement provisions of section 502(a). Further, in the Department's view, the evaluation of whether a recommendation constitutes

¹¹⁵ The Department believes this approach is consistent with the SEC's approach in Regulation Best Interest. In FAQs, the SEC described a scenario involving broker-dealer communications with a prospective retail customer that would not rise to the level of a recommendation. However, the SEC cautioned that a recommendation made in the context of a "hire me" conversation or otherwise would be subject to Regulation Best Interest. See Questions on Regulation Best Interest, available at <https://www.sec.gov/tm/faq-regulation-best-interest>.

¹¹⁶ See Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 FR 81658 (Dec. 16, 2020) ("In connection with proxy voting, the Department's longstanding position is that the fiduciary act of managing plan assets includes the management of voting rights (as well as other shareholder rights) appurtenant to shares of stock.").

fiduciary investment advice should be the same regardless of whether it is a recommendation to take a distribution or make a rollover to an IRA or a recommendation not to take a distribution or to keep assets in a plan.

The proposal's approach also aligns with the SEC's Regulation Best Interest and Advisers Act fiduciary obligations, which extend to account recommendations generally as well as recommendations to roll over or transfer assets from one type of account to another.¹¹⁷

5. Application of Paragraph (c)(1)

The proposal provides a general rule under which investment advice providers could determine their status through application of the facts and circumstances surrounding their interactions with their customers. To aid parties in conducting the analysis, the Department provides the following discussion of the application of the general rule in certain common circumstances and requests comment on the discussion. The Department also seeks comment on whether any adjustment should be made to the regulatory text to address issues discussed herein.

Sophisticated Retirement Investors

The proposed regulation does not include any special provision for recommendations to sophisticated advice recipients. Rather, under the proposal, fiduciary status would turn on the application of proposed paragraph (c)(1). In the absence of investment discretion (see proposed paragraph (c)(1)(i)) or a fiduciary acknowledgment (see proposed paragraph (c)(1)(iii)), the investment advice provider's fiduciary or non-fiduciary status would depend on the parties' understandings under the particular facts and circumstances (see proposed paragraph (c)(1)(ii)).

The Department acknowledges that some commenters in previous rulemakings have asserted that a specific "counterparty" provision is necessary to avoid limiting plan and IRA investors' choices in investment transactions.¹¹⁸ Commenters have suggested that the Department should adopt certain metrics, such as wealth or income, as conclusively establishing that the retirement investor has sufficient expertise and sophistication

to foreclose fiduciary status of an advice provider. The Department is unaware, however, of compelling evidence that wealth and income are strong proxies for financial sophistication or inconsistent with a relationship of trust and confidence.¹¹⁹ Moreover, and independently, nothing in the statute's text suggests that Congress intended to categorically deny fiduciary protection to "sophisticated investors." Instead of a specific "counterparty" provision or a provision for sophisticated plan- and IRA-level fiduciaries, proposed paragraph (c)(1)(ii) generally states an appropriate test for fiduciary status to apply to a covered recommendation, even if made to a plan or IRA fiduciary. To the extent counterparties wish to avoid fiduciary status, they can avoid structuring their relationships to fall within the circumstances described in that subparagraph.

In the context of "wholesaling" activity, which involves communications by product manufacturers or other financial service providers to financial intermediaries who then directly advise plans, participants, beneficiaries, and IRA owners and beneficiaries, the Department believes that communications to financial intermediaries would typically fall outside the scope of proposed paragraph (c)(1)(ii) because they would not involve recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary. There may also be other circumstances in which application of proposed paragraph (c)(1)(ii) would not result in a covered recommendation being treated as fiduciary investment advice. In general, however, the Department envisions that proposed paragraph (c)(1)(ii) would apply broadly to recommendations to plan and IRA fiduciaries acting on behalf of plans and IRAs.

More fundamentally, the Department rejects the purported dichotomy between a mere "sales" recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products. As reflected in recent regulatory developments from both the SEC and NAIC, financial service industry marketing materials, and the industry's comment letters reciting the guidance they provide to investors, sales and advice typically go hand in hand in the retail market.

In the Department's view, the updated conduct standards adopted by the SEC and the NAIC also reflect an acknowledgment of the fact that broker-dealers and insurance agents commonly provide paid investment and annuity recommendations to their customers. The SEC stated in the Regulation Best Interest release that "there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations."¹²⁰ The NAIC Model Regulation, section 6.5.M defines a recommendation as "advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice." Further, "cash compensation" is defined as "any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer."¹²¹ When retirement investors talk to investment advice providers about the investments they should make, they commonly pay for, and receive, advice within the meaning of the statutory definition.

Platform Providers and Pooled Employer Plans

Platform providers are entities that offer a platform or selection of investment alternatives to participant-directed individual account plans and their fiduciaries who choose the specific investment alternatives that will be made available to participants for investing their individual accounts. In connection with such offerings, platform providers may provide investment advice, or they may simply provide general financial information such as information on the historic performance of asset classes and of the investment alternatives available through the provider.

In the case of a platform provider, application of the proposed regulation may often focus on whether the communications fall within the threshold definition of a "recommendation." As discussed in section 4, whether a recommendation exists under the proposal will turn on the degree to which a communication is

¹¹⁷ Regulation Best Interest release, 84 FR 33318, 33339 (July 12, 2019); SEC Investment Adviser Interpretation, 84 FR 33669, 33674 (July 12, 2019).

¹¹⁸ The 2016 Final Rule provided that, subject to specified conditions, certain transactions with independent fiduciaries with financial expertise would not constitute fiduciary investment advice. 81 FR 20946, 20980 (Apr. 8, 2016).

¹¹⁹ High net worth investors and sophisticated investors are not carved out of protections under the SEC's Regulation Best Interest or the Advisers Act fiduciary duty.

¹²⁰ 84 FR 33318, 33319 (July 12, 2019).

¹²¹ NAIC Model Rule section 5.B. (emphasis added).

“individually tailored” to the retirement investor or investors, and providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Therefore, the inquiry may turn on whether the provider presents the investments on the platform as having been selected for and appropriate for the investor (*i.e.*, the plan and its participants and beneficiaries). In this regard, platform providers who merely identify investment alternatives using objective third-party criteria (*e.g.*, expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of plan or IRA investors, would not be considered under the proposal to be making a recommendation.

In the Department’s view, this same analysis is likely to apply in the context of pooled employer plans (PEPs), which are individual account plans established or maintained for the purpose of providing benefits to the employees of two or more employers, authorized in the Setting Every Community Up for Retirement Enhancement (SECURE) Act.¹²² PEPs are required to designate a pooled plan provider (PPP) who is a named fiduciary of the PEP.¹²³ PPPs are in a unique statutory position in that they are granted full discretion and authority to establish the plan and all of its features, administer the plan, act as a fiduciary, hire service providers, and select investments and investment managers. When a PPP or another service provider interacts with an employer about investment options under the plan, whether they have made a recommendation under the proposal will turn, in part, on whether they present the investments as selected for, and appropriate for, the plan, its participants, or beneficiaries.

Swaps and Security-Based Swaps

Swaps and security-based swaps are a broad class of financial transactions defined and regulated under amendments to the Commodity Exchange Act and the Securities Exchange Act of 1934 (Securities Exchange Act) by the Dodd-Frank Act. Section 4s(h) of the Commodity Exchange Act¹²⁴ and section 15F of the

Securities Exchange Act¹²⁵ establish similar business conduct standards for dealers and major participants in swaps or security-based swaps. Special rules apply for swap and security-based swap transactions involving “special entities,” a term that includes employee benefit plans covered under ERISA. Under the business conduct standards in the Commodity Exchange Act as added by the Dodd-Frank Act, swap dealers or major swap participants that act as counterparties to ERISA plans must, among other conditions, have a reasonable basis to believe that the plans have independent representatives who are fiduciaries under ERISA.¹²⁶ Similar requirements apply for security-based swap transactions.¹²⁷ The CFTC and the SEC have issued final rules to implement these requirements.¹²⁸

In the Department’s view, when Congress enacted the swap and security-based swap provisions in the Dodd-Frank Act, including those expressly applicable to ERISA-covered plans, it did not intend to broadly impose ERISA fiduciary status on the plan’s counterparty as it engaged in regulated conduct as part of the swap or security-based swap transaction with the employee benefit plan. The Department conferred with both the CFTC and the SEC at the time of those agencies’ rulemakings, and assured harmonization of any change in the ERISA fiduciary advice regulation so as to avoid unintended consequences.

The Department makes the same assurance with respect to this proposed regulation. The disclosures required of plans’ counterparties under the business conduct standards would not generally constitute a “recommendation” as defined in the proposal, or otherwise compel the dealers or major participants to act as fiduciaries in swap and security-based swap transactions conducted pursuant to section 4s of the Commodity Exchange Act and section 15F of the Securities Exchange Act. This includes disclosures regarding material risks, characteristics, incentives and conflicts of interest; disclosures regarding the daily mark of a swap or security-based swap and a counterparty’s clearing rights; disclosures necessary to ensure fair and balanced communications; and

disclosures regarding the capacity in which a swap or security-based swap dealer or major swap participant is acting when a counterparty to a special entity, as required by the business conduct standards.

This is not to say that a dealer or major participant would necessarily fall outside the scope of the proposed regulation if, in addition to providing the disclosures mandated above, it also chose to make specific investment recommendations to plan clients. In that circumstance, a swap dealer could become a fiduciary by virtue of their voluntary decision to make individualized investment recommendations to an ERISA-covered plan if the subparagraph’s conditions were met.¹²⁹ To the extent dealers wish to avoid fiduciary status under the proposal, however, they can structure their relationships to avoid making such investment recommendations to plans. Additionally, clearing firms would not be investment advice fiduciaries under the proposed rule merely as a result of providing such services as valuations, pricing, and liquidity information. As discussed in greater detail in the next section, the proposed rule does not include valuation and similar services as a category of covered recommendations.

Valuation of Securities and Other Investment Property

This proposed rule does not include valuation services, appraisal services, or fairness opinions as categories of covered recommendations. In this regard, the Department notes that the definition of “recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property” in proposed paragraph (f)(10) does not include reference to any of these functions. Accordingly, the provision of valuation services, appraisal services, or fairness opinions would not, in and of themselves, lead to fiduciary status under the proposed rule. The Department continues to believe issues related to valuation are best addressed through a separate rulemaking.

¹²⁵ 15 U.S.C. 78o–10(h).

¹²⁶ 7 U.S.C. 6s(h)(5); 17 CFR 23.450.

¹²⁷ 15 U.S.C. 78o–10(h)(4), (5).

¹²⁸ See 17 CFR 23.400–451; Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734 (Feb. 17, 2012); 17 CFR 240.15Fh–3–h–6; Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 81 FR 29960 (May 13, 2016).

¹²² ERISA section 3(43), 29 U.S.C. 1002(43).

¹²³ ERISA Section 3(43)(B), 29 U.S.C. 1002(43)(B).

¹²⁴ 7 U.S.C. 6s(h).

¹²⁹ The business conduct standards do not preclude a swap dealer from giving advice if it chooses to do so. See, *e.g.*, 17 CFR 23.434 (imposing requirements on swap dealers that recommend a swap or trading strategy involving a swap to a counterparty); see also 17 CFR 240.15Fh–3(f) (similar provision applicable to security-based swap dealers).

6. For a Fee or Other Compensation, Direct or Indirect

Paragraph (e) of the proposal includes a definition of “for a fee or other compensation, direct or indirect,” for purposes of section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code. The proposal provides:

[A] person provides investment advice “for a fee or other compensation, direct or indirect,” if the person (or any affiliate) receives any explicit fee or compensation, from any source, for the advice or the person (or any affiliate) receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase, sale, or holding of a security or other investment property or the provision of investment advice, including, though not limited to, commissions, loads, finder’s fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative’s new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation. A fee or compensation is paid “in connection with or as a result of” such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or provision of advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of advice.

This proposed definition is consistent with the preamble of the 1975 regulation, which states that “a fee or other compensation, direct or indirect” includes all fees or other compensation “incident to the transaction in which the investment advice to the plan has been rendered or will be rendered,” including, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions.¹³⁰

As the Department explained in the preamble when it proposed the exemption now at PTE 77–9:¹³¹

[T]he Department and the [IRS] stated in the preamble sections of the notices announcing the adoption of the [1975 fiduciary definition] regulations that, until a more definitive statement is issued, the phrase “fee or other compensation, direct or indirect” for the rendering of investment advice for purposes of section 3(21)(A)(ii) of the Act and section 4975(e)(3)(B) of the Code should be deemed to include all fees or other compensation incidental to the transaction in which the investment advice to the plan has been rendered or will be rendered, and may therefore include insurance and mutual fund

sales commissions. The Department and the [IRS] have not modified or revised this position, notwithstanding the contrary views expressed in several of the applications for class exemption.

This proposed definition is also consistent with, for example, guidance the Department provided just eight years after the 1975 regulation was finalized. Specifically, an association that represented broker-dealers asked the Department to “clarify the status of broker-dealers under ERISA.”¹³² The association posited that fiduciary status under ERISA section 3(21)(A)(ii) (the “fee or other compensation, direct or indirect” provision) would not attach to broker-dealers “unless the broker-dealer provides investment advice for distinct, non-transactional compensation.”¹³³ The Department rejected this interpretation of ERISA section 3(21)(A)(ii). The Department stated that, based on the facts and circumstances presented by each case,

if . . . the services provided by the broker-dealer include the provision of “investment advice”, as defined in regulation 2510.3–21(c), it may be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice.¹³⁴

As the proposed regulation makes clear, however, there must be a link between the transaction-based compensation and the investment professional’s recommendation. Under the terms of the proposal, the compensation is treated as paid “in connection with or as a result of” the provision of advice only if it would not have been paid but for the recommended transaction or the provision of advice, or if the investment advice provider’s eligibility for the compensation (or its amount) is based in whole or part on the recommended transaction or the provision of advice.

Under the proposed definition, any fee that is paid explicitly for the provision of investment advice would fall within the proposed definition of “for a fee or other compensation, direct

or indirect.” This would include, for example, a fee paid to an investment adviser under the Advisers Act based on the retirement investor’s assets under management.

A fee or other compensation received in connection with an investment transaction also would fall within the proposed definition of “for a fee or other compensation, direct or indirect.” This treatment of investment compensation is in accord with the actions of other State and Federal regulators, and with the modern marketplace for investment advice in which brokers and insurance agents can do far more than merely execute transactions or close sales. Investment professionals are commonly compensated for their advice through the payment of transaction-based fees, such as commissions, which are contingent on the investor’s decision to engage in the recommended transaction.

The SEC acknowledged this in the Regulation Best Interest release, noting that “there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations.”¹³⁵ The SEC discussion further contemplated that commissions compensate broker-dealers for their recommendations, and may be the preferred method of investment advice compensation with respect to certain transactions. As an example, the SEC stated that retail customers seeking a long-term investment may determine that “paying a one-time commission to a broker-dealer recommending such an investment is more cost effective than paying an ongoing advisory fee to an investment adviser merely to hold the same investment.”¹³⁶ The Department agrees that there are benefits to ensuring a wide range of compensation structures remain available to retirement investors.

Likewise, the NAIC Model Regulation acknowledged that insurance agents make recommendations and might be compensated for their recommendations through commissions. The NAIC Model Regulation defines a recommendation as “advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice.”¹³⁷ The definition of “cash compensation” in the model regulation is: “any discount, concession, fee, service fee,

¹³² U.S. Department of Labor, Adv. Op. 83–60A (Nov. 21, 1983), available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1983-60a>.

¹³³ *Id.*

¹³⁴ *Id.*; see Letter from the Department of Labor to the Securities Industry Association (Mar. 1, 1984) (declining to modify this position); see also IB 96–1, 61 FR 29586, 29589 at fn. 3 (June 11, 1996) (“The Department has expressed the view that, for purposes of section 3(21)(A)(ii), such fees or other compensation need not come from the plan and should be deemed to include all fees or other compensation incident to the transaction in which the investment advice [sic] has been or will be rendered.” (citations omitted)).

¹³⁰ 40 FR 50842 (Oct. 31, 1975); 41 FR 56760, 56762 (Dec. 29, 1976).

¹³¹ 41 FR 56760, 56762 (Dec. 29, 1976).

¹³⁵ Regulation Best Interest release, 84 FR 33318, 33319 (July 12, 2019).

¹³⁶ *Id.*

¹³⁷ NAIC Model Regulation, at Section 6, 5. M.

commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.”¹³⁸

When an investment professional meets the five-part test set out in the 1975 rule, or the fiduciary definition set forth in this proposal, the services rendered by the professional include individualized advice, and the compensation, including commission payments, is not merely for execution of a sale, but for the professional advice provided to the investor, as uniformly recognized by the Department’s previous guidance and by other State and Federal regulators.¹³⁹

The statutory exemption for investment advice to participants and beneficiaries of individual account plans set forth in ERISA section 408(b)(14) similarly recognizes that compensation for advice often comes in the form of commissions and transaction-based compensation.¹⁴⁰ Accordingly, the exemption applies to transactions “in connection with the provision of investment advice described in section 3(21)(A)(ii)” including “the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof . . . in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice.”¹⁴¹

As has been true since the Department first proposed regulations under this section in 1975 and as discussed above, the Department understands the phrase “for a fee or other compensation, direct or indirect” to encompass a broad array of compensation incident to the transaction.¹⁴² The Department requests comments on this portion of the proposal, including whether additional examples would be helpful.

¹³⁸ *Id.* at Section 5. B.

¹³⁹ *E.g.*, U.S. Department of Labor, Adv. Op. 83–60A (Nov. 21, 1983), available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1983-60a>.

¹⁴⁰ 29 U.S.C. 1108(b)(14). *See* Code section 4975(d)(17) (parallel statutory exemption).

¹⁴¹ 29 U.S.C. 1108(b)(14) (emphasis added).

¹⁴² *See* Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Americans for Consumer Choice v. U.S. Dep’t of Labor*, No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *21 (N.D. Tex. June 30, 2023) (“The expansive choice of investment advice ‘for other compensation’ indicates an intent to cover any transaction where the financial professional may receive conflicted income if they are acting as a trusted adviser.”)

7. Other Definitions in the Proposed Rule

In addition to the definitions discussed above, proposed paragraph (f) would define a variety of other pertinent terms for purposes of the proposed rule. The definitions generally track other definitions within Title I and Title II of ERISA and the Federal securities laws. The definitions in proposed paragraph (f), not otherwise discussed above, are: “affiliate” (similar to that of paragraph (e)(1) of the 1975 rule); and “control” (similar to that of paragraph (e)(2) of the 1975 rule). “Plan” refers to any plan described under section 3(3) of ERISA and any plan described in section 4975(e)(1)(A) of the Code. For purposes of the proposal “IRA” refers to any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.¹⁴³ “Plan fiduciary” would use the same definition as described in section 3(21)(A) of the Act and section 4975(e)(3) of the Code; for these purposes, a participant or beneficiary of the plan who is receiving advice is not a “plan fiduciary” with respect to the plan. Under the proposed rule “relative” refers to a person described in section 3(15) of the Act and section 4975(e)(6) of the Code and also includes a sibling, or a spouse of a sibling. “Plan participant” or “participant” (for a plan described in section 3(3) of ERISA), would be a person described in section 3(7) ERISA.

8. Scope of Investment Advice Fiduciary Duty

Paragraph (c)(2) of the proposal confirms that a person who is a fiduciary with respect to a plan or IRA by reason of rendering investment advice is not deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which that person does not have or exercise any discretionary authority, control, or responsibility or with respect to which the person does not render or have authority to render investment advice defined by the proposed rule. On the other hand, nothing in paragraph (c)(2) exempts such a person from the provisions of section 405(a) of the Act concerning

liability for violations of fiduciary responsibility by other fiduciaries or excludes such person from the definition of party in interest under section 3(14)(B) of the Act or section 4975(e)(2) of the Code. This provision is unchanged from the current 1975 regulation.

The Department further notes that, if a person’s recommendations relate to the advisability of acquiring or exchanging securities or other investment property in a particular transaction, the proposed rule does not impose on the person an automatic fiduciary obligation to continue to monitor the investment or the retirement investor’s activities to ensure the recommendations remain prudent and appropriate for the plan or IRA. Instead, the obligation to monitor the investment on an ongoing basis would be a function of the reasonable expectations, understandings, arrangements, or agreements of the parties.

Also, as has been made clear by the Department, there are a number of ways to provide fiduciary investment advice without engaging in transactions prohibited by Title I or Title II of ERISA because of the conflicts of interest they pose. For example, an investment advice provider can structure the fee arrangement to avoid a prohibited transaction (and the related conflicts of interest) by offsetting third party payments against direct fees agreed to by the retirement investor, as explained in advisory opinions issued by the Department.¹⁴⁴ If there is not a prohibited transaction, then there is no need to comply with the terms of an exemption, though an investment advice fiduciary with respect to a Title I plan would still be required to comply with the statutory duties including prudence and loyalty.

Proposed paragraph (d) of the regulation is identical to paragraph (d) of the 1975 regulation, apart from updated references. The paragraph specifically provides that the mere execution of a securities transaction at the direction of a plan or IRA owner would not be deemed to be fiduciary activity. The regulation’s scope remains limited to advice relationships, as delineated in its text, and does not cover transactions that are executed pursuant to specific direction in which no advice is provided. The Department seeks comment as to whether any updates to paragraph (d) are necessary.

¹⁴³ The definition of an IRA would also include an individual retirement annuity described in Code section 408(b), an Archer MSA described in Code section 220(d), and a Coverdell education savings account described in Code section 530. However, for purposes of any rollover of assets between a Title I Plan and an IRA described in this preamble, the term “IRA” includes only an account or annuity described in Code section 4975(e)(1)(B) or (C).

¹⁴⁴ U.S. Department of Labor, Adv. Op. 97–15A (May 22, 1997).

9. Interpretive Bulletin 96–1

The proposed regulation does not include a specific provision addressing investment education. Investment education is addressed in the Department's IB 96–1, which was reinstated in 2020.¹⁴⁵ IB 96–1 provides examples of four categories of information and materials regarding participant-directed individual account plans—plan information, general financial and investment information, asset allocation models, and interactive investment materials—that do not constitute investment advice. This is the case irrespective of who provides the information (*e.g.*, plan sponsor, fiduciary, or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (*e.g.*, on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials. The IB states that there may be many other examples of information, materials, and educational services, which, if furnished to participants and beneficiaries, would not constitute “investment advice.”

Although the Department issued IB 96–1 when the 1975 rule was in effect, the Department believes that the IB would continue to provide accurate guidance under the proposed regulation. If the proposed rule is finalized, the IB would continue to correctly describe the types of educational information and materials that should not be treated as “recommendations” subject to the fiduciary advice definition. Although the IB specifically applies in the context of participants and beneficiaries in participant-directed individual account plans, the Department believes that the analysis it presents is valid regardless of whether the retirement investor is a plan participant, beneficiary, IRA owner, IRA beneficiary, or fiduciary.

One important example of investment education is the provision of information about the benefits of increasing contributions to an employee benefit plan. Under IB 96–1, the provision of information on “the benefits of plan participation” and the “benefits of increasing plan contributions” are both examples of “plan information.” The Department confirms that, for purposes of the proposal, the provision of such

information would not trigger fiduciary status.

In the 2016 Final Rule, the Department incorporated the provisions of IB 96–1 into the regulatory text; as a result, certain provisions were specifically applicable to transactions involving IRAs. In addition, the Department made a few changes to the provisions. The Department clarified and expanded the category in IB 96–1 from “General Financial and Investment Information” to “General financial, investment, and retirement information.” The revised category included information on “[g]eneral methods and strategies for managing assets in retirement (*e.g.*, systemic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits).” This change was intended to improve retirement security by facilitating the provision of information and education relating to retirement needs that extend beyond a participant's or beneficiary's date of retirement. Such information would be considered non-fiduciary education as long as the provider did not recommend a specific investment or investment strategy.¹⁴⁶

The Department cautions however, that to the extent a provider goes beyond providing education and gives investment advice on a specific investment or investment strategy, it is not appropriate to broadly exempt those communications from fiduciary liability. The Department believes that such an approach would be especially inappropriate in cases in which a service provider offers “educational” services that systematically exceed the boundaries of education. In such cases, when firms or individuals make specific investment recommendations to plan participants, they should adhere to basic fiduciary norms of prudence and loyalty and take appropriate measures to protect plan participants and beneficiaries from the potential harm caused by conflicts of interest.

An employer or other plan sponsor would not, however, become an investment advice fiduciary under the proposal merely because the employer or plan sponsor engaged a service provider to provide investment advice or because a service provider engaged to provide investment education crossed the line and provided investment advice in a particular case. On the other hand, whether the service provider renders fiduciary advice or non-fiduciary education, the proposed rule does not change the well-established fiduciary obligations that arise in connection with the selection and monitoring of plan

service providers.¹⁴⁷ Even if the service provider crosses the line and makes investment recommendations that go beyond mere “education,” the service provider will only be treated as an investment advice fiduciary to the extent that the full proposed regulatory definition is satisfied. Depending on the facts and circumstances, whether a service provider is an investment advice fiduciary under the proposal may require an inquiry into whether that service provider has held itself out as a fiduciary, whether that service provider regularly provides investment advice as part of the provider's business, whether such advice is individualized, and whether the service provider received a fee or compensation (directly or indirectly) in connection with the advice.

The Department seeks comment on this discussion of investment education. Do commenters agree that the examples of investment education information and materials identified in IB 96–1 and in the provisions of the 2016 Final Rule regarding investment education do not constitute a “recommendation” as described under the proposed rule? Further, do commenters believe that IB 96–1 provides sufficient and appropriate guidance in conjunction with the provisions in this proposal, or do commenters support amending IB 96–1 or incorporating any of its provisions into the final regulation?

10. Application to Code Section 4975

Certain provisions of Title I of ERISA, such as those relating to participation, benefit accrual, and prohibited transactions, also appear in Title II of ERISA, codified in the Code. This parallel structure ensures that the relevant provisions apply to Title I plans, whether or not they are “plans” defined in section 4975 of the Code, and to tax-qualified plans and IRAs, regardless of whether they are subject to Title I of ERISA. With regard to prohibited transactions, the ERISA Title I provisions generally authorize recovery of losses from, and imposition of civil penalties on, the responsible plan fiduciaries, while the Title II provisions impose excise taxes on persons engaging in the prohibited transactions. The definition of fiduciary is the same in section 4975(e)(3)(B) of the Code as the definition in section 3(21)(A)(ii) of ERISA, and, as noted above, the Department's 1975 regulation defining fiduciary investment advice is virtually identical to the regulation

¹⁴⁵ 85 FR 40589 (July 7, 2020).

¹⁴⁶ 81 FR 20946, 20977 (Apr. 8, 2016).

¹⁴⁷ See IB 96–1, Section (e) “Selection and Monitoring of Educators and Advisors.”

defining the term “fiduciary” under the Code.

To rationalize the administration and interpretation of the parallel provisions in Title I and Title II of ERISA, Reorganization Plan No. 4 of 1978 divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the Treasury.¹⁴⁸ Under the Reorganization Plan, which was prepared by the President and transmitted to Congress pursuant to the provisions of Chapter 9 of Title 5 of the United States Code, the Department of Labor has authority to interpret the prohibited transaction provisions and the definition of a fiduciary in the Code. ERISA’s prohibited transaction rules, sections 406 to 408,¹⁴⁹ apply to Title I plans, and the Code’s corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply to tax-qualified pension plans, as well as other tax-advantaged arrangements, such as IRAs, that are not subject to the fiduciary responsibility and prohibited transaction rules in Title I of ERISA.¹⁵⁰ In accordance with the above discussion, paragraph (g) of the proposal, entitled “Applicability” provides that the regulation defines a “fiduciary” both for purposes of ERISA section 3(21)(A)(ii) and for the parallel provision in Code section 4975(e)(3)(B).

Proposed paragraph (g) explains the applicability of Title I of ERISA and the Code in the specific context of rollovers. As that paragraph explains, “a person who satisfies paragraphs (c)(1) and (e) of this section in connection with a recommendation to a retirement investor that is an employee benefit plan as defined in section 3(3) of the Act, a fiduciary of such a plan, or a participant or beneficiary of such a plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to the provisions of Title I of the Act.” With this example, the Department intends to clarify the application of Title I to recommendations made regarding rollovers from a Title I plan under the proposal. As discussed above, the Department had earlier taken a contrary position in the Deseret Letter, which was withdrawn.

11. State Law

Proposed paragraph (h) is entitled “Continued applicability of state law regulating insurance, banking, or

securities” and provides “[n]othing in this section shall be construed to affect or modify the provisions of section 514 of Title I of the Act, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities.” This paragraph of the proposal acknowledges that ERISA section 514 expressly saves State regulation of insurance, banking, and securities from ERISA’s express preemption provision, and confirms that the regulation is not intended to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of insurance, banking, or securities.

D. Severability

The Department is considering whether this proposal could continue to work even if certain aspects of the proposal were struck down by a court. In determining whether any aspects of this proposal could be severable the Department is focused on the text and purpose of ERISA. The Department requests comments regarding whether this proposal would be workable and appropriate if certain aspects were severed, or why it would not be workable or appropriate. Specifically, the Department is interested in hearing which aspects of the rule the public believes could or could not be severed, and the rationale behind those views. The Department expects to consider severability as it reviews comments and drafts a final rule.

The Department generally intends discrete aspects of this regulatory package to be severable. For example, in the event that this regulatory package is finalized with both an updated regulatory definition of a fiduciary and amendments to the PTEs, the Department intends that the updated regulatory definition of a fiduciary would survive even if a court vacated any of the amendments to the PTEs leaving in place the previously granted versions of those PTEs.

E. Effective Date

The Department proposes to make the rule effective 60 days after publication of a final rule in the **Federal Register**. The Department requests comment on this proposed timeframe and whether parties believe that additional time is needed before the rule becomes applicable.

F. Regulatory Impact Analysis

This section analyzes the economic impact of the proposed rule and proposed amendments to the following class administrative exemptions (PTEs) providing relief from the prohibited

transaction rules that are applicable to fiduciaries under Title I of ERISA and the Code: PTEs 2020–02, 84–24, 75–1, 77–4, 80–83, 83–1, and 86–128. The Department is publishing the proposed amendments to the PTEs elsewhere in this issue of today’s **Federal Register**. Collectively, the proposed rule and amendments to the PTEs are referred to as “the proposal” for this section.

Employment-based retirement plans and IRAs are critical to the retirement security of millions of America’s workers and their families. Because retirement investors often lack financial expertise, professional investment advice providers often play an important role in guiding their investment decisions. Prudent professional advice helps consumers set and achieve appropriate retirement savings and decumulation goals more effectively than consumers would on their own. For many years, the benefits of professional investment advice, however, have been persistently undermined by conflicts of interest that occur when financial services firms compensate individual investment advice providers in a manner that incentivizes them to steer consumers toward investments and transactions that yield higher profits for the firms. These practices can bias the investment advice that providers render to consumers and detrimentally impact their retirement savings by eroding plan and IRA investment results.

Title I of ERISA imposes duties and restrictions on fiduciaries with respect to employee benefit plans. ERISA section 404 requires Title I plan fiduciaries to act with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” Further, fiduciaries must carry out their duties “solely in the interest of the participants and beneficiaries” of the plan. Title I of ERISA also includes prohibited transaction provisions that forbid fiduciaries from, among other things, self-dealing.¹⁵¹ The aim of the prohibited transaction provisions is to protect plans, their participants, and beneficiaries from dangerous conflicts of interest that threaten the safety and security of plan benefits.¹⁵²

Title II of ERISA, codified in the Internal Revenue Code, governs the conduct of fiduciaries to tax-qualified

¹⁴⁸ 5 U.S.C. App. (2018).

¹⁴⁹ 29 U.S.C. 1106–1108.

¹⁵⁰ Reorganization Plan No. 4 of 1978 also transferred to the Secretary of Labor the authority to grant administrative exemptions from the prohibited transaction provisions in section 4975 of the Code. See section 4975(c)(2) of the Code.

¹⁵¹ ERISA section 406, 29 U.S.C. 1106.

¹⁵² *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Comm’r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152 (1993).

plans and IRAs. Although Title II does not directly impose specific duties of prudence and loyalty on fiduciaries as ERISA section 404(a) does, it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.¹⁵³

The proposal focuses on the provision of fiduciary investment advice to ERISA retirement plans, participants, and IRA owners and seeks to reduce or eliminate the impacts of conflicts of interest on advice they receive. The proposal amends the definition of a fiduciary such that an investment advice provider is a fiduciary if the person provides advice or makes a recommendation on any securities transaction or other investment transaction or any investment strategy involving securities or other investment property to the plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or IRA fiduciary (retirement investor), the advice or recommendation is provided “for a fee or other compensation, direct or indirect,” as defined by the proposed rule, and (i), (ii) or (iii) is satisfied:

(i) The person either directly or indirectly (*e.g.*, through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;

(ii) The person either directly or indirectly (*e.g.*, through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of its business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest; or

(iii) The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making the investment recommendation.

The proposed amendments to PTE 2020–02 expand the scope of the exemption to cover certain transactions involving PEPs and transactions involving “pure” robo-advice providers. The amendments would provide greater specificity as to what information must

be disclosed to retirement investors under the exemption and clarify that fiduciary acknowledgements must clearly indicate whether the entity is a fiduciary with respect to investment recommendations and advice.

Additionally, the amendments would require financial institutions to notify retirement investors of their right to obtain additional information upon request, free of charge. The proposed amendments would also provide more guidance for financial institutions and investment professionals complying with PTE 2020–02’s requirements related to financial institutions’ policies and procedures. The amendments would also expand on which parties can request and receive records under the exemption’s recordkeeping provisions.

PTE 84–24 would be amended to limit relief for investment advice to independent insurance producers (*i.e.*, independent insurance agencies) that recommend annuities from an unaffiliated financial institution to retirement investors on a commission or fee basis. Additionally, PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86–128 would be amended to eliminate relief for transactions resulting from fiduciary investment advice, as defined under ERISA.

Rather than look to an assortment of different exemptions with different conditions for different transactions, investment advice fiduciaries—apart from independent insurance producers—would generally be expected to rely solely on the amended PTE 2020–02 for exemptive relief for covered investment advice transactions. These amendments serve to give the same or similar requirement for the provision of retirement investment advice regardless of the market and investment product.

The most significant benefits of the proposal are expected to result from (1) changing the definition of a fiduciary by amending the five-part test, (2) requiring advice given to a broader range of advice recipients, including plan fiduciaries and non-retail investors, to meet fiduciary standards under ERISA, (3) extending the application of the fiduciary best interest standard in the market for non-security annuities, creating a uniform standard across different retirement products, and (4) requiring that more rollover recommendations be in the retirement investor’s best interest.

These proposed amendments generally align with the Investment Advisers Act of 1940 and the SEC’s Regulation Best Interest. In crafting this proposal, the Department has worked to align its proposed definition with

Regulation Best Interest and the Advisers Act where it can. ERISA has a functional fiduciary test and imposes fiduciary status only to the extent the functional test is satisfied. The Department intends for the compliance obligations under this proposal to broadly align with the standards set by the SEC where practicable and has tried to accomplish such alignment in this proposal. The Department believes that by harmonizing the application of fiduciary duty for retirement investment advisers across regulatory regimes, retirement investors will benefit from more uniform protections from conflicted advice. While extending fiduciary duty to more entities will generate costs, the Department believes any new compliance costs will not be unduly burdensome as the proposal broadly aligns with those compliance obligations imposed under the Investment Advisers Act and the SEC’s Regulation Best Interest on investment advisers and broker-dealers, respectively, and simply expands them to larger portions of the retirement market.

The Department of Labor has examined the effect of the proposal as required by Executive Order 13563,¹⁵⁴ Executive Order 12866,¹⁵⁵ the Regulatory Flexibility Act,¹⁵⁶ section 202 of the Unfunded Mandates Reform Act,¹⁵⁷ and Executive Order 13132.¹⁵⁸

1. Executive Orders

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,¹⁵⁹ entitled “Modernizing Regulatory Review”, section 3(f) of Executive Order 12866 defines a “significant regulatory

¹⁵⁴ 76 FR 3821 (Jan. 21, 2011).

¹⁵⁵ 58 FR 51735 (Oct. 4, 1993).

¹⁵⁶ Public Law 96–354, 94 Stat. 1164 (Sept. 19, 1980).

¹⁵⁷ Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

¹⁵⁸ 64 FR 43255 (Aug. 9, 1999).

¹⁵⁹ 88 FR 21879 (Apr. 6, 2023).

¹⁵³ *Cf.* 26 U.S.C. 4975(c)(1), Code section 4975(f)(5) defining “correction” with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been in if the person had acted “under the highest fiduciary standards.”

action” as any regulatory action that is likely to result in a rule that may:

(1) have an annual effect on the economy of \$200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities;

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

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

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

It has been determined that this proposal is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the proposal’s potential costs, benefits, and transfers, and OMB has reviewed the proposal.

2. Need for Regulatory Action

In preparing this analysis, the Department has reviewed recent regulatory and legislative actions concerning investment advice, market developments in industries providing investment advice, and research literature weighing in on investment advice. From this review, the Department believes there is compelling evidence that retirement investors remain vulnerable to harm from conflicts of interest in the investment advice they receive. Given this evidence, and the Department’s mission to ensure the security of retirement benefits of America’s workers and their families, the Department is proposing to amend the definition of fiduciary and certain exemption relief.

Why Being a Fiduciary Matters

As described above, fiduciaries under ERISA are subject to specific requirements. ERISA section 404 requires Title I plan fiduciaries to act with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with

like aims.” Further, fiduciaries must carry out their duties “solely in the interest of the participants and beneficiaries” of the plan. Title II of ERISA, codified in the Internal Revenue Code, governs the conduct of fiduciaries to tax-qualified plans and IRAs. Under both Title I and Title II, fiduciaries are subject to prohibited transactions that forbid them from, among other things, self-dealing.¹⁶⁰ The aim of the prohibited transaction provisions is to protect plans, their participants, and beneficiaries from dangerous conflicts of interest that threaten the safety and security of plan benefits.¹⁶¹

This combination of a high standard of conduct and personal liability for violations of the standard of conduct for Title I fiduciaries, and restrictions on behavior for Title I and Title II fiduciaries functions to protect plans, participants, and beneficiaries from fiduciary misdeeds. Previously, the Department conducted an economic analysis¹⁶² (2016 Regulatory Impact Analysis (RIA)) of then-current market conditions and the likely effects of expanding the definition of fiduciary to include more individuals. It reviewed evidence that included:

- statistical comparisons finding poorer risk-adjusted investment performance in more conflicted settings;
- experimental and audit studies revealing questionable investment advice provider conduct, including recommendations to withdraw from low-cost, well diversified portfolios and invest in higher-cost alternatives likely to deliver inferior results;
- studies detailing gaps in consumers’ financial literacy, errors in their financial decision-making, and the inadequacy of disclosure as a consumer protection;
- federal agency reports documenting abuse and investors’ vulnerability;
- a study by the President’s Council of Economic Advisers that attributed \$17 billion in annual IRA investor losses to advisory conflicts;
- economic theory, which predicts that when expert investment advice providers have conflicts of interest, non-expert investors will be harmed; and

- international experience with harmful advisory conflicts and responsive reforms.

The Department’s analysis found that conflicted advice was widespread, caused serious harm to retirement investors, and that disclosing conflicts alone would fail to adequately mitigate the conflicts or remedy the harm. The analysis concluded that extending fiduciary protections to more advice would reduce advisory conflicts and deliver substantial net gains for retirement investors.

Changes in Retirement Savings Since the 1975 Regulation

While the 1975 regulation that established the five-part test has remained fixed, the private retirement savings landscape has changed dramatically. In the late 1970s, private retirement savings were mainly held in large employer-sponsored defined benefit plans. Under the terms of these plans and the governing legal structure, the plans and plan sponsors promised fixed payments to retirees, generally based on a percentage of their compensation and years of employment with the sponsoring employer. Plan sponsors hired professional asset managers, who were subject to ERISA’s fiduciary obligations, to invest the funds, and the employers or other plan sponsors shouldered the risk that investment returns were insufficient to pay promised benefits. Individual plan participants did not take direct responsibility for management of the assets held by the plan and did not depend on expert advice for the sound management of funds, which were directly controlled by investment professionals.

Since then, much of the responsibility for investment decisions in employment-based plans has shifted from these large private pension fund managers to individual retirement account participants, many with low levels of financial literacy. Over time, the share of participants covered by defined contribution plans, in which benefits are based on contributions and earnings within an individual account, grew substantially, from just 26 percent in 1975 to 78 percent in 2020.¹⁶³ By 2020, 94 percent of active participants in defined contribution plans had responsibility for directing the investment of some or all of their

¹⁶⁰ ERISA section 406, 29 U.S.C. 1106.

¹⁶¹ *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152 (1993).

¹⁶² Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

¹⁶³ Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables and Graphs 1975–2020*, (November 2022), Table E4, (November 2022), <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf>.

account balances.¹⁶⁴ The Department could not have foreseen such a dramatic shift when it issued the existing fiduciary investment advice regulation in 1975. The passage of ERISA authorized IRAs in 1974, and IRAs remained in their infancy when the 1975 rule was issued. The vast majority of consumers were not managing their own retirement savings, nor retaining investment advisers to do so, because 401(k) plans did not even exist in 1975.

Though workers have assumed more of the responsibility for their investment decisions, they at least still receive some fiduciary oversight and protections provided by ERISA while participating in employer-sponsored plans. However, often workers who change jobs or retire roll over their retirement savings to an IRA, where they assume full responsibility for investing the assets in the larger marketplace without those protections. Not only is it very common for defined contribution plan participants to roll over their retirement savings to an IRA, but it is also increasingly common among defined benefit plan participants. Defined benefit plan participants have the option to perform a rollover if their plan allows them to take a lump-sum payment when they separate from service. About 36 percent of private industry workers in traditional defined benefit plans have a lump-sum payment available at normal retirement, as do virtually all private industry workers in non-traditional defined benefit plans, such as cash balance plans.¹⁶⁵

In 1981, private defined benefit plans held more than twice the assets in private defined contribution plans, and roughly 10 times more than IRA assets. By the first quarter of 2022, the order had reversed: IRAs held \$13.2 trillion in assets, private defined contribution plans held \$9.2 trillion, and private defined benefit plans held \$3.7 trillion in assets.¹⁶⁶ This trend is expected to

continue as retirement investors are projected to move \$4.5 trillion from defined contribution plans to IRAs from 2022 through 2027.¹⁶⁷

Moreover, workers have become more reliant on their retirement savings as Social Security benefits have eroded in recent decades. The age to receive full retirement benefits is gradually increasing from 65 to 67 between 2003 and 2027. Those who claim Social Security before reaching full retirement age—which in 2021 was approximately 60 percent of new retired-worker beneficiaries—receive reduced benefits.¹⁶⁸ For a hypothetical medium wage earner who first claims benefits at age 65, their Social Security benefit, as a share of average career earnings, was more than 40 percent in 2005 but is projected to be only about 35 percent in 2025.¹⁶⁹

Investment Advice and the 1975 Regulation

As the nature of retirement savings has changed since 1975, investment advice has also evolved. Commercial relationships between corporate pension plan sponsors and fund managers and their consulting advisers have been supplanted by retail relationships between consumers and the trusted experts they turn to for help managing their 401(k) plan and IRA savings.

Instead of ensuring that trusted advisers give prudent and unbiased advice in accordance with fiduciary norms, the 1975 regulation erected a multi-part series of technical impediments to fiduciary responsibility. The five-part test of the 1975 rule diverges from the express language of the statute and from its protective purposes by stating that advice must be on a “regular basis” and be “a primary basis for investment decisions” to confer fiduciary status. Without fiduciary status, the advice provider is free to disregard ERISA’s duties of prudence and loyalty and to engage in self-dealing transactions that would otherwise be flatly prohibited by ERISA and the Code because of the dangers they pose to plans and plan participants.

While consumers often use financial advisers for investment advice related to their retirement savings, if an

investment recommendation does not meet *all* five parts of the 1975 test, the adviser is not treated as a fiduciary under ERISA, no matter how complete the investor’s reliance on recommendations purported to be based on their best interest in light of their individual circumstances.

For example, under the 1975 rule, if the advice is not given on a “regular basis,” it makes no difference if the person making the recommendation claims to make the recommendation based on the investor’s best interest and knows that the investor is relying on that recommendation. Thus, if a plan participant seeks advice on whether to roll over all their retirement savings, representing a lifetime of work, out of an ERISA-covered plan overseen by professional ERISA fiduciaries, to purchase an annuity, the person making the recommendation with respect to the purchase of the annuity has no obligation to adhere to a best interest standard unless they meet all prongs of the 1975 rule, including regularly giving advice to the plan participant. This is true even if the person giving the advice holds themselves out as an investment expert whose recommendation is based solely on a careful and individualized assessment of the investor’s needs, the plan participant has no investment expertise whatsoever, and both parties understand that the participant is relying upon the advice for the most important financial decision of their life. Because the advice was not rendered on a “regular basis,” the adviser has no obligation under ERISA to adhere to fiduciary standards, and thus would not be subject to ERISA’s prohibitions on disregarding the participants’ financial interests, recommending an annuity that is imprudent and ill-suited to the participant’s circumstances, and favoring the adviser’s own financial interests at the expense of the participant.¹⁷⁰ An adviser who regularly

¹⁶⁴ Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2020 Form 5500 Annual Reports*, Table D5, (November 2022), <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2020.pdf>.

¹⁶⁵ U.S. Bureau of Labor Statistics, *National Compensation Survey: Retirement Plan Provisions For Private Industry Workers in the United States*, 2022, Table 6, (April 2023), <https://www.bls.gov/ebs/publications/retirement-plan-provisions-for-private-industry-workers-2022.htm>.

¹⁶⁶ Board of Governors of the Federal Reserve System, *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts: Second Quarter 2022*, Tables L.117 & L.118, (Sept. 9, 2022), <https://www.federalreserve.gov/releases/z1/20220909/z1.pdf>; *Historical Series Z1/Z1/FL572000075.Q, Z1/Z1/FL574090055.Q & Z1/Z1/LM893131573.Q*, <https://www.federalreserve.gov/datadownload/Build.aspx?rel=z1>.

¹⁶⁷ Cerulli Associates, *U.S. Retirement Markets 2022: The Role of Workplace Retirement Plans in the War for Talent*, Exhibit 8.06, (2023).

¹⁶⁸ Congressional Research Services, *The Social Security Retirement Age*, (July 6, 2022), <https://sgp.fas.org/crs/misc/R44670.pdf>.

¹⁶⁹ Social Security Administration, Office of the Chief Actuary, *Replacement Rates for Hypothetical Retired Workers*, Actuarial Note, 2021.9, Tables B & D, (August 2021), <https://www.ssa.gov/oact/NOTES/ran9/an2021-9.pdf>.

¹⁷⁰ Investors have suffered significant losses when an investment professional does not act in the investor’s best interest. For example, in 2021, the SEC settled with Teachers Insurance and Annuity Association of America (TIAA) for \$97 million, citing disclosure violations and failure to implement policies and procedures. See <https://www.sec.gov/litigation/admin/2021/33-10954.pdf>. While the SEC was able to settle, the Southern District of New York recently dismissed a complaint by plaintiffs in this same TIAA plan who argued that TIAA acted as an ERISA fiduciary when advising plan participants to roll over assets from their employer-sponsored plan to a TIAA managed account product. Although TIAA represented in market materials that it “[met] a fiduciary standard” when providing investment recommendations, the court found that it did not provide this advice on a regular basis and therefore did not satisfy the five-part test to be considered an ERISA fiduciary. See

had rendered trivial advice about small plan investments, and met the other prongs of the multi-part test, would appropriately be treated as a fiduciary if they met the other requirements of the 1975 rule, but not the person who on one occasion purported to give individualized advice to roll a lifetime of savings out of an ERISA-covered plan and place it in a fixed indexed annuity. This is not a sensible way to draw distinctions in fiduciary status, and finds no support in the text of ERISA, which makes no mention of a “regular basis” requirement.

When the Department issued PTE 2020–02, it sought to ameliorate some of the effects of the regular basis requirement by suggesting that rollover advice could be treated as falling within the 1975 rule, if it was rendered at the beginning of an ongoing advisory relationship. Accordingly, in an April 2021 FAQ, in the context of advice to roll over assets from an employee benefit plan to an IRA, the Department acknowledged that a single instance of advice would not satisfy the regular basis prong of the 1975 test¹⁷¹ but explained that “advice to roll over plan assets can also occur as part of an ongoing relationship or as the beginning of an intended future ongoing relationship that an individual has with an investment advice provider.”¹⁷² In other words, “when the investment advice provider has not previously provided advice but expects to regularly make investment recommendations regarding the IRA as part of an ongoing relationship, the advice to roll assets out of an employee benefit plan into an IRA would be the start of an advice relationship that satisfies the regular basis requirement.”¹⁷³

Carfora v. TIAA, 631 F. Supp. 3d 125, 138 (S. D. N. Y. 2022).

¹⁷¹ Employee Benefits Security Administration, *New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions*, (April 2021), <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption>; Notably, although the Department does not think that a single instance of advice would satisfy the regular basis prong of the 1975 regulation, a single piece of advice can be sufficient to satisfy the language of the statute. See Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Ams. for Consumer Choice v. U.S. Dep’t of Labor*, 2023 WL 5682411, at *18, No. 3:22–CV–00243–K–BT, at 43 (N.D. Tex. June 30, 2023) (“First-time advice may be sufficient to confer fiduciary status and is consistent with ERISA.”) (emphasis added).

¹⁷² Employee Benefits Security Administration, *New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions*, (April 2021), <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption>.

¹⁷³ *Id.*

Ultimately, however, that policy interpretation was struck down as inconsistent with the text of the 1975 rule.¹⁷⁴ In *American Securities Association v. United States Department of Labor*, the court found that “the scope of the regular basis inquiry is limited to the provision of advice pertaining to a particular plan.”¹⁷⁵ Further, the court held that, “[b]efore a rollover occurs, a professional who gives rollover advice does so with respect to an ERISA-governed plan. However, after the rollover, any future advice will be with respect to a new non-ERISA plan, such as an IRA that contains new assets from the rollover. The professional’s one-time rollover advice is thus the last advice that he or she makes to the specific plan.”¹⁷⁶ Based on the court’s ruling, the only way for the Department to remedy the shortcomings of the “regular basis” test is through new rulemaking.

Inexpert Customers

Researchers have consistently found that many Americans demonstrate low levels of financial knowledge and lack basic understanding of investment strategies. In particular, households age 50 and older and nearing retirement, “fail to grasp essential aspects of risk diversification, asset valuation, portfolio choice, and investment fees.”¹⁷⁷ Such customers appear to be particularly vulnerable to receiving harmful advice. Egan et al. (2019) found that misconduct among investment advice professionals was higher in counties with populations that were less financially sophisticated, including those who are less educated and older.¹⁷⁸ Retirement investors are in

¹⁷⁴ *ASA v. U.S. Dep’t of Labor*, No. 8:22–CV–330VMC–CPT, 2023 WL 1967573, at *14–*19 (M.D. Fla. Feb. 13, 2023).

¹⁷⁵ *Id.* at *16 (emphasis added).

¹⁷⁶ *Id.* at *17; *id.* (“Because assets cease to be assets of an ERISA plan after the rollover is complete, any future provision of advice is, by nature, no longer to that ERISA plan.”); Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Americans for Consumer Choice v. U.S. Dep’t of Labor*, No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *18 (N.D. Tex. June 30, 2023) (“ERISA’s text defines Title I and Title II ‘plans’ distinctly. By utilizing these separate definitions, Congress indicated how each Title’s plans should be treated differently due to the nature of the relationship between financial professionals and retirement investors in Title I and Title II plans. As the New Interpretation purports to consider recommendations as to Title II plans when determining Title I fiduciary status, it conflicts with ERISA.”) (internal citation omitted).

¹⁷⁷ Annamaria Lusardi, Olivia Mitchell, & Vilsa Curto, *Financial Literacy and Financial Sophistication in the Older Population*, 13(4) *Journal of Pension Economics and Finance* 347–366, (October 2014).

¹⁷⁸ Mark Egan, Gregor Matvos, & Amit Seru, *The Market for Financial Adviser Misconduct*, 127(1) *Journal of Political Economy*, (2019).

a poor position to assess the quality of the advice they receive, and the advisers’ incentives are often misaligned with the investors’ interests.¹⁷⁹ The dependence of inexperienced clients on advisers with significant conflicts of interest creates a large risk of investment advice and investment decisions that are not in the best interest of retirement investors.

The Department’s 2016 RIA¹⁸⁰ demonstrated that the balance of research and evidence indicates that the aggregate harm from cases in which consumers received bad advice due to investment advice providers’ conflicts of interest is significant. The complex nature of financial markets alone, particularly for insurance products, creates information asymmetry that makes it difficult for inexperienced investors to navigate savings for retirement. Multiple studies cited found that retirement investors often lack a basic understanding of investment fundamentals.¹⁸¹ A subsequent 2018 FINRA study of non-retired individuals age 25–65 found that those investors that only had retirement accounts through their employers routinely scored lower on financial literacy questions than active investors and that these workplace-only investors scored only two percentage points higher than the general population (32 percent versus 30 percent) on a composite question regarding interest, inflation and risk diversification.¹⁸² In addition to lacking rudimentary financial knowledge, many retirement investors do not understand the roles of different players in the investment industry and what those players are obligated to do.

The SEC has commissioned several studies on whether investors can differentiate between different types of

¹⁷⁹ Mark Egan, *Brokers vs. Retail Investors: Conflicting Interests and Dominated Products*, 74(3) *Journal of Finance* 1217–1260, (June 2019).

¹⁸⁰ 2016 RIA in this document refers to Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

¹⁸¹ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 108–109 & 136–137, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

¹⁸² Jill E. Fisch, Andrea Hasler, Annamaria Lusardi, & Gary Mottolo, *New Evidence on the Financial Knowledge and Characteristics of Investors* (October 2019), https://gflec.org/wp-content/uploads/2019/10/FINRA_GFLEC_Investor_FinancialIlliteracy_Report_FINAL.pdf?x20348.

investment service providers. A 2005 study considered four focus groups in different geographic locations and found that investors were generally unclear about distinctions between broker-dealers, financial advisers, investment advisers, and financial planners and often used the terms indistinguishably.¹⁸³ A 2008 household survey found that while most of the survey respondents had “a general sense of the difference in services offered by brokers and by investment advisers but that they are not clear about their specific legal duties.”¹⁸⁴ A 2018 study also evaluated four focus groups and found that participant understanding of the distinction between broker-dealers and investment advisers was low, even among those who were provided information describing the classifications of the two categories.¹⁸⁵ If investors are unable to distinguish between types of advisers, they cannot be expected to understand legal distinctions of the standard to which that advice is held.

Confusion regarding the different types of advice providers and the different standards of conduct to which they must adhere is often made worse by industry marketing and other practices.¹⁸⁶ To attempt to address this, the SEC adopted as part of its 2019 Rulemaking a new required disclosure of a “Form CRS Relationship Summary,” under which registered investment advisers and broker-dealers must provide retail investors with certain information about the nature of their relationship with the firm and its financial professionals in plain English.¹⁸⁷ One of the purposes of the Form CRS is to help retail investors better understand and compare the services and relationships that

investment advisers and broker-dealers offer in a way that is distinct from other required disclosures under the securities laws.

In order for disclosures to be effective, however, investors must both review and understand them. Many disclosures, however, suffer from complexity, so investors overlook or misunderstand them and gloss over the information presented to them. A 2017 survey of private-sector workers with retirement plans found only one-third had read any investment fee disclosure in the past year and only 25 percent of all respondents had both read and understood the information.¹⁸⁸

Many investors also cannot effectively assess the quality of investment advice they receive. Research suggests that, in general, consumers often fail to fully comprehend the quality of professional services they receive, including services from doctors, lawyers, and banks in addition to investment advice providers.¹⁸⁹ The 2016 RIA cited evidence that advice from providers often encouraged investors’ cognitive biases, such as return chasing, rather than correcting such biases. It cited research showing that payments made to broker-dealers influenced the advice provided to clients and that funds distributed through more conflicted broker channels tend to perform worse.¹⁹⁰ Research also suggests that investors’ opinions of adviser quality can be manipulated. For instance, Agnew et al. (2014) found that if an adviser first provides good advice on a financial decision that is easy to understand, the client will subsequently trust bad advice on a more difficult or complicated topic.¹⁹¹ Investors who are unable to discern when they are receiving bad advice are at risk of being persuaded to make investment decisions that are not in their best interest.

Overall, evidence demonstrates that the combination of inexperienced customers and conflicted advisers results in investment underperformance and negative outcomes for investors. According to a 2015 report by the Council of Economic Advisers, approximately \$1.7 trillion of IRA assets were invested in products with a payment structure that generates conflicts of interests.¹⁹² A substantial body of research has shown that IRA holders receiving conflicted investment advice can expect their investments to underperform by approximately 50 to 100 basis points per year.¹⁹³

As discussed in the 2016 RIA, the Department estimated that a 50 to 100 basis point performance gap of broker-sold funds would result in retirees losing \$9 to \$17 billion each year (or between 0.5 and 1 percentage point of return each year for \$1.7 trillion in assets), \$95 to \$189 billion over 10 years, and \$202 and \$404 billion over 20 years. That means a retiree spending their savings down over 30 years would have 6 to 12 percent less to spend.¹⁹⁴ If a retiree encounters conflicts of interest and experiences a 100-basis point reduction in performance, but still spends as though they were not encountering conflicts of interest, they would run out of retirement savings more than five years early.¹⁹⁵

¹⁹² Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings*, (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

¹⁹³ *Ibid.*

¹⁹⁴ For example, an ERISA plan investor who rolls \$200,000 into an IRA, earns a 6 percent nominal rate of return with 2.3 percent inflation, and aims to spend down her savings in 30 years, would be able to consume \$11,034 per year for the 30-year period. A similar investor whose assets underperform by 0.5, 1, or 2 percentage points per year would only be able to consume \$10,359, \$9,705, or \$8,466, respectively, in each of the 30 years. The 0.5 and 1 percentage point figures represent estimates of the underperformance of retail mutual funds sold by potentially conflicted brokers. These figures are based on a large body of literature cited in the 2015 NPRM RIA, comments on the 2015 NPRM RIA, and testimony at the Department’s hearing on conflicts of interest in investment advice in August 2015. The 2 percentage point figure illustrates a scenario for an individual where the impact of conflicts of interest is more severe than average. See Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, p. 4, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

¹⁹⁵ Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings*, (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

¹⁸³ Siegel & Gale, LLC, & Gelb Consulting Group, Inc., *Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures: Report to the Securities and Exchange Commission*, (March 2005).

¹⁸⁴ Angela Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, & Farrukh Suvankulov, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND Institute for Civil Justice, (October 2008), https://www.sec.gov/news/press/2008/2008-1_randiadbreport.pdf.

¹⁸⁵ Brian Scholl, & Angela A. Hung, *The Retail Market for Investment Advice*, (October 2018), <https://bit.ly/3hGGNj4>.

¹⁸⁶ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 108, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

¹⁸⁷ Securities and Exchange Commission, *Form CRS Relationship Summary: Amendments to Form ADV*, (September 19, 2019), <https://www.sec.gov/info/smallbus/secg/form-crs-relationship-summary>.

¹⁸⁸ Pew Charitable Trusts, *Many Workers have Limited Understanding of Retirement Plan Fees*, (November 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/11/many-workers-have-limited-understanding-of-retirement-plan-fees>.

¹⁸⁹ William Rogerson, *Reputation and Product Quality*, 14(2) *The Bell Journal of Economics* 508–516 (1983).

¹⁹⁰ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 145–158, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

¹⁹¹ Julie Agnew, Hazel Bateman, Christine Eckert, Fedor Iskhakov, Jordan Louviere, & Susan Thorp, *Individual Judgment and Trust Formation: An Experimental Investigation of Online Financial Advice*, Australian School of Business Research Paper No. 2013 ACTL21, (2014).

Pervasiveness of Conflicts of Interest in Investment Advice

In recent years, consolidation of the financial industry and innovations in products and compensation practices have multiplied opportunities for self-dealing and made fee arrangements less transparent to clients and regulators. The existence of safeguards in only certain markets, such as the recent adoption of Regulation Best Interest by the SEC regarding recommendations of securities transactions or investment strategies involving securities, creates incentives for agents to recommend conflicted products in less regulated markets. While the relative newness of Regulation Best Interest makes it challenging to quantify instances of these effects, there is research demonstrating similar impacts from other policies addressing financial conflicts of interest or misconduct that varied across markets. Bhattacharya et al. (2020) found that higher fiduciary standards are associated with the sale of higher quality annuity products.¹⁹⁶ Honigsberg et al. (2022) showed that variation in regulatory oversight regimes leads to a situation where the worst financial advisers are operating in the most lightly regulated regimes.¹⁹⁷ Charoenwong et al. (2019) found that under lighter regulation, advisers were more likely to receive complaints, particularly advisers with past complaints or with conflicts of interest.¹⁹⁸ This proposal would extend protections associated with fiduciary status under ERISA, regardless of advice model, and reduce the gap in protections with respect to ERISA-covered investments.

Conflicts of Interest After the SEC's Regulation Best Interest

Regulation Best Interest under the Securities Exchange Act of 1934 created a "best interest" standard of conduct for broker-dealers and associated persons when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities, including recommendation of types of accounts. While Regulation Best Interest does

overlap with ERISA's fiduciary standard, and reduces conflicts, the two standards do not align perfectly: Regulation Best Interest does not apply fiduciary accountability to all parties that provide investment advice to Retirement Investors and does not cover advice to non-retail investors. Moreover, Regulation Best Interest generally does not apply to recommendations of investment products that are not regulated as securities, such as many annuity products. Similarly, while there is a large overlap in the substance of the different regulatory regimes, in enacting ERISA, Congress provided special protections for tax-advantaged retirement savings that don't apply more broadly. For example, Congress prohibited transactions (absent an exemption) that were determined to raise significant risk to retirement plan participants and beneficiaries.

The SEC began conducting limited scope broker-dealer examinations and risk-based inspections in June 2020 to assess whether firms established written policies and procedures to comply with Regulation Best Interest and had made reasonable progress in implementing those policies and procedures. In their reviews, staff identified instances of deficient disclosure obligations, care obligations, periodic review and testing, and conflict of interest obligations.¹⁹⁹ FINRA has identified similar deficiencies in its Report on Examination and Risk Monitoring Program.²⁰⁰ The SEC's Division of Examination notes that in response to deficiency letters identifying these issues, many broker-dealers modified their practices, policies and procedures.²⁰¹ In addition, the SEC released additional guidance in April 2023 focused on the Care Obligation to continue to improve compliance with Regulation Best Interest.²⁰²

In the first year after the SEC's compliance deadline for Regulation Best Interest, the North American Securities

Administrators Association (NASAA) conducted a survey of 443 FINRA firms.²⁰³ The survey found that many broker-dealer firms were still utilizing the compliance programs they had in place prior to Regulation Best Interest, when the standard for retail advice was to recommend investments that were "suitable" for the client.²⁰⁴ In addition, the percentage of broker-dealer firms surveyed that were offering complex, costly, and risky products increased by 11 percent after Regulation Best Interest took effect. About 65 percent of broker-dealer firms did not discuss lower-cost or lower-risk products with their customers when they recommended complex, costly, and risky products. The survey also found that 24 to 30 percent of broker-dealer firms were still using conflicted forms of compensation, including sales contests, differential or variable compensation, and other extra forms of compensation.²⁰⁵ In the first year after Regulation Best Interest took effect, only 35 percent of those broker-dealer firms recommending complex, costly, and risky products had "reduced the financial reward associated with these products by capping agent sales credits."²⁰⁶ In other words, the majority of broker-dealer firms that offered complex, costly and risky products had not restructured their financial reward structure in response to conflict mitigation requirements in SEC's Regulation Best Interest.

NASAA's Broker-Dealer Section Committee concluded a subsequent review of over 200 examinations evaluating broker-dealers' compliance of Regulation Best Interest by state examiners in 25 states, under its second and third year of implementation.²⁰⁷ This review revealed steady implementation progress, including that firms had been updating investor profile forms and policies and procedures; that firms recommending complex, costly or risky products were imposing restrictions based on ages, income/net worth and risk profiles; and that firms were utilizing cost-comparison tools to better consider reasonable investment

¹⁹⁹ Securities and Exchange Commission, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest*, (Jan. 30, 2023), <https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf>.

²⁰⁰ FINRA, *2023 Report on FINRA's Examination and Risk Monitoring Program*, (Jan. 2023), <https://www.finra.org/sites/default/files/2023-01/2023-report-finras-examination-risk-monitoring-program.pdf>.

²⁰¹ Securities and Exchange Commission, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest*, (Jan. 30, 2023), <https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf>.

²⁰² Securities and Exchange Commission, *Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligation*, (Apr. 20, 2023), <https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers>.

¹⁹⁶ Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice*, Working Paper 25861 National Bureau of Economic Research (2020), <https://www.nber.org/papers/w25861>.

¹⁹⁷ Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., *74 Regulatory Arbitrage and the Persistence of Financial Misconduct*, *Stanford Law Review* 797, (2022).

¹⁹⁸ Ben Charoenwong, Alan Kwan, & Tarik Umar, *Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation*, 109(10) *American Economic Review* (October 2019), <https://www.aeaweb.org/articles?id=10.1257/aer.20180412>.

²⁰³ North American Securities Administrators' Association, *Report and Findings of NASAA's Regulation Best Interest Implementation Committee: National Examination Initiative Phase II (A)*, (Nov. 2021).

²⁰⁴ Kenneth Corbin, *Reg BI Isn't Working So Far. Exams Are Coming*, *Says NASAA*, *Barron's* (Nov. 5, 2021).

²⁰⁵ James Langton, *New Conduct Rules, Same Old Conflicts: NASAA, Advisor's Edge* (Nov. 4, 2021).

²⁰⁶ Melanie Waddell, *Reg BI Report Zooms in BDs' Lack of Compliance*, *Think Advisor*, (Nov. 5, 2021).

²⁰⁷ North American Securities Administrators' Association, *Report and Findings of NASAA's Broker-Dealer Section Committee: National Examination Initiative Phase II (B)*, (Sept. 2023).

alternatives. The report noted, however, that firms still struggle with considering reasonably available alternatives and conflict mitigation; ignoring lower cost and risk products when recommending complex, costly risk products and relying on financial incentives to sell them; and that firms have not enhanced point of sale disclosures.

The SEC and FINRA have subsequently released additional guidance designed to clarify and strengthen compliance with Regulation Best Interest's Consumer Protective conditions.²⁰⁸ The SEC announced in January 2023 that it intends to incorporate compliance with Regulation Best Interest into retail-focused examinations of broker-dealers²⁰⁹ and both the SEC and FINRA have begun enforcement actions related to Regulation Best Interest.²¹⁰ In June 2022, the SEC charged a firm and five brokers for violating Regulation Best Interest and selling high-risk bonds to retirees and other retail investors.²¹¹ Meanwhile, FINRA levied its first Regulation Best Interest-related fine in October 2022 and suspended two New York-based brokers in February 2023.²¹²

²⁰⁸ See Securities and Exchange Commission, *Regulation Best Interest: A Small Entity Compliance Guide*, (September 23, 2019), https://www.sec.gov/info/smallbus/secg/regulation-best-interest#Disclosure_Obligation; Securities and Exchange Commission, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors*, (Mar. 20, 2022), <https://www.sec.gov/tm/iabd-staff-bulletin>; Securities and Exchange Commission, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest*, (Aug. 2, 2022), <https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest>; Securities and Exchange Commission, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation*, (Apr. 20, 2023), <https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers>.

²⁰⁹ Securities and Exchange Commission, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest*, p. 1, (Jan. 30, 2023), <https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf>.

²¹⁰ See Securities and Exchange Commission, *Press Release: SEC Charges Broker-Dealer with Violations of Regulation Best Interest and Fraud for Excessive Trading in Customer Accounts*, (Sept. 28, 2023), <https://www.sec.gov/enforce/34-98619-s>; SEC Charges Broker-Dealers with Violations of Regulation Best Interest and Form CRS Rules for Failing to Effect Delivery of Required Disclosures, (Sept. 28, 2023), <https://www.sec.gov/enforce/34-98609-s>; and SEC Charges Wisconsin Broker-Dealer with Violations of Regulation Best Interest, (Sept. 22, 2023), <https://www.sec.gov/enforce/34-98478-s>.

²¹¹ Securities and Exchange Commission, *Press Release: SEC Charges Firm and Five Brokers with Violations of Reg BI*, (June 16, 2022), <https://www.sec.gov/news/press-release/2022-110>.

²¹² Melanie Waddell, *FINRA Fines Long Island BD Over Reg BI*, Think Advisor, (Feb. 13, 2023), <https://www.thinkadvisor.com/2023/02/13/finra-fines-long-island-bd-over-reg-bi/>.

Conflicts of Interest in Advice Given to Plan Fiduciaries

Concerns regarding investment advice extend to that received by ERISA plan fiduciaries. Pool et al. (2016) found that while mutual fund companies involved in plan management for 401(k) plans included both funds from their own family as well as unaffiliated funds in the menu of investment options, poor performing funds were less likely to be removed and more likely to be added to the menu if they were affiliated with the plan trustee.²¹³ In 2005, the SEC found evidence that some pension consultants do not adequately disclose their conflicts and may steer plan fiduciaries to hire money managers based partly on the consultants' own financial interests.²¹⁴ The U.S. Government Accountability Office (GAO) found these inadequately disclosed conflicts were associated with substantial financial losses. GAO's study found that between 2000 and 2004, plans associated with pension consultants without adequate disclosure of their conflicts of interest saw annual rates of return 1.2 to 1.3 percentage points lower than plans associated with pension consultants with adequate disclosure of conflicts of interest.²¹⁵ In another study, GAO found that ERISA plan sponsors often are confused as to whether the advice they receive is fiduciary advice, and small plans in particular may suffer as a result.²¹⁶ This confusion leaves plan participants vulnerable to lower returns due to conflicted advice.

Conflicts of Interest in Rollover Recommendations or Advice

The treatment of rollover recommendations or advice under the 1975 rule has been a central concern in the Department's regulation of fiduciary investment advice. The decision to roll over assets from a plan to an IRA is often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings.

Most IRA assets are attributable to rollover contributions, and the amount

of assets rolled over to IRAs is large and expected to increase substantially. In 2021, IRA rollovers from defined contribution plans increased by 4.9 percent. Cerulli Associates estimates that aggregate rollover contributions to IRAs from 2022 to 2027 will surpass \$4.5 trillion.²¹⁷

The decision to roll over one's retirement savings from an ERISA-covered employer-based plan into an IRA or other plan has significant consequences, and for many investors is the single most consequential advice they will receive and affects a lifetime of savings. About 57 percent of traditional IRA-owning households indicated that their IRAs contained rollovers from employer-sponsored retirement plans and of those households, 85 percent indicated they had rolled over their entire account balance in their most recent rollover.²¹⁸ In 2020 more than 95 percent of the dollars flowing into IRAs came from rollovers, while the rest came from regular contributions.²¹⁹

Retiring workers must decide how best to invest a career's worth of 401(k) savings, and many look to an investment advice provider for guidance. Financial institutions face an innate conflict of interest, in that a financial institution that provides a recommendation or advice concerning a rollover to a retirement investor may expect to earn transaction-based compensation such as commissions and/or receive an ongoing advisory fee that it likely would not receive if the assets were to remain in an ERISA-covered plan. Further, under the 1975 rule, if an investment advice provider makes a one-time recommendation that the worker move the entire balance of their retirement plan into an IRA and invest it in a particular annuity, then the advice provider has no fiduciary obligation under ERISA to honor the worker's best interest unless this recommendation is part of an "ongoing" advice relationship. The resulting compensation represents a significant revenue source for investment advice providers.

²¹³ Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options in 401(k) Plans*, 71(4) *Journal of Finance* 1779–1812, (2016).

²¹⁴ The report's findings were based on a 2002 to 2003 examination of 24 pension consultants. See SEC, *SEC Staff Report Concerning Examination of Select Pension Consultants*, (May 16, 2005), <http://www.sec.gov/news/studies/pensionexamstudy.pdf>.

²¹⁵ GAO Publication No. GAO–09–503T, *Private Pensions: Conflicts of Interest Can Affect Defined Benefit and Defined Contribution Plans*, (2009), <https://www.gao.gov/assets/gao-09-503t.pdf>.

²¹⁶ GAO Publication No. GAO–11–119, *401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest*, (2011), <http://www.gao.gov/products/GAO-11-119>.

²¹⁷ Cerulli Associates, *U.S. Retirement Markets 2022: The Role of Workplace Retirement Plans in the War for Talent*, Exhibit 8.06, (2023). Note that these numbers include public sector plans.

²¹⁸ Investment Company Institute, *The Role of IRAs in US Households' Savings for Retirement*, 2021, 28(1) ICI Research Perspective, (Jan. 2022), <https://www.ici.org/system/files/2022-01/per28-01.pdf>.

²¹⁹ Internal Revenue Service, *SOI Tax Stats—Accumulation and Distribution of Individual Retirement Arrangement (IRA)*, Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020, (2023).

In the preamble to PTE 2020–02, the Department provided an interpretation of when advice or a recommendation to roll over assets from an employee benefit plan to an IRA would constitute fiduciary investment advice under the 1975 regulation's five-part test. The preamble interpretation confirmed the Department's view that advice or a recommendation to roll assets out of a Title I Plan is advice with respect to moneys or other property of the plan and, if provided by a person who satisfies all of the requirements of the five-part test, constitutes fiduciary investment advice. The preamble interpretation also discussed when a recommendation to roll over employee benefit plans to an IRA would satisfy the "regular basis" requirement and the Department's interpretation of the requirement of "a mutual agreement, arrangement, or understanding" that the investment advice will serve as "a primary basis for investment decisions."

Regarding the regular basis prong, the Department explained that "advice to roll assets out of a Title I Plan into an IRA where the investment advice provider has not previously provided advice but will be regularly giving advice regarding the IRA in the course of a lengthier financial relationship would be the start of an advice relationship that satisfies the regular basis prong."²²⁰ As discussed above, however, this interpretation of the 1975 rule was rejected by the court in *American Securities Association v. United States Department of Labor*,²²¹ and in the case of *Federation of Americans for Consumer Choice v. United States Department of Labor*,²²² the magistrate judge has recommended that the district court also reject this interpretation. In their view, the 1975 rule does not permit the Department to treat one-time rollover recommendations as "regular basis" advice based on the expectation of future advice on the management of the assets rolled out of the ERISA plan and into the IRA. Any change to the "regular basis" requirement requires a new rule.²²³

While PTE 2020–02 mitigates some of these concerns by requiring investment advice fiduciaries to render advice in their customer's best interest in order to

receive certain types of compensation from otherwise prohibited transactions resulting from rollover advice, the limitations of the existing five-part test for fiduciary status still result in significant portions of the retirement investment market operating outside of the PTE's protections.

Uniformity Across Markets and Product Types

The current regulatory approach to investment advice results in standards that vary by advice market and investment product.²²⁴ As a result, retirement investors cannot rely on a single protective standard, and their exposure to risk is not only based on the types of products they invest in but also by who gives that advice or makes that recommendation and in what capacity they are acting. This creates investor confusion and makes room for regulatory arbitrage, where investment advice providers can use more favorable rules in one market to circumvent less favorable regulations elsewhere. The Department identifies the following nuances of the regulatory landscape as sources of investor confusion:

- Regulation Best Interest only applies to recommendations made by broker-dealers to retail customers. As a result of this limitation, broker-dealers' recommendations of securities transactions, investment strategies, plan design, and plan investment options to plan fiduciaries, fall outside its scope. This may be particularly confusing for small plan fiduciaries.

- Securities laws (*i.e.*, the Investment Advisers Act and Regulation Best Interest) may not apply to advice on investments such as real estate, fixed indexed annuities, commodities, certificates of deposit, and other bank products.

- Variable annuities and some indexed annuities are considered securities and are subject to securities laws, while fixed annuities, including fixed indexed annuities, are subject to state law. As discussed in the Regulatory Baseline section, these laws vary significantly from state to state.

This list is not exhaustive but provides a sense of how many seemingly similar investments are subject to widely different regulators and protective standards.

Honigsberg et al. (2022) identified associated persons of broker-dealers who had been registered with FINRA between 2010 and 2020 but were no longer registered with the regulatory

authority. Of those that exited, roughly a third continued providing financial advice under a different regulatory regime, of which eight percent had a history of serious misconduct while registered with FINRA. This share increased to 12 percent when you looked at those that were still providing financial advice as an insurance producer registered with the NAIC and 13 percent when you looked at the National Futures Association members. The authors argued that the existing framework for regulating adviser misconduct creates incentives for the worst advisers to migrate to more poorly regulated state regimes.²²⁵

The risk posed by non-uniform regulatory environments is exemplified by the annuity market. A recent survey of insurers reported that 58 percent of insurers thought the SEC's Regulation Best Interest had improved protections for consumers.²²⁶ However, as discussed above, generally only annuities considered securities are under the jurisdiction of the SEC. The remaining annuities are covered by state regulations that potentially hold those selling such insurance products to a lower standard. In crafting this proposal, the Department strove to craft a definition that hews to both the text and purpose of ERISA.

An investor's retirement account may hold a wide range of investment products, those products may touch multiple regulatory regimes, and the retirement investor may not be aware of the different standards. Once the investment products are held in a tax-advantaged retirement account, however, ERISA requires a uniform standard, applicable regardless of the type of investment product. This range of investment products held in retirement plans means that the regulatory definition of an investment advice fiduciary for purposes of Title I of ERISA and the Code takes on special importance in creating uniform standards for investment advice, particularly when a retirement investor may not realize the investment product is not covered by another regulatory regime such as federal securities laws.

Need for Uniformity Concerning Rollovers

The difference between types of products, such as securities subject to regulation by the SEC and non-

²²⁰ 85 FR 82798, 82805, (Dec. 18, 2020).

²²¹ *American Securities Association v. U.S. Dep't of Labor*, No. 8:22–CV–330–VMC–CPT, 2023 WL 1967573, at *14–*19, (M.D. Fla. Feb. 13, 2023) [hereinafter ASA].

²²² Conclusions, and Recommendations of the United States Magistrate Judge, *FACC v. U.S. Dep't of Labor*, No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *18–*19 (N.D. Tex. June 30, 2023)

²²³ See *id.* at *22–23.

²²⁴ For more information on the different regulatory regimes, Refer to the Regulatory Baseline section in this analysis.

²²⁵ Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., 74 *Regulatory Arbitrage and the Persistence of Financial Misconduct*, *Stanford Law Review* 797, (2022).

²²⁶ Cerulli Associates, *U.S. Annuity Markets 2021: Acclimating to Industry Trends and Changing Demand*, Exhibit 1.06, The Cerulli Report, (2022).

securities annuities subject to regulation by state insurance departments, creates problematic incentives for financial professionals to recommend certain products.

Under the Investment Advisers Act and Regulation Best Interest, investment advisers and broker-dealers must have a reasonable basis to believe both the rollover itself and the account being recommended are in the retail investor's best interest.²²⁷ SEC staff guidance recognizes that it would be difficult to have such a reasonable basis if, "you do not consider the alternative of leaving the retail investor's investments in their employer's plan, where that is an option."²²⁸ Moreover, broker-dealers and investment advisers are instructed to generally consider certain factors when making rollover recommendations to retail investors, specifically and without limitation, "costs; level of services available; features of the existing account, including costs; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; and holdings of employer stock."²²⁹ As such, the SEC's regulatory framework is likely to mitigate some of the aforementioned harms to retirement investors, but only in markets where it applies.

In contrast, the NAIC Model Regulation #275, which is the basis for much of the state regulation on insurers,²³⁰ makes no direct reference to rollovers, and imposes a less stringent obligation on annuity recommendations than the best interest standard imposed on securities recommendations and investment advice by the SEC. Given the average rollover contribution to a traditional IRA in 2019 was \$112,000,²³¹ the variation in regulatory standards regarding rollover advice can result in widely disparate outcomes among similarly situated retirement investors

based solely on who they sought for advice and whether that adviser was required to put the investor's interests above their own.

An update to the regulatory definition of an investment advice fiduciary, for purposes of Title I of ERISA and the Code, is necessary to enhance protections of retirement investors. This approach both reflects ERISA's and the Code's statutory text, which adopts a uniform approach, as well as sound public policy. Investment recommendations should be consistently governed solely by the best interest of retirement investors, rather than adviser perceptions that advice on one category of investment product is subject to different regulatory standards than another.

How the Proposed Rule Addresses the Need for Regulatory Action

The proposed amendments to the 1975 rule would better reflect the text and purposes of the statute and would address inadequacies that the Department has observed during its decades of experience in implementing the 1975 rule. This proposal would honor the broad statutory definition of fiduciary by amending the five-part test to create a uniformly protective fiduciary standard for retirement investors, subject to firm-level oversight, designed to mitigate and eliminate the harmful effects of biased advice. The amendments to the 1975 rule and related exemptions would also eliminate the risk of regulatory arbitrage, in which an investment advice provider may operate in a particular market to evade more stringent regulation. For instance, under the current regulation, an independent producer selling an indexed annuity, a financial professional giving a retirement investor one-time advice to roll investments into an IRA, or a financial professional giving advice on one transaction, could portray themselves as serving the best interest of the investor while being held to lower care standard than financial professionals subject to the Investment Advisers Act of 1940 or the SEC's Regulation Best Interest or the Department's fiduciary standard. In contrast, the amended rule would broadly align the standard of care required of all financial professionals giving retirement investment advice with retirement investors' reasonable expectations that those recommendations are trustworthy. This would in turn create a retirement market where all advisers compete under a uniform fiduciary standard, reducing

investor exposure to harms from conflicted advice.

The fiduciary standard, as buttressed by the protective conditions of PTE 2020-02 and PTE 84-24, protects investors from getting investment recommendations that are improperly biased because of the advisers' competing financial interests. It requires firms and advisers to put the interests of Retirement Investors first and to take appropriate action to mitigate and control conflicts of interest. These conditions should go a long way to redressing the dangers posed by biased advice.

In addition, the proposed exemptions also give inexperienced investors important information on the scope, severity, and magnitude of conflicts of interest. Moreover, by imposing a uniform fiduciary standard on conflicted advisers in the retirement marketplace, the proposed rule and exemptions reduce investor confusion about the standards governing advice. Retail investors who rely on expert advice are unlikely to have a sound understanding of differences in standards across various categories of investments and investment professionals.²³² The SEC Investor Advisory Committee, when considering a uniform adoption of a standard of duty for investment advisers and broker-dealers in 2013, found that "investors do not distinguish between broker-dealers and investment advisers, do not know that broker-dealers and investment advisers are subject to different legal standards, do not understand the difference between a suitability standard and a fiduciary duty, and expect broker-dealers and investment advisers alike to act in their best interest when giving advice and making recommendation."²³³

While these issues have been mitigated to a considerable degree by the imposition of a common "best interest" standard for broker-dealers governed by Regulation Best Interest and investment advisers subject to the Investment Advisers Act or state law, significant differences remain with respect to the standards governing investments that are not securities, such as fixed indexed annuities. Investor confusion is exacerbated by different

²²⁷ In addition to staff guidance, the Commission recognized in Regulation Best Interest that, "as part of determining whether a broker-dealer has a reasonable basis to believe that a recommendation is in the best interest of the retail customer, a broker-dealer generally should consider reasonably available alternatives offered by the broker-dealer" which the Commission viewed as "an inherent aspect of making a 'best interest' recommendation." See Reg BI Adopting Release at 33381.

²²⁸ SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors*, (March 30, 2022), <https://www.sec.gov/tm/iabd-staff-bulletin>.

²²⁹ *Ibid*.

²³⁰ For more information, refer to the discussion in the Regulatory Baseline section on state legislation and regulation.

²³¹ Matched file of Forms 1040, 1099-R, and 5498 for Tax Year 2019. IRS, Statistics of Income Division, Individual Retirement Arrangements Study, February 2022.

²³² Angela A. Hung, Noreen Clancy, Jeff Emmett Dominitz, Eric Talley, Claude Berrebi, & Farrukh Suvankulov, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND Corporation, (2008), https://www.rand.org/pubs/technical_reports/TR556.html.

²³³ Securities and Exchange Commission. "Recommendation of the Investor as Purchaser Subcommittee Broker-Dealer Fiduciary Duty," November 1, 2013. <https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation.pdf>.

regulatory regimes referencing a “best interest standard” while defining what that means and the protections that entails differently.

Although the proposal will enhance disclosures of conflicts of interest, the Department stresses that disclosure alone is limited in its effectiveness at protecting investors from the dangers posed by conflicts of interest, as detailed in the RIA for the fiduciary rule the Department promulgated in 2016.²³⁴ As that document explained, there are myriad reasons to doubt that disclosure alone could effectively mitigate conflicts of interest, and available data support a finding that disclosure is not a reliable corrective for conflicts of interest:

- Even with relatively clear disclosures, investors routinely ignore them and are hard pressed to understand them. Investors often lack the requisite financial expertise, disregard the materials they receive, and have trouble following the disclosures or parsing their significance. These problems can be compounded for older and more vulnerable retirement-age investors.

- Merely disclosing a conflict of interest does not give the investor a working model on how to determine the impact of the conflict of interest on the advice they are receiving or of how to use the disclosure to make a better investment decision. While now on notice of the conflict, the inexperienced customer remains dependent on the expert’s advice.

- Disclosure can even exacerbate the harmful impacts of conflicts of interest, as when an adviser feels morally licensed to indulge the conflict of interest because they can now treat the customer as duly warned or as when they press harder to make the sale to offset possible concerns about disclosed conflicts.

- Without a working model on how to take account of conflicts of interest, investors may overweight the advice based on the adviser’s perceived honesty for having disclosed the conflict, or unduly discount the advice and take a contrarian approach because of discomfort about the advice’s reliability. Investors may also feel pressure not to question the adviser’s integrity or deprive them of their livelihood.

While disclosure of conflicts could, in some cases, change the adviser’s behavior for the better,²³⁵ mitigating or removing conflicts and requiring the adviser to adhere to a strong conduct standard with a mechanism for overseeing and enforcing compliance, when necessary, provides stronger incentives for advisers to provide investment advice that is in the best interest of the investor. These are the key components of the Department’s proposals, and the primary ways the Department expects the rule to address the problems posed by conflicted advice.

While the SEC has addressed many of the Department’s concerns about conflicted advice, the impact is limited to advice in the SEC’s regulatory jurisdiction. This situation would be alleviated by the introduction of a uniform fiduciary standard for the broad range of retirement investment transactions in all regulatory spheres. Additional regulatory action is warranted due to the pervasiveness of conflicts of interest in this marketplace and the complexity of investing assets for retirement. The growing body of evidence underscores that best interest fiduciary standards play an important role in protecting retirement investors.²³⁶ One of the Department’s objectives in issuing this proposal is to abate these and similar harms in areas outside of SEC jurisdiction, to ensure that retirement investors’ assets outside the securities space are also protected from conflicted advice. This proposal would extend the fiduciary best interest standard to additional markets and investment product, including annuities and other non-securities. This proposal would apply to advice given to plan fiduciaries as well as plan participants.

In addition, for retirement investors who already receive the protections in the Investment Advisers Act of 1940, Regulation Best Interest, and PTE 2020–02 under the regulatory baseline, this proposal would provide even stronger protections. Standards for mitigating conflicts under this proposal would be more rigorous and well-defined.

3. Baseline

Since the Department first took on the issues of fiduciary advice and conflicts of interest, there have been numerous developments in the regulatory environment and the financial markets in which they operate.

Regulatory Baseline

The problems of conflicted advice and supervisory structures for advice have received increased regulatory attention, resulting in action from the Department, the SEC, individual states, and the National Association of Insurance Commissioners (NAIC). The major actions are summarized below.

Regulatory Baseline, the Department of Labor

Many financial institutions undertook efforts to adapt to the Department’s 2016 Final Rule. As such, the intended improvements in retirement investor outcomes appear to have been on track prior to the Fifth Circuit’s vacatur of the 2016 Final Rule.²³⁷ Research suggests that the Department’s prior efforts produced positive changes in advice markets, even without fully taking effect, which were reinforced by the SEC’s actions. For instance, several studies found that the Department’s 2016 Final Rule had a positive effect on conflicts of interest and that some categories of conflicts, such as bundled share classes of mutual funds and high-expense variable annuities, were reduced even after the DOL rule was struck down.²³⁸ The nature of the conflicts associated with bundled share classes and high-expense variable annuities are discussed later in this document.

In 2020, the Department issued a technical amendment to the CFR to reinsert the 1975 rule and published PTE 2020–02. The exemption is available to registered investment advisers, broker dealers, banks, and insurance companies and their individual employees, agents, and

²³⁷ See *Chamber*, 885 F.3d 360 (5th Cir. 2018).

²³⁸ Aron Szapiro & Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors*, Morningstar, (April 2017); Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?*, 6(3) *The Journal of Retirement* 46–59, (2019); Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It’s Time to Dive Past Superficial Conflicts of Interest*, Morningstar, (November 2019), https://ccl.yale.edu/sites/default/files/files/wp_Conflicts_Of_Interest_111319%20FINAL.pdf; Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) *Review of Financial Studies* 5334–5386 (December 2022).

²³⁴ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 268–271, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

²³⁵ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 268–271, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

²³⁶ For more information on the relationship of best interest fiduciary standards and the protection of retirement investors, refer to the Benefits section of the RIA.

representatives that provide fiduciary investment advice to retirement investors. However, the exemption explicitly excluded investment advice solely generated by an interactive website, referred to as “pure robo-advice.”²³⁹ Under the exemption, financial institutions and investment professionals can receive a wide variety of payments that would otherwise violate the prohibited transaction rules. The exemption’s relief extends to prohibited transactions arising as a result of investment advice to roll over assets from a plan to an IRA, under certain conditions.

This exemption conditions relief on the investment professional and financial institution investment advice fiduciaries providing advice in accordance with the Impartial Conduct Standards. The Impartial Conduct Standards include a best interest standard, a reasonable compensation standard, and a requirement to make no misleading statements about investment transactions and other relevant matters. The best interest standard in the exemption is broadly aligned with the federal securities laws. In addition, the exemption requires financial institutions to acknowledge in writing the institution’s and their investment professionals’ fiduciary status under Title I and the Code, as applicable, when providing investment advice to the retirement investor, and to describe in writing the services to be provided and the financial institutions’ and investment professionals’ material conflicts of interest. Financial institutions must document the reasons that a rollover recommendation is in the best interest of the retirement investor and provide that documentation to the retirement investor.²⁴⁰ Financial institutions are required to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and conduct a retrospective review of compliance.

In order to ensure that financial institutions provide reasonable oversight of investment professionals

and adopt a culture of compliance, the exemption provides that financial institutions and investment professionals will be ineligible to rely on the exemption if, within the previous 10 years, they were convicted of certain crimes arising out of their provision of investment advice to retirement investors. They can also become ineligible if they engage in systematic or intentional violation of the exemption’s conditions or provided materially misleading information to the Department in relation to their conduct under the exemption.

At the time PTE 2020–02 was finalized, the Department left in place other administrative exemptions that could be used to provide investment advice in place of PTE 2020–02, including the other PTEs being amended in this proposal. Leaving the other PTEs in place allowed for a varied landscape of conditions that could be used by different types of financial institutions to provide investment advice for different types of assets and financial products. The varied landscape of conditions allows for regulatory arbitrage where investment advice providers can use more favorable rules in one market to circumvent less favorable regulations elsewhere.

Regulatory Baseline, the Securities and Exchange Commission

The Investment Advisers Act of 1940, “establishes a fiduciary duty for [investment advisers] roughly analogous to the fiduciary duties of care and loyalty established by ERISA for investment advisers to plans and plan participants.”²⁴¹ In an interpretation of the conduct standards applicable to investment advisers, the SEC wrote:

An investment adviser’s fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty. This fiduciary duty requires an adviser “to adopt the principal’s goals, objectives, or ends.” This means the adviser must, at all times, serve the best interest of its client and not subordinate its client’s interest to its own.²⁴²

In June 2019, the SEC adopted a package of rulemakings and interpretations designed to enhance the quality and transparency of retail investors’ relationships with investment

advisers and broker-dealers.²⁴³ The package included Regulation Best Interest, the Form CRS, and publication of two separate interpretations under the Investment Advisers Act.

Regulation Best Interest establishes a standard of conduct for broker-dealers and associated persons (unless otherwise indicated, together referred to as “broker-dealers”) when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities.²⁴⁴ In adopting Regulation Best Interest, the SEC made findings consistent with the underlying premise of DOL’s recent rulemakings: that financial services firms’ conflicts of interest are harmful to investors. Specifically, in the Regulation Best Interest preamble, the SEC stated that:

[l]ike many principal-agent relationships—including the investment adviser-client relationship—the relationship between a broker-dealer and a customer has inherent conflicts of interest, including those resulting from a transaction-based (e.g., commission) compensation structure and other broker-dealer compensation.²⁴⁵ These and other conflicts of interest may provide an incentive to a broker-dealer to seek to increase its own compensation or other financial interests at the expense of the customer to whom it is making investment recommendations.²⁴⁶

Notwithstanding these inherent conflicts of interest in the broker-dealer-customer relationship, there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers

²⁴³ SEC Regulation Best Interest defines retail customer to include ERISA plan participants and beneficiaries, including IRA owners, but not ERISA fiduciaries. See 84 FR 33343–44 (July 12, 2019). This subject is further addressed in the affected entities section below.

²⁴⁴ The SEC’s Regulation Best Interest was adopted pursuant to the express and broad grant of rulemaking in Section 913(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The SEC also required disclosure of a Customer Relationship Summary, adopted an interpretation of the fiduciary duty that investment advisers owe to their clients under the Investment Advisers Act, and published an interpretation of the “solely incidental” prong of the broker-dealer exclusion under the Investment Advisers Act. Under Regulation Best Interest, broker-dealers are required to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer and cannot place its own interests ahead of the customer’s interests.

²⁴⁵ The SEC also stated that “[t]he investment adviser-client relationship also has inherent conflicts of interest, including those resulting from an asset-based compensation structure that may provide an incentive for an investment adviser to encourage its client to invest more money through an adviser in order increase its AUM at the expense of the client.”

²⁴⁶ 84 FR 33319 (July 12, 2019).

²³⁹ “Hybrid robo-advice,” or advice that combines combine features of robo-advice and traditional investment advice, is included under the existing PTE 2020–02. 85 FR 82798, 82830 (Dec. 18, 2020).

²⁴⁰ The PTE 2020–02 preamble says: This requirement extends to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (e.g., from a commission-based account to a fee-based account). The requirement to document the specific reasons for these recommendations is part of the required policies and procedures, in Section II(c)(3).”

²⁴¹ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 30, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

²⁴² Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669 (July 12, 2019).

seeking investment recommendations . . . Nevertheless, concerns exist regarding (1) the potential harm to retail customers resulting from broker-dealer recommendations provided where conflicts of interest exist and (2) the insufficiency of existing broker-dealer regulatory requirements to address these conflicts when broker-dealers make recommendations to retail customers. More specifically, there are concerns that existing requirements do not require a broker-dealer's recommendations to be in the retail customer's best interest.²⁴⁷

Accordingly, the SEC stated that Regulation Best Interest enhances the broker-dealer standard of conduct beyond existing "suitability" obligations²⁴⁸ and aligns the standard of conduct with customers' reasonable expectations by requiring broker-dealers to act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the retail customer's interest; and, among other things, address conflicts of interest by disclosing and mitigating, or even eliminating, conflicts of interest.²⁴⁹

In particular, the best interest obligation for Regulation Best Interest is only satisfied if the broker-dealer complies with four component obligations: a Disclosure Obligation, which requires a broker-dealer to provide all material facts related to the scope and terms of the relationship with the retail customer and the conflicts of interests associated with the recommendation prior to or at the time of the recommendation; a Care Obligation, which requires a broker-dealer to exercise reasonable diligence, care, and skill when making recommendations to a retail customer; a Conflict of Interest Obligation, which requires the broker-dealer to establish, maintain and enforce written policies and procedures reasonably designed to address conflicts of interest associated with its recommendations to retail customers; and a Compliance Obligation, which requires broker-dealers to establish, maintain and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest as a whole.²⁵⁰

Significantly, Regulation Best Interest applies to recommendations by broker-dealers to roll over or transfer assets in a workplace retirement plan accounts to

an IRA and recommendations to take a plan distribution. The SEC has also issued staff guidance that under Regulation Best Interest and the Advisers Act's fiduciary duty, when making a rollover recommendation, broker-dealers and investment advisers must consider costs, the level of services available, and features of existing accounts. The guidance notes that, "it would be difficult to form a reasonable basis to believe that a rollover recommendation is in the retail investor's best interest and does not place your or your firm's interests ahead of the retail investor's interest, if you do not consider the alternative of leaving the retail investor's investments in their employer's plan, where that is an option."²⁵¹

The standard of conduct in SEC's Regulation Best Interest draws from key principles of fiduciary obligations, including those that apply to investment advisers under the Investment Advisers Act. As reiterated in Staff Bulletins²⁵² and speeches,^{253 254} Regulation Best Interest, as adopted, incorporates Care and Conflict of Interest Obligations substantially similar to the fiduciary duties under the Advisers Act of loyalty (to not subordinate their client's interest to their own) and care (to ensure that advice is suitable and in the best interest of the client), to recommendations made by broker-dealers to their retail clients. Importantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and does not place the interests of the firm or the financial professional ahead of the interests of the retail investor.

The SEC's Regulation Best Interest covers advice that SEC-registered broker-dealers render to retail investors. Therefore, the affected firms and professionals include those making

recommendations to the individual IRA and ERISA plan investors covered by this proposal. With respect to this area of overlap, the potential costs of this proposal are relatively limited, because the SEC actions and this proposal share many similarities and many firms have already built compliance structures based on SEC actions, the Department's 2016 Final Rule, and PTE 2020-02.

The SEC also covers robo-advice, subjecting robo-advisers that meet the definition of "investment adviser" to regulation under the Investment Advisers Act of 1940. It states that robo-advisers have a fiduciary duty to provide advice in the best interest of their clients. In addition, if robo-advisers also hold customer assets, they must register with the SEC and FINRA as broker-dealers. In 2017, the SEC's Division of Investment Management released regulatory compliance guidance for robo-advisers that included the need for adequate disclosure about the robo-adviser and the services it provides, the need to ensure that the robo-adviser is providing appropriate advice to its customers, and the need to adopt and implement appropriate compliance programs tailored to the automated nature of the robo-adviser's services.²⁵⁵ This SEC guidance confirms that robo-advisers registered as investment advisers with the SEC are subject to the Investment Adviser Act's legal requirements and fiduciary obligations.

For brokers-dealers subject to Regulation Best Interest and investment advisers subject to the Investment Advisers Act, there is substantial overlap between SEC requirements and the obligations imposed by ERISA, the Code, and this regulatory project. Outside this area of overlap, however, current standards generally are lower, so the potential costs—and benefits—of this proposal may be more significant. For example, this proposal would apply to state-licensed insurance agents and state-registered brokers, who are not uniformly regulated by the SEC, when they provide investment advice to IRA or ERISA plan investors. It would also apply to broker-dealers who give fiduciary advice to ERISA plan fiduciaries, who are not included within Regulation Best Interest's definition of a retail customer. Recommendations regarding plan and IRA investments in real estate, certificates of deposit, other bank products and fixed indexed annuities that are not considered

²⁵¹ SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors*, (March 30, 2022), <https://www.sec.gov/tm/iabd-staff-bulletin>.

²⁵² *Ibid.*

²⁵³ Chairman Jay Clayton, *Statement at the Open Meeting on Commission Actions to Enhance and Clarify the Obligations Financial Professionals Owe to our Main Street Investors*, (June 5, 2019), <https://www.sec.gov/news/public-statement/statement-clayton-060519-iabd>.

²⁵⁴ Chairman Jay Clayton, *Regulation Best Interest and the Investment Advisory Fiduciary Duty: Two Strong Standards that Protect and Provide Choice for Main Street Investors*, SEC (July 8, 2019), <https://www.sec.gov/news/speech/clayton-regulation-best-interest-investment-adviser-fiduciary-duty>.

²⁵⁵ Jill E. Fisch, Marion Labouré, & John A. Turner, *The Disruptive Impact of FinTech on Retirement Systems: Chapter 2: The Emergence of the Robo-Advisor*, Oxford University Press 13 (2019).

²⁴⁷ *Id.* at 33319 (internal citation omitted).

²⁴⁸ FINRA Rule 2111(a).

²⁴⁹ 84 FR 33318 (July 12, 2019).

²⁵⁰ SEC's Office of Compliance Inspections and Examinations, *Examinations that Focus on Compliance with Regulation Best Interest*, (April 7, 2020), <https://www.sec.gov/files/Risk%20Alert-%20Regulation%20Best%20Interest%20Exams.pdf>.

securities under the federal securities laws are also not generally regulated by the SEC.

The Department is especially concerned about the proper regulation of fixed index annuities, as they comprised 67 percent of the retail annuity market in 2022, an increase of 42 percent from 2021, as investors hedged against rising interest rates.²⁵⁶ This growth in fixed annuity investments has increased the share of retirement savings residing in a less secure environment with fewer protections against conflicted advice compared to direct investors in mutual funds and securities. The Department

anticipates the benefits to investors of extending fiduciary law principles to entities providing investment advice in currently less stringent regulatory regimes to be substantial.

Regulatory Baseline, State Legislative and Regulatory Developments

The appropriate baseline for this analysis is also informed by certain recent legislative and regulatory developments involving conduct standards at the state level.

Summary of State Legislative and Regulatory Developments

In a list compiled in July 2023, the Department identified 43 states that

have enacted legislation, finalized regulation, or both that impose conduct standards and disclosure requirements on various financial institutions.²⁵⁷ The table below summarizes the enacted legislation and finalized regulation in each state, as well as the type of financial institution each regulation pertains to. This list includes states that have adopted the NAIC Model Regulation #275,²⁵⁸ in addition to states that have adopted conduct standards and disclosure requirements outside of NAIC Model Regulation #275.

TABLE 1—STATES THAT HAVE ENACTED LEGISLATION OR FINALIZED REGULATION

State	Legislation or regulation	Title of legislation or regulation	Affected entities
Alabama	Regulation	Suitability in Annuity Transactions	Insurers, Broker-Dealers, and Independent Producers.
Alaska	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Arizona	Legislation	An Act Relating to Annuity Transactions	Insurers and Independent Producers.
Arkansas	Regulation	Article 2—Transaction of Insurance	Insurers and Independent Producers.
Colorado	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers.
		Colorado Securities Act: Dishonest and Unethical Conduct.	Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers.
	Regulation	Concerning Best Interest Obligations and Supervision in Annuity Transactions.	Insurers and Independent Producers.
Connecticut	Legislation	Consumers Doing Business with Financial Planners.	Financial Planners.
	Legislation	An Act Requiring Administrators of Certain Retirement Plans to Disclose Conflicts of Interest.	Administrators to Municipal 403(b) Plans.
Delaware	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Florida	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers.
Georgia	Legislation	Consumer Protection	Insurers and Insurance Agents.
Hawaii	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Idaho	Legislation	An Act Relating to Insurance	Insurers and Independent Producers.
Illinois	Regulation	Annuity Consumer Protections Act	Insurers and Independent Producers.
Iowa	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
		Rulemaking Related to Best Interest Standard for Insurance Professionals.	
Kansas	Regulation	Policy and Procedure on Suitability in Annuity Transactions.	Insurers and Independent Producers.
Kentucky	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers.
Louisiana	Legislation	Provides Relative to Venue for Direct Actions by Third Parties Against Insurers.	Insurance Commissioner.
Maine	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Maryland	Legislation	Financial Consumer Protection Act of 2018 ...	N/A.
Massachusetts ²⁵⁹	Regulation	Suitability in Annuity Transaction	Insurers and Independent Producers.
		Suitability in Annuity Transactions	Investment Advisers, Financial Planners, Broker-Dealers, Insurers, and Independent Producers.
	Regulation	Amendments to Fiduciary Conduct Standards	Broker-Dealers and Agents.
	Regulation	Amendments to Investment Adviser Disclosure Regulations.	Investment Advisers.

²⁵⁶ LIMRA, *Record Annuity Sales in 2022 Expected Continue into First Quarter 2023*, (March 8, 2023), <https://www.limra.com/en/newsroom/news-releases/2023/limra-record-annuity-sales-in-2022-expected-to-continue-into-first-quarter-2023/>.

²⁵⁷ States that have enacted legislation include Arizona, Connecticut, Florida, Hawaii, Idaho, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, Pennsylvania, South Dakota, Texas, Washington, and Wisconsin. States that have finalized regulation include Alabama, Alaska, Arizona, Arkansas,

Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming.

²⁵⁸ For more information on the NAIC's Suitability in Annuity Transactions Model Regulation, or Model Regulation #275, refer to the section entitled "NAIC Annuity Transactions Model Regulation #275" in this RIA.

²⁵⁹ The Massachusetts Supreme Judicial Court recently upheld the validity of the state's fiduciary duty rule, holding that the Secretary of the Commonwealth had authority to promulgate it, that the Secretary's authority was not an impermissible delegation of legislative power, that the rule did not override the common-law protections available to investors, and that the rule was not preempted by the SEC's imposition of the Regulation Best Interest. *Robinhood Fin. LLC v. Sec'y of Commonwealth*, No. SJC-13381, 2023 WL 5490571, at *1, *6-15 (Mass. Aug. 25, 2023).

TABLE 1—STATES THAT HAVE ENACTED LEGISLATION OR FINALIZED REGULATION—Continued

State	Legislation or regulation	Title of legislation or regulation	Affected entities
Michigan	Legislation	Amendments to An Act to Revise, Consolidate, and Classify the Law Relating to the Insurance and Surety Business.	Insurers and Independent Producers.
Minnesota	Legislation	Annuity Suitability Regulation Modification	Insurers and Independent Producers.
Mississippi	Regulation	Insurance Industry Trade Practices	Insurers and Independent Producers.
Montana	Regulation	Annuity Transactions Model	Insurers and Independent Producers.
	Legislation	An Act to Revise Insurance Laws Related to Annuities.	Insurers and Independent Producers.
	Regulation	Securities Regulation	Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers.
Nebraska	Legislation	An Act relating to the Nebraska Protections in Annuity Transactions Act.	Insurers and Independent Producers.
Nevada	Legislation	An Act Relating to Financial Planners; Imposing a Fiduciary Duty on Broker-Dealers, Sales Representatives and Investment Advisers Who for Compensation Advise Other Persons Concerning the Investment of Money.	Broker-Dealers, Sales Representatives, Investment Advisers, and Investment Adviser Representatives.
New Mexico	Regulation	Suitability and Annuity Transactions	Insurers and Independent Producers.
New York	Regulation	Suitability and Best Interests in Life Insurance and Annuity Transactions.	Insurers and Independent Producers.
North Carolina	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
North Dakota	Legislation	An Act Relating to Annuity Transaction Practices.	Insurers and Independent Producers.
Ohio	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Oklahoma	Regulation	Standards of Ethical Practices	Investment Advisers and Investment Adviser Representatives.
	Regulation	Standards of Ethical Practices for Broker-Dealers and Their Agents.	Broker-Dealers and Agents.
Oregon	Legislation	An Act Relating to Annuities	Insurers and Independent Producers.
Pennsylvania	Legislation	An Act amending the Insurance company Law of 1921.	Insurers and Independent Producers.
Rhode Island	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
South Carolina	Regulation	Suitability in Annuity Transactions	Independent Producers, Broker-Dealers, Agents, and Plan Fiduciaries.
South Dakota	Legislation	An Act to Revise Annuity Sales Standards	Broker-Dealers, Investment Advisers, Insurers, and Independent Producers.
Tennessee	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Texas	Legislation	Relating to Disclosures and Standards Required for Certain Annuity Transactions and Benefits Under Certain Annuity Contracts.	Insurers and Agents.
Virginia	Regulation	Rules Governing Suitability in Annuity Transactions.	Insurers and Independent Producers.
Washington	Legislation	Concerning the Best Interest Standard for Annuity Transactions.	Insurers and Independent Producers.
West Virginia	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Wisconsin	Legislation	An Act Relating to Best Interest in Annuity Transactions.	Insurers, Independent Producers, Investment Advisers, and Broker-Dealers.
Wyoming	Regulation	Regulation Governing Suitability in Annuity Transactions.	Insurers and Independent Producers.

In addition, three states, that have not yet enacted legislation or finalized regulations have introduced legislation or proposed regulations that would impose conduct standards and disclosure requirements on various financial institutions.²⁶⁰

NAIC Annuity Transactions Model Regulation #275

As shown in the table above, much of the legislative and regulatory action among states focuses on insurers and

independent producers. In February 2020, the NAIC membership approved revisions to its Suitability in Annuity Transactions Model Regulation to include a “best interest” standard of conduct. When the Department conducted its analysis of states in July of 2023, 39 states had adopted the NAIC Model Regulation #275.²⁶¹ Since then,

²⁶¹ Based on internal Department analysis, the modified Model Regulation #275, including a best interest standard, was adopted by Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland,

additional states may have adopted the Model Regulation. In August 2023, the NAIC reported that 43 states had adopted it.²⁶²

The revisions were in response to both the SEC and the Department’s work

Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

²⁶² NAIC, *Annuity Suitability & Best Interest Standard*, (August 2023), <https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard>.

²⁶⁰ California, New Hampshire, and New Jersey have introduced legislation and/or regulation.

in the regulatory space and reflected some movement in the direction of greater uniformity, although significant differences remain, as partially discussed below.²⁶³ The NAIC Model Regulation includes a best interest obligation comprised of a care obligation, a disclosure obligation, a conflict of interest obligation, and a documentation obligation, applicable to an insurance producer.²⁶⁴ If these obligations are met, the producer is treated as satisfying the best interest standard. The care obligation states that the producer, in making a recommendation, must exercise reasonable diligence, care and skill to:

- Know the consumer's financial situation, insurance needs and financial objectives;
- Understand the available recommendation options after making a reasonable inquiry into options available to the producer;
- Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives over the life of the product, as evaluated in light of the consumer profile information; and
- Communicate the basis or bases of the recommendation.

The conflict of interest obligation requires the producer to “identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest.” “Material conflict of interest” is defined as “a financial interest of the producer in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation,” but the definition expressly carves out “cash compensation or non-cash compensation” from treatment as sources of conflicts of interest. The NAIC Model Regulation also provides that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA.

The NAIC expressly disclaimed that its standard creates fiduciary obligations and the obligations in the Model Regulation differ in significant respects

from those in Regulation Best Interest. For example, in addition to disregarding compensation as a source of conflicts of interest, the specific care, disclosure, conflict of interest, and documentation requirements, do not expressly incorporate the obligation not to put the producer's interests before the customer's interests, even though compliance with their terms is treated as meeting the “best interest” standard. The care obligation in the Model Regulation only requires that the adviser “[h]ave a reasonable basis to believe the recommended option *effectively addresses the consumer's financial situation.*”²⁶⁵ In contrast, Regulation Best Interest requires that, when making a recommendation, the broker-dealer “exercises reasonable diligence, care, and skill to . . . [h]ave a reasonable basis to believe that the *recommendation is in the best interest of a particular retail customer,*”²⁶⁶ and the exemptions proposed here, consistent with ERISA's text, require that advice reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

In recent insurance industry litigation against the Department, the plaintiffs described the differences between “the requirements of an ERISA fiduciary and an insurance agent operating under the NAIC model regulation [as] extensive.”²⁶⁷ Among the numerous differences they identified is the fact that, “the NAIC model regulation does not define conflicts of interest or the requirements pertaining to such conflicts as broadly as ERISA.”²⁶⁸ Additionally, they asserted that “the NAIC model regulation does not contain a ‘prudence’ standard”²⁶⁹ and characterized “these best interest requirements . . . [as] a far cry from the obligations imposed on an ERISA fiduciary.”²⁷⁰

²⁶⁵ *Id.* at § 6(A)(1)(a)(iii). Members of the insurance industry have noted that “[t]here is a world of difference” between the NAIC model rule and ERISA's fiduciary regime. See Brief of Plaintiffs at 39–40, *FACC*, No. 3:22-cv-00243-K-BN (Nov. 7, 2022), ECF No. 48 (comparing ERISA's best interest requirement to NAIC Model Regulation 275, Sections 2.B and 6.A.(1)(d)).

²⁶⁶ 84 FR 33318, 33458, 33491 (July 12, 2019).

²⁶⁷ Brief of Plaintiffs at 40, *FACC*, No. 3:22-CV-00243-K-BT (Nov. 7, 2022), ECF No. 48.

²⁶⁸ *Id.* at 40–41 n.15.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 40.

The Department of Labor, uniquely among the regulators, can impose uniform standards for the provision of investment advice to retirement investors. It is neither limited to the regulation of securities, nor to insurance products, but rather can set a uniform fiduciary standard for the regulation of conflicts of interest with respect to any advice on any investment products recommended to retirement investors. The Department believes that retirement investors and the regulated community are best served by a consistent, protective, and understandable fiduciary standard.

Market Conditions and Impacts of Conflicts of Interest

Financial products, commission structures, and investment services are constantly evolving. The major market developments that the Department considered with respect to the proposed amendments are discussed below.

Market Developments, Mutual Fund Share Classes

The 2016 Final Rule and recent SEC actions highlighted inherent conflicts of interest in how broker-dealers or investment advisers are compensated for recommending certain share classes of mutual funds. Since then, share classes without traditional conflicts of interest have increased in popularity. For instance, data published by the Investment Company Institute (ICI) in 2021 show that no-load mutual funds, or mutual funds without commissions, accounted for 46 percent of long-term mutual fund gross sales in 2000, 79 percent in 2015, and 89 percent in 2021. The ICI attributed the increase in no-load funds to two growing trends: investors paying intermediaries for advice through direct fees rather than indirectly through funds and the popularity of retirement accounts that invest in institutional, no-load share classes.²⁷¹

Sethi, Spiegel, and Szapiro (2019) found that the Department's 2016 Final Rule reduced flows into funds with excess loads or loads that were higher than would otherwise be expected based on the fund's characteristics.²⁷²

²⁷¹ Investment Company Institute, *Trends in the Expenses and Fees of Funds*, 2021, 28(2) ICI Research Perspective (March 2022).

²⁷² This study updated the analysis performed by Christoffersen, Evans, and Musto (2013) and examined the period from 1993 to 2017 in order to look at the impact of the Department's Final Rule, taking into consideration preexisting marketplace trends, anticipatory effects, the April 2015 Proposal, and the April 2016 Final Rule. The study calculates the excess load as “the difference between loads predicted by a regression and actual load, given a

²⁶³ NAIC, *Suitability in Annuity Transactions Model Regulation (#275) Best Interest Standard of Conduct Revisions Frequently Asked Questions*, (May 10, 2021), <https://content.naic.org/sites/default/files/inline-files/Final%20FAQ%20July%202021.pdf>.

²⁶⁴ A producer is defined in section 5.L. of the model regulation as “a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.” Section 5.L. further provides that the term producer includes an insurer where no producer is involved.

Mitchell, Sethi, and Szapiro (2019) found while mutual funds with excess loads have historically received greater inflows, since 2010 the correlation between excess loads and inflows has been lower. The authors attribute this change to an “increased focus on broker practices” and “a culture of accountability.”²⁷³

Meanwhile, other types of share classes have emerged and grown more prevalent, including unbundled and semi-bundled share classes. In a traditional, bundled share class, the investor pays the mutual fund a load or 12b–1 fee, and the mutual fund pays a portion back to an intermediary, such as the intermediary that sold the fund to the investor. Alternatively, in an unbundled or “clean” share class, the investor pays any intermediaries directly, while in a semi-bundled share class, the fund pays sub-accounting fees for recordkeeping services and uses revenue sharing for other services, such as distribution.²⁷⁴ The different compensation arrangement for each of the types of share classes create different types and magnitudes of conflicts for financial professionals.

Adoption of these new share classes has spread quickly. Mitchell, Sethi, and Szapiro (2019) found that between July 2018 to August 2019, relatively few bundled share classes were launched into the market and that more bundled share classes closed in that time frame than semi-bundled and unbundled combined. Additionally, they found that unbundled share classes received almost five times as much new money as semi-bundled share classes. While flows to semi-bundled share classes fluctuated, they received net positive flows overall during this period.²⁷⁵

Market Developments, the Insurance Market

Before it was vacated, the 2016 Final Rule had begun exerting substantial influence on financial advice and products in the insurance market, particularly with regard to annuities. There are three common types of annuities offered by insurance companies.

- In a *variable annuity*, an insurance company invests in an investment option chosen by the investor, which is

number of other control variables.” See Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?*, 6(3) *The Journal of Retirement* 46–59 (Winter 2019).

²⁷³ Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Superficial Conflicts of Interest*, *Morningstar* (November 2019).

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

often a mutual fund.²⁷⁶ The return of the variable annuity reflects the return on the underlying investments. Variable annuities have often been referred to as “mutual funds in an insurance wrapper.”²⁷⁷

- In a *fixed annuity*, an insurance company agrees to pay the investor no less than a specified rate of interest during the asset accumulation phase and to pay a specified amount per dollar in the decumulation phase.^{278 279}

- In an *indexed annuity*, an insurance company agrees to pay the investor returns linked to the performance of a market index. However, unlike a variable annuity, the terms in the contract and the method used to calculate gains and losses may result in actualized gains or losses that differ from the gains and losses experienced by the index.²⁸⁰

Annuity regulators also vary by type. While all annuity products are subject to state regulation, variable annuities and some indexed annuities are considered securities, and therefore are also subject to SEC and FINRA regulations.²⁸¹ As the financial structure of each type of annuity varies, so does the risk of conflicted advice. Variable and fixed-indexed annuity commissions tend to be similar, while fixed rate income and immediate annuity commissions are generally lower.²⁸²

Similar to mutual funds, insurance agents and brokers are often compensated through load fees for selling variable annuities.²⁸³ The

²⁷⁶ SEC, *Annuities*, (2021), <https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities>.

²⁷⁷ Frank Fabozzi, *The Handbook of Financial Instruments*, 596–599 (2002).

²⁷⁸ SEC, *Annuities*, (2021), <https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities>.

²⁷⁹ The initial contract of a fixed annuity establishes an initial credited rate, a minimum guaranteed rate, and a bailout rate. The invested premiums grow at the specified credited rate and are added to the cash value of the annuity. The credited rate may be changed by the insurance company at a specified frequency. However, the interest rate is guaranteed to be no lower than the specified minimum guaranteed rate. If the credited rate falls below the bailout rate, the investor is able to withdraw all the funds without paying a surrender charge. See Frank Fabozzi, *The Handbook of Financial Instruments*, 599–601 (2002).

²⁸⁰ SEC, *Updated Investor Bulletin: Indexed Annuities*, (July 2020), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-13>. See also FINRA Rule 2330.

²⁸¹ SEC, *Annuities*, (2021), <https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities>.

²⁸² Constantijn Panis & Kathik Padmanabhan, *Literature Review of Conflicted Advice in Annuities Markets*, Internal Report for Department of Labor (February 2023).

²⁸³ Frank Fabozzi, *The Handbook of Financial Instruments* 596–599 (2002).

commission paid varies significantly, from as little as 0 percent to as much as 10 percent of the investment with the most common amount being 7 percent.²⁸⁴ The 2016 Final Rule discouraged sales of the typical load funds. Between 2016 and 2018, the sale of fee-based variable annuities, or I-share class variable annuities, increased by 43 percent.²⁸⁵ Following the vacatur of the 2016 Final Rule in 2018, fee-based variable annuity sales decreased, falling by 28 percent between 2018 and 2020. More recently, sales have rebounded, increasing 76 percent between 2020 and 2021.²⁸⁶ The significant increases in I-share class variable annuities have been driven by demand for fee-based products among fee-based advisers. They have been the second most popular variable annuity contract type since 2016, though they still only comprised 9.5 percent of retail variable annuity sales in 2021.²⁸⁷ The Department does not have similar trend data on sales of fee-based fixed annuities.

Summary

The recent regulatory and market developments, combined with the judicial vacatur of the 2016 Final Rule, provide for a different baseline than the pre-2016 Final Rule baseline. While some reforms and improvements in the delivery of advice have endured despite the vacatur, without new regulatory action, gains made to some products and markets that are not covered by recent regulatory actions by the Department, SEC, or states, could be derailed. Other regulatory agencies have worked to reduce conflicts of interest, but this has resulted in a “patchwork” approach to regulating advice arrangements of retirement investments,²⁸⁸ which has already resulted in the most conflicted advisers moving to markets with the least oversight.²⁸⁹

²⁸⁴ Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) *The Review of Financial Studies* 5334–5486 (December 2022).

²⁸⁵ Cerulli Associates, *U.S. Annuity Markets 2022: Acclimating to Industry Trends and Changing Demand*, Exhibit 4.09. The Cerulli Report.

²⁸⁶ *Ibid.*

²⁸⁷ Cerulli Associates, *U.S. Annuity Markets 2022: Acclimating to Industry Trends and Changing Demand*, Exhibit 2.07. The Cerulli Report.

²⁸⁸ Eversheds Sutherland, “Getting the Full Picture: The Emerging Best Interest and Fiduciary Duty Patchwork.” (August 2020), <https://www.jdsupra.com/legalnews/the-emerging-patchwork-of-fiduciary-54761/>.

²⁸⁹ Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., *Regulatory Arbitrage and the Persistence of Financial Misconduct*, 74 *Stanford Law Review* 797 (2022).

This proposal would extend important and effective protections broadly to retirement investors. Specifically, the proposal would replace the 1975 regulation's five-part test with a new fiduciary status test, which would capture more financial investment transactions in which the investor is reasonably relying on the advice individualized to the investor's financial needs and best interest. This proposal would also increase the number of rollover recommendations being considered as fiduciary advice, which would enhance protections to retirement investors, particularly in

regard to recommendations regarding annuities.

In accordance with OMB Circular A–4, Table 2 depicts an accounting statement summarizing the Departments' assessment of the benefits, costs, and transfers associated with this regulatory action. The Department is unable to quantify all benefits, costs, and transfers of the proposal but has sought, where possible, to describe these non-quantified impacts. The effects in Table 2 reflect non-quantified impacts and estimated direct monetary costs resulting from the provisions of the proposal.

The quantified costs are significantly lower than costs in the 2016 RIA due to the smaller scope of the proposal relative to the 2016 Final Rule as well as compliance structures adopted by the industry to reduce conflicted advice in response to state regulations, Regulation Best Interest, PTE 2020–02, and the Department's 2016 Rulemaking. The methodology for estimating the costs of the proposed amendments to the rule and PTEs is consistent with the methodology and assumptions used in the 2020 analysis for the current PTE 2020–02.

TABLE 2—ACCOUNTING STATEMENT

Benefits:

Non-Quantified (please also see the Transfers section of this table):

• Increase uniformity in the regulation of financial advice for retirement investors, across different market segments and market participants. • Protect consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility). • Facilitate retirement investors' trust in advisers. • Facilitate more efficient capital allocation				
Costs	Estimate	Year dollar	Discount rate	Period covered
Annualized	\$221.1	2023	7 percent	2024–2033
Monetized (\$million/Year)	220.4	2023	3 percent	2024–2033

Quantified Costs:

The Department expects that entities would not incur additional costs from the proposed amendments to PTE 77–4, PTE 80–83, and PTE 83–1. However, the Department expects that entities would incur costs directly from the proposed amendments to the following PTEs:

- The annualized cost estimates in PTE 2020–02 reflect estimated costs associated with reviewing the proposal, preparing written disclosures for investors, preparing written disclosures for PEPs, reviewing and updating policies and procedures, reviewing and updating the retrospective review, and preparing rollover documentation.
- The annualized cost estimates in PTE 84–24 reflect estimated costs associated with reviewing the rule, providing disclosures to retirement investors, establishing written policies and procedures, conducting a retrospective review, and maintaining recordkeeping.
- The annualized cost estimates in PTE 75–1 reflect estimated costs associated with maintaining recordkeeping.
- The annualized cost estimates in PTE 86–128 reflect estimated costs associated with maintaining recordkeeping. In addition, the annualized cost estimates in PTE 86–128 reflect estimated costs associated with extending the exemption requirements on IRAs. These costs include preparing and distributing the written authorization from the authorizing fiduciary to the broker-dealer, preparing and mailing the required information to the authorizing fiduciary, preparing and distributing the annual termination form, preparing and distributing the quarterly report, collecting and generating the information required for the annual report, and collecting and generating the information required for the report of commissions paid.

TABLE 2—ACCOUNTING STATEMENT—Continued

Transfers:

Non-Quantified:

The Benefits section provides a qualitative description of the expected gains to investors; however, the available data do not allow the Department to break down those gains into component social welfare “benefits” and “transfers.”

Transfers identified in this analysis include:

- Lower fees and expenses for participants paid to financial institutions.
- Reallocation of investment capital to different asset classes, share classes, or investment products.
- Shifts in the assets in plans and IRAs.

4. *Affected Entities*

The table below summarizes the estimated number of entities that would

be affected by the proposed amendments to the Rule and each of the

PTEs. These estimates are discussed in greater detail below.

TABLE 3—AFFECTED FINANCIAL ENTITIES

	Prohibited transaction exemptions					
	2020–02	75–1	77–4	80–83	86–128	84–24
Retirement Plans	765,124	765,124	277,390	6,886	1,000	1,722
Individual Retirement Accounts	3,119,832	.....	.....	.....	210	52,449
Pooled Employer Plans	382	.....	.....	.....	.....	.....
Pooled Plan Providers	134	.....	.....	.....	.....	.....
Broker-Dealers	1,894	1,894	.....	.....	.....	.....
Discretionary Fiduciaries .....	.....	.....	.....	.....	1,894	.....
Registered Investment Advisers	15,982	.....	.....	.....	.....	.....
Pure Robo-Advisers	200	.....	.....	.....	.....	.....
Insurance Companies	183	.....	.....	.....	.....	215
Captive Insurance Agents and Brokers	1,577	.....	.....	.....	.....	1,577
Insurance Producers .....	.....	.....	.....	.....	.....	4,000
Banks .....	.....	2,048	.....	25	.....	.....
Mutual Fund Companies .....	.....	.....	812	.....	.....	.....
Investment Company Principal Underwriters	20	.....	.....	.....	.....	20
Pension Consultants	1,011	.....	.....	.....	.....	1,011

Plans and Participants

The proposed amendments to the rule and related PTEs would affect plans that receive investment advice from a financial institution. Participants may be affected by advice they receive directly and by advice that is received by their plan’s administrators and fiduciaries. As of 2021, there were approximately 765,000 private sector retirement plans with 146 million participants and \$13.2 trillion in assets that would be affected by these proposals. Approximately 46,000 of these plans were defined benefit plans, with 31 million participants and \$3.7 trillion in assets, and approximately 719,000 are defined contribution plans with 115 million participants and \$9.5 trillion in assets.²⁹⁰ The Department

recognizes that some plans, such as simplified employee pension (SEP) plans and Savings Incentive Match Plan for Employees IRA (SIMPLE IRA) plans, are exempt from filing and are not included in these estimates but would typically be affected by the proposal. The Department expects that participants in general would benefit from the stronger, uniform standards imposed by the proposed amendments to the rule and PTEs.

Participants who receive investment advice would be directly affected by the proposed amendments, particularly participants receiving one-time advice as to whether they should roll over their retirement savings. These participants are discussed in the section on IRA owners, below.

Similarly, plans receiving fiduciary investment advice would also be

directly affected by the proposed amendments. The Department believes that most of these plan fiduciaries are compliant with the existing PTE 2020–02. Accordingly, the Department expects that plans would be only minimally affected by the proposed amendments to the rule. The Department requests comment on how plans currently compliant with PTE 2020–02 would be affected. As amended, PTE 86–128, PTE 84–24, and PTE 77–4 would directly affect subsets of plans, described below.

The proposed amendments to PTE 86–128 would limit the scope of the amendment to transactions in which a fiduciary uses its fiduciary authority to cause the plan or IRA to pay a fee to such trustee for effectuating or executing securities transactions as an agent for the plan. Using 2021 Form 5500 data, the Department estimates that 1,257 unique plans hired service providers that denoted on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 plans

²⁹⁰ Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports, Employee Benefits Security Administration (2023; forthcoming), Table A1. Table A1 reports that there were 765,124 pension plans, consisting of 46,388 defined benefit plans and 718,736 defined contribution plans. Due to a rounding discrepancy, the sum of defined

benefit and defined contribution plans does not equal the aggregate of the plans. Additionally, some individuals participate in two or more plans, so the number of individuals covered is lower than the number of gross participants.

also reported that the discretionary trustee provided investment management services or received investment management fees paid directly or indirectly by the plan.²⁹¹ Based on the range of values (801 and 1,257), the Department estimates on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate. The Department requests comment on how many plans have discretionary fiduciaries with full discretionary control and how many would continue to rely on PTE 86–128 under the proposed amendments.

The Department estimates that of the estimated 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.²⁹² Based on these assumptions, the Department estimates that 75 plans would be affected by the proposed amendments to PTE 86–128.²⁹³

For PTE 84–24, the Department estimates that 7.5 percent of plans are new accounts or new financial advice relationships²⁹⁴ and that 3 percent of plans will use the exemption for covered transactions.²⁹⁵ Based on these assumptions, the Department estimates that 1,722 plans would be affected by the proposed amendments to PTE 84–24.²⁹⁶

To estimate the number of plans affected by the proposed amendments to PTE 77–4, the Department estimated the number of plans relying on a mutual fund company. The Department does not have data on what percentage of plans receive fiduciary advice through mutual fund companies. A 2013 Deloitte/ICI survey found that 37 percent of 401(k) plans have a mutual fund company as their service

provider.²⁹⁷ Based upon ICI analyses and Form 5500 data that examines the percentage of plans that are invested in registered investment companies, the Department estimates that 24.7 percent of defined benefit plans have mutual fund companies as money managers.²⁹⁸ Applying these percentages to the universe of pension plans that filed a Form 5500 in 2021 yields a total of approximately 277,390 plans with service provider relationships with mutual fund companies.²⁹⁹ Thus, the Department estimates that 277,390 plans would be affected by the proposed amendments to PTE 77–4. The Department acknowledges that this estimate likely overestimates the number of plans affected by the proposed amendments.

Individual Retirement Account (IRA) Owners

The proposed amendments to the rule and PTEs 2020–02, 84–24, 75–1, and 86–128 would also impact IRA owners receiving investment advice. According to Cerulli Associates, there were 67.8 million IRA owners holding \$11.5 trillion in assets in 2022.³⁰⁰ Approximately 85 percent of the assets are held in traditional IRAs, 10 percent in Roth IRAs, and 5 percent in SEP, Salary Reduction Simplified Employee Pension (SARSEP), and SIMPLE IRAs.³⁰¹ Some owners hold multiple IRAs. The Department estimates that the number of IRA accounts is 83.3 million by applying the ratio of IRA accounts to IRA owners observed in EBRI's administrative database.³⁰²

²⁹⁷ The Department uses this estimate as a proxy for the percent of defined contribution plans that have service provider relationships with mutual fund companies. See Deloitte & Investment Company Institute, *Defined Contribution/401(k) Fee Study*, (August 2014).

²⁹⁸ Based on Form 5500 Data 2000–2010, defined benefit plans are approximately 33 percent less likely than defined contribution plans to be invested in a registered investment company. See Sarah Holden, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, Investment Company Institute (September 2010).

²⁹⁹ Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports, Employee Benefits Security Administration (2023; forthcoming), Table A1. There are 765,124 pension plans, of which 718,736 are defined contribution plans and 46,388 are defined benefit plans. The number of plans with service provider relationships with mutual fund companies is estimated as: 718,736 defined contribution plans $\times$ 37% = 265,932; 46,388 defined benefit plans $\times$ 24.7% = 11,458.

³⁰⁰ Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience*, Exhibits 5.03 and 5.12. The Cerulli Report.

³⁰¹ *Ibid.* Exhibits 5.03 and 5.04.

³⁰² The EBRI database has data on 11.3 million IRA accounts owned by 9.2 million individuals. See Craig Copeland, *EBRI IRA Database: IRA Balances, Contributions, Rollovers, Withdrawals, and Asset Allocation, 2017 Update*, EBRI Issue Brief, no. 513

The proposed amendments to the rule and PTE 2020–02 would affect retirement investors who roll over money from a plan or IRA into another plan or IRA. A 2020 survey found that 46 percent of recent retirees who had at least \$30,000 in retirement savings had rolled at least some of their savings into an IRA.³⁰³ According to Cerulli Associates, in 2022, almost 4.5 million DC plan accounts with \$779 billion in assets were rolled over into an IRA. Additionally, 0.7 million DC plan accounts with \$66 billion in assets were rolled over to other employer-sponsored plans.³⁰⁴ It is challenging to obtain detailed data on other types of rollovers such as IRA-to-IRA and DB plan-to-IRA. The Department used IRS data from 2020 to estimate overall rollovers into IRAs, which is 5.7 million taxpayers and \$618 billion.³⁰⁵ Adding in the figures for plan-to-plan rollovers, the Department estimates the total number of rollovers at 6.4 million accounts with \$684 billion in assets.³⁰⁶ The Department requests comment on these estimates.

Only rollovers overseen by an ERISA fiduciary would be affected by the proposed amendments to PTE 2020–02. The Department does not have compelling data on the percentage of rollovers that will be overseen by an ERISA fiduciary under the amended rule. In 2022, 49 percent of DC plan-to-IRA rollovers with 63 percent of DC plan rollover assets were intermediated by a financial adviser.³⁰⁷ Because the

(2020). The Department uses this ratio as a proxy for the ratio for total IRA accounts to IRA owners in the following estimate: (11.3 million IRA accounts/9.2 million IRA owners) $\times$ 67,781,000 IRA owners = 83,252,750 IRA accounts.

³⁰³ Pew Charitable Trusts, “Pew Survey Explores Consumer Trend to Roll Over Workplace Savings Into IRA Plans,” Issue Brief, (October 2021), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/09/pew-survey-explores-consumer-trend-to-roll-over-workplace-savings-into-ira-plans>.

³⁰⁴ According to Cerulli, in 2022, there were 4,485,059 DC plan-to-IRA rollovers and 707,104 DC plan-to-DC plan rollovers. See Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience*, Exhibit 6.05. The Cerulli Report.

³⁰⁵ Internal Revenue Service, *SOI Tax Stats—Accumulation and Distribution of Individual Retirement Arrangement (IRA)*, Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020, (2023).

³⁰⁶ Estimates for the number of IRAs may include some non-retirement accounts such as Health Savings Accounts, Archer medical savings accounts, and Coverdell education savings accounts. See the discussion on Code section 4975 in the Background section of the preamble for more details.

³⁰⁷ According to Cerulli, 49 percent of rollovers were mediated by an adviser, while 37 percent were self-directed. The remaining 14 percent were plan-to-plan rollovers. See Cerulli Associates, *U.S. Retirement-End Investor 2023: Personalizing the*

²⁹¹ Estimates based on 2021 Form 5500 data.

²⁹² EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

²⁹³ The number of new plans is estimated as: 1,000 plans $\times$ 7.5 percent of plans are new = 75 new plans. The number of new IRAs is estimated as: 10,000 IRAs $\times$ 2.1 percent of IRAs are new = 210 new IRAs.

²⁹⁴ EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

²⁹⁵ In 2020, 7 percent of traditional IRAs were held by insurance companies. See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>. This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.

²⁹⁶ 765,124 plans $\times$ 7.5 percent of plans are new $\times$ 3 percent of plans with relationships with insurance agents or pension consultants = 1,722 plans.

Department assumes that advisers intermediating rollovers are ERISA fiduciaries, this estimate is an upper bound. The Department then applies the estimate of DC plan-to-IRA rollovers to all types of rollovers. Accordingly, the Department estimates that 3.1 million rollovers and \$431 billion in rollover assets would be affected by the proposed amendments to PTE 2020–02.³⁰⁸ The Department requests comments on these estimates.

As amended, PTE 86–128 and PTE 84–24 would each affect subsets of the number of IRAs discussed above. The Department's estimates of the IRAs that would be affected by the proposed amendments to PTE 86–128 and PTE 84–24 are discussed below.

The proposed amendments to PTE 84–24 would affect new IRA accounts. The Department does not have data on the number of new IRA accounts that are opened each year. However, in 2022, of the 67.8 million IRA owners, 1.4 million, or approximately 2.1 percent, opened an IRA for the first time.³⁰⁹ The Department used this statistic to estimate that 2.1 percent of IRA accounts are new each year. The Department acknowledges that some IRA owners may have multiple IRAs, and as such, this statistic may underestimate the percentage of new IRAs opened.³¹⁰ Additionally, the Department estimates that about 3 percent of these new IRAs, or approximately 52,000 IRAs, would use PTE 84–24 for covered transactions.³¹¹ The Department requests comments on these assumptions, particularly with

regard to the percent of IRAs that are new accounts each year.

The proposed amendments to PTE 86–128 would limit the scope of the amendment to transactions in which a fiduciary uses its fiduciary authority to cause the plan or IRA to pay a fee to such trustee for effectuating or executing securities transactions as an agent for the plan, without providing investment advice. The Department lacks reliable data on the number of managed IRAs that would experience such a transaction in a given year. For the purpose of this analysis, the Department assumes that there are 10,000 managed IRAs. To err on the side of caution, the Department assumes that all managed IRAs would have a relationship with a discretionary fiduciary. As discussed above for PTE 84–24, the Department assumes 2.1 percent of IRA accounts are new each year. This results in an estimate of 210 managed IRAs that are new accounts or new financial advice relationships.³¹² The Department requests comment on these estimates, particularly on the number of IRAs that are managed accounts.

These estimates likely overestimate of the number of IRA owners that would be affected by the proposed amendments, since IRA owners would only be affected by the proposed rule and amendments to PTEs when they have a relationship with certain financial entities or are conducting financial certain transactions, as defined by the revised fiduciary definition and the conditions for exemptive relief of each PTE. In addition to the specific requests for comment, the Department welcomes general comments on how IRAs and rollovers are likely to be affected by the proposed amendments.

Pooled Plan Providers and Pooled Employer Plans

The proposed amendments to PTE 2020–02 would affect PPPs and PEPs. As of August 22, 2023, 134 PPPs had filed an initial Form PR Pooled Plan Provider Registration (Form PR) and 382 PEPs were registered with the Department, though this number does not include all PEPs operating on fiscal years whose filing deadline may be delayed.³¹³ Due to these data limitations, the Department assumes a

universe of 134 PPPs and 382 PEPs for its cost estimate.³¹⁴

The Department does not have data on what percent of PPPs or PEPs would be affected by PTE 2020–02. For the purposes of this analysis, the Department assumes that all PPPs and PEPs would be affected. The Department requests comment on this assumption.

Summary of Affected Financial Entities

In its economic analysis for its 2020 rulemaking, the Department included all financial institutions eligible for relief on a variety of transactions and compensation that may not have been covered by prior exemptions in its cost estimate. In 2020, the Department acknowledged that not all these entities will serve as investment advice fiduciaries to plans and IRAs within the meaning of Title I and the Code. Additionally, the Department acknowledged that because other exemptions are also currently available to these entities, it is unclear how widely financial institutions will rely upon the new exemptions and which firms are most likely to choose to rely on them.

This analysis, like the analysis from 2020, includes all financial institutions eligible for relief in its cost estimate. These estimates are subject to caveats similar to those in 2020. The Department requests comments on which, and how many, financial institutions may rely on each of the exemptions, as amended.

Additionally, the proposed rule would expand the definition of a fiduciary such that an advice provider would be a fiduciary if they make an investment recommendation to a retirement investor for a fee or compensation and any of the following circumstances apply: (1) the advice provider (directly or indirectly) has investment discretion over the retirement investor's assets, (2) the advice provider (directly or indirectly) provides investment recommendations on a regular basis as part of their business and the recommendation is provided under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest, or (3)

401(k) Investor Experience Fostering Comprehensive Relationships, Exhibit 6.04. The Cerulli Report.

³⁰⁸ The number of affected rollovers is estimated as: $(6,367,005 \times 49\%) = 3,119,832$.

³⁰⁹ Cerulli Associates, *U.S. Retirement End-Investor 2023: Fostering Comprehensive Relationships*, The Cerulli Report.

³¹⁰ The Department lacks data on the number of IRA owners that own multiple IRAs. To provide scope of magnitude, one source reported that in 2019, 19 percent of IRA owners contributed to both a traditional IRA and Roth IRA. See Investment Company Institute, *The Role of IRAs in U.S. Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>. This statistic does not account for individuals who own multiple of each type of IRA or those who did not contribute in 2019, but it provides a lower bound.

³¹¹ In 2020, 7 percent of traditional IRAs were held by insurance companies. See Investment Company Institute, *The Role of IRAs in U.S. Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>. This number has been adjusted downward to 3 percent to reflect the removal of transactions not covered by this exemption. The number of IRAs affected is estimated as: $(83,252,750 \text{ IRAs} \times 2.1\% \text{ IRAs assumed to be new IRAs} \times 3\% \text{ of IRAs held by insurance companies}) = 52,449 \text{ IRAs}$.

³¹² $(10,000 \text{ managed IRAs} \times 2.1 \text{ percent of IRAs are new}) = 210 \text{ IRAs}$.

³¹³ Department of Labor, *Form PR*, <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-pr>.

³¹⁴ The inaugural filing deadline for Form 5500 filings for PEPs with plan years beginning after January 1, 2021, was July 31, 2022. The Department based its estimates on those filings it had received by August 22, 2023. The Department anticipates that this understates the true number of PEPs.

the advice provider represents or acknowledges they are a fiduciary when making investment recommendations.

Registered Investment Advisers

Registered investment advisers providing investment advice to retirement plans or retirement investors and registered investment advisers acting as pension consultants would be directly affected by the proposed amendments to PTE 2020–02. Generally, investment advisers must register with either the SEC or with state securities authorities, as appropriate.³¹⁵

Investment advisers registered with the SEC are generally larger than state-registered investment advisers, both in staff and in regulatory assets under management.³¹⁶ For example, according to one report, 64 percent of state-registered investment advisers manage assets under \$30 million while investment advisers must register with the SEC if they manage assets of \$110 million or more.³¹⁷ In addition, according to one survey of SEC-registered investment advisers, about 47 percent of SEC-registered investment advisers reported 11 to 50 employees.³¹⁸ In contrast, an examination of state-registered investment advisers reveals about 80 percent reported less than two employees.³¹⁹

³¹⁵ Generally, a person that meets the definition of “investment adviser” under the Investment Advisers Act (and is not eligible to rely on an enumerated exclusion) must register with the SEC, unless they are prohibited from registering under Section 203A of the Investment Advisers Act or qualify for an exemption from the Act’s registration requirement. An adviser precluded from registering with the SEC may be required to register with one or more state securities authorities.

³¹⁶ After the Dodd-Frank Wall Street Reform and Consumer Protection Act, an investment adviser with \$110 million or more in regulatory assets under management generally registers with the SEC, while an investment adviser with less than \$110 million registers with the state in which it has its principal office, subject to certain exceptions. For more details about the registration of investment advisers. See Securities and Exchange Commission, *General Information on the Regulation of Investment Advisers*, (March 11, 2011), <https://www.sec.gov/investment/divisionsinvestmentiaa/regulationmemoia.htm>; North American Securities Administrators Association, *A Brief Overview: The Investment Adviser Industry*, (2019), www.nasaa.org/industry-resources/investment-advisers/investment-adviser-guide/.

³¹⁷ North American Securities Administrators Association, *2018 Investment Adviser Section Annual Report*, (May 2018), www.nasaa.org/wp-content/uploads/2018/05/2018-NASAA-IA-Report-Online.pdf.

³¹⁸ Investment Adviser Association, *2019 Investment Management Compliance Testing Survey*, (June 18, 2019), https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/about/190618_IMCTS_slides_after_webcast_edits.pdf.

³¹⁹ North American Securities Administrators Association, *NASAA 2019 Investment Adviser*

As of December 2021, there were 14,714 SEC-registered investment advisers, of which 9,254 provided advice to retail investors while 5,460 provided advice to non-retail investors. Of the 14,714 SEC-registered investment advisers, 325 were dual-registered as broker-dealers.³²⁰ To avoid double counting when estimating compliance costs, the Department counted dually registered firms as broker-dealers and excluded them from the count of registered investment advisers.³²¹ Therefore, the Department estimates there to be 14,389 SEC-registered investment advisers.

Additionally, as of December 2021, there were 15,987 state-registered investment advisers, of which 283 are dually registered as a broker-dealer.³²² In 2018, 125 state-registered investment advisers were also registered with the SEC.³²³ To avoid double counting, the Department counted dually registered firms as broker-dealers and excluded them from the count of state-registered investment advisers. Similarly, the Department counted investment advisers registered with the SEC and a state as SEC-registered investment advisers. Accordingly, for the purposes of this analysis, the Department considers 15,579 state-registered investment advisers.

In 2021, 54 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.³²⁴ Based on this statistic, the Department estimates that 16,182 registered investment advisers, including 7,770 SEC-registered investment advisers and 8,412 state-registered investment advisers state, would be affected by the proposed amendments.³²⁵

As discussed in the Baseline section, PTE 2020–02 excludes investment

Section Annual Report, (May 2019), www.nasaa.org/wp-content/uploads/2019/06/2019-IA-Section-Report.pdf.

³²⁰ Estimates are based on the SEC’s FOCUS filings and Form ADV filings.

³²¹ The Department applied this exclusion rule across all types of investment advisers, regardless of registration (SEC-registered versus state only) and retail status (retail versus nonretail).

³²² Estimates are based on the SEC’s FOCUS filings and Form ADV filings.

³²³ In December 2018, 125 of the state-registered investment advisers were also registered with the SEC and 204 were dually registered as broker-dealers. See *Form CRS Relationship Summary: Amendments to Form ADV*, 84 FR 33492 (Jul. 12, 2019).

³²⁴ Cerulli Associates, *U.S. RIA Marketplace 2022: Expanding Opportunities to Support Independence*, Exhibit 5.10. The Cerulli Report.

³²⁵ The number of registered investment advisers is estimated as: [(14,389 SEC-registered investment advisers + 15,579 state-registered investment advisers) × 54%] = 16,182 registered investment advisers.

advisers providing pure robo-advice. The proposed amendments would include these entities; however, pure robo-advisers would have a different baseline from registered investment advisers currently under PTE 2020–02. As discussed below, the Department estimates that there are 200 pure robo-advisers.³²⁶ Accordingly, the Department estimates that 15,982 registered investment advisers who do not provide pure robo-advice are currently eligible for relief under PTE 2020–02.³²⁷

The Department does not have data on how many of these firms provide advice only to retirement investors that are plan participants, plan beneficiaries, or IRA owners, rather than the workplace retirement plans themselves. These firms are fiduciaries under the Investment Advisers Act and already operate under standards broadly similar to those required by PTE 2020–02.³²⁸

Robo Advisers

The proposed changes to PTE 2020–02 would make investment advice providers providing pure robo-advice eligible for relief under the exemption. While there has been a significant increase in robo-advice in recent years,³²⁹ the market for robo-advice has shifted away from pure robo-advice to a hybrid approach which combines features of robo-advisers and traditional human advisers.³³⁰ This is partly driven by investor preference. For instance, one survey found that only 45 percent of investors were comfortable using online only advice services.³³¹ Another driver is larger financial institutions entering the market with hybrid robo-advice.

³²⁶ For more information on this estimate, refer to the Robo-Advisers discussion in the Affected Entities section.

³²⁷ As discussed below, the Department estimates that there are 200 pure robo-advisers. Accordingly, the Department estimates that 15,982 registered investment advisers would be affected by the proposed amendments and are not pure robo-advisers. The number of registered investment advisers is estimated as: [(14,389 SEC-registered investment advisers + 15,579 state-registered investment advisers) × 54%] – 200 robo-advisers = 15,982 registered investment advisers.

³²⁸ Investment Adviser Association, *SEC Standards of Conduct Rulemaking: What It Means for RIAs*, IAA Legal Staff Analysis (July 2019), <https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/resources/IAA-Staff-Analysis-Standards-of-Conduct-Rulemaking2.pdf>.

³²⁹ Deloitte, “The Expansion of Robo-Advisory in Wealth Management.” (2016).

³³⁰ Jill E. Fisch, Marion Laboure, & John A. Turner, *The Emergence of the Robo-advisor*, Wharton Pension Research Council Working Papers (2018).

³³¹ Cerulli Associates, *U.S. Retail Investor Advice Relationships 2022: Rethinking the Advice Continuum*, Exhibit 3.02. The Cerulli Report.

While the first robo-advisers were stand-alone firms, many existing financial firms, including banks, broker-dealers, technology firms, and asset managers, have entered the market.³³² many by acquiring existing pure robo-advice platforms.³³³

Robo-advisers offer varying services and different degrees of hands-on assistance.³³⁴ The most basic models use computer algorithms to offer investments deemed appropriate in terms of asset allocation and diversification based on the information supplied by the client on opening an account. These investments typically include low-cost mutual funds and exchange traded funds (ETFs), and automatically invest and rebalance funds based on a specified objective or risk tolerance. Most robo-advisers offer advice concerning taxable accounts and IRA accounts. The nature of robo-advice appeals to different investors than traditional investment advice does. While traditional advisers often target older investors with high net worth, robo-advice providers or other low-cost investment firms tend to attract young, technology-savvy investors with low balances.³³⁵

According to one source, there were 200 robo-advisers in the United States in 2017.³³⁶ Robo-advisers are typically required to register with the SEC or state authorities. For the purposes of this analysis, the Department estimates that there are 200 pure robo-advisers that would be subject to the amended PTE 2020-02 that are not subject to the current PTE 2020-02. The Department requests comment on how the number of robo-advisers in the market has evolved since 2017, what proportion of robo-advisers provide pure versus hybrid robo-advice, and what proportion of pure robo-advisers are likely to rely on the amended PTE 2020-02. The Department also requests comment on whether robo-advisers operate as registered investment

advisers, or if they can also operate as broker-dealers.

Broker-Dealers

The proposed amendments would modify PTE 75-1 such that broker-dealers would no longer be able to rely on the exemption for investment advice. The Department does not have information about how many of these firms provide investment advice to plan fiduciaries, plan participants and beneficiaries, and IRA owners.

Under PTE 75-1, broker-dealers would still be able to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if (1) the potential failure of the purchase or sale of the securities is not caused by such fiduciary or an affiliate, and (2) the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties. Any broker-dealers seeking relief for investment advice, however, would be required to rely on the amended PTE 2020-02.

According to data provided by the SEC, there were 3,508 registered broker-dealers as of December 2021. Of those, approximately 70 percent, or 2,447 broker-dealers, reported retail customer activities, while approximately 30 percent, or 1,061 broker-dealers, were estimated to have no retail customers.³³⁷

Not all broker-dealers perform services for employee benefit plans. In 2021, 54 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.³³⁸ Assuming the percentage of broker-dealers provide advice to retirement plans is the same as the percent of investment advisers providing services to plans, the Department assumes 54 percent, or 1,894 broker-dealers, would be affected by the proposed amendments.³³⁹ The Department requests comment on this estimate.

Discretionary Fiduciaries

The proposed amendments to PTE 86-128 would affect investment advice fiduciaries. The proposed amendments

would remove provisions that had provided relief for certain plans not covering employees, such as IRAs. Investment advice fiduciaries to IRAs would, instead, have to rely on another exemption, such as PTE 2020-02. While fiduciaries that exercise full discretionary authority or control with respect to IRAs may continue to rely on the exemption, the proposed amendments to PTE 86-128 would impose additional requirements on fiduciaries of employee benefits plans that affect or execute securities transactions and the independent plan fiduciaries authorizing the plan or IRA to engage in the transactions with an authorizing fiduciary.

The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption. For the purposes of this analysis, the Department assumes that the number of discretionary fiduciaries relying on the exemption is no larger than the estimated number of broker-dealers estimated to be affected by the amendments to PTE 2020-02, or 1,894 investment advice providers while acknowledging the number is likely significantly smaller.³⁴⁰

The Department requests comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data.

Insurance Companies

The proposed amendments to PTE 2020-02 and PTE 84-24 would affect insurance companies and captive agents.

The existing version of PTE 84-24 granted relief for captive insurance agents, insurance agents who are overseen by a single insurance company; however, the proposed amendments would exclude insurance companies and captive agents currently relying on the exemption for investment advice. These entities would be required to comply with the requirements of PTE 2020-02 for relief involving investment advice. As a result, the estimates for PTE 84-24 discussed below likely overestimate the reliance on the exemption. The Department requests comment on the extent to which entities currently relying on PTE 84-24 would continue to rely on the exemption.

Insurance companies are primarily regulated by states and no single

³³² Jill E. Fisch, Marion Laboure, & John A. Turner, *The Emergence of the Robo-Advisor*, Wharton Pension Research Council Working Papers (2018).

³³³ Andrew Welsch, *Robo-Advisors Changed Investing, But Can They Survive Independently*, Barron's (February 2022), <https://www.barrons.com/articles/robo-advisors-changed-investing-but-can-they-survive-independently-51645172100>.

³³⁴ SEC, *Investor Bulletin: Robo-Advisers*, (February 23, 2017), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_robo-advisers.

³³⁵ Jonathan W. Lam, *Robo-Advisors: A Portfolio Management Perspective*, (April 2016). https://economics.yale.edu/sites/default/files/2023-01/Jonathan_Lam_Senior%20Essay%20Revised.pdf.

³³⁶ Facundo Abraham, Sergio L. Schmukler, & Jose Tessada, *Robo-advisors: Investing Through Machines*, World Bank Research and Policy Briefs 134881 (2019).

³³⁷ Estimates are based on the SEC's FOCUS filings and Form ADV filings.

³³⁸ Cerulli Associates, *U.S. RIA Marketplace 2022: Expanding Opportunities to Support Independence*, Exhibit 5.10. The Cerulli Report.

³³⁹ The estimated of retail broker-dealers affected by this exemption is estimated as: (2,447 retail broker-dealers × 54%) = 1,321 retail broker dealers. The estimated number of non-retail broker-dealers affected by this exemption is estimated as: (1,061 non-retail broker-dealers × 54%) = 573 non-retail broker dealers. The estimated number of total broker-dealers is 1,894 (1,321 + 573).

³⁴⁰ SEC Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser, 84 FR 33681, 33685-86 (July 12, 2019).

regulator records a nationwide count of insurance companies. Although state regulators track insurance companies, the total number of insurance companies cannot be calculated by aggregating individual state totals, because individual insurance companies often operate in multiple states. In the Department's 2016 RIA, it estimated that 398 insurance companies wrote annuities.³⁴¹ The Department continues to use this estimate although the number may have changed during the intervening years. Furthermore, this may be an overestimate because some of these insurance companies may not sell annuity contracts in the IRA or Title I retirement plan markets. The Department requests information on the number of insurance companies underwriting annuities that would be affected by this proposal.

Annuity sales reached record highs in 2022. Total annuity sales in 2022 amounted to \$312.8 billion, while indexed annuity sales amounted to \$79.8 billion, or approximately 26% of total annuity sales. During the first two quarters of 2023, indexed annuity sales accounted for 27% of total annuity sales.³⁴²

Recent legislative developments may lead to an expansion in this market. A 2021 survey asked insurers what impacts they expected to see from the Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act). It found that 58 percent of insurers thought the SECURE Act would result in a significant increase in the number of plan sponsors offering in-plan annuities, and 63 percent of insurers thought the SECURE Act would lead to a significant increase in the number of plan participants allocating a portion of their plan balances to an annuity option.³⁴³ With increasing usage of annuities in plans, the future impact on plans, participants, assets, and insurance companies will be greater. It also increases the need for

plan fiduciaries to receive advice that is subject to a best interest standard.

Insurance companies sell insurance products through (1) their employees or "captive insurance agents" that work directly for an insurance company or as independent contractors and exclusively sell the insurance company's products, and/or (2) independent agents that sell multiple insurance companies' products. In recent years, the market has seen a shift away from captive distribution towards independent distribution.³⁴⁴

The Department does not have strong data on the number of insurance companies using captive agents or independent producers. Based on data on the sales of individual annuities by distribution channel, the Department estimates that, of annuities distributed through either a captive or independent distribution channel, approximately 46 percent of sales are done through captive distribution channels and 54 percent of sales are done through independent distribution channels.³⁴⁵ For the purpose of this analysis, the Department assumes that the number of companies selling annuities through captive distribution channels and independent distribution channels is proportionate to the sales completed by each distribution channel. The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel. The Department

requests comment on how many insurance companies sell annuities through captive and independent distribution channels. The Department also requests comment on whether how many insurance companies may rely on both methods of distribution.

Following from this assumption, the Department estimates that 183 insurance companies distribute annuities through captive channels and would rely on PTE 2020–02 for transactions involving investment advice. Further, the Department estimates that 215 insurance companies distribute annuities through independent channels and would rely on PTE 84–24 for transactions involving investment advice.³⁴⁶

The Department estimates that 70 of the 398 insurance companies are large entities.³⁴⁷ In the absence of data relating to the distribution channel differences by firm size, the Department uses the aggregate rate in its estimates. That is, the Department assumes that 46 percent of large insurance companies (32 insurance companies) sell annuities through captive distribution channels, while the remaining 151 insurance companies distributing annuities through captive channels are assumed to be small.³⁴⁸ Additionally, 54 percent of large insurance companies (38 insurance companies) sell annuities through independent distribution channels, while the remaining 177 insurance companies selling annuities through independent distribution channels are assumed to be small.³⁴⁹ The Department requests comment on this assumption.

Independent Producers

The proposal would also affect independent insurance producers that recommend annuities from unaffiliated

³⁴¹ This estimate is based on 2014 data from SNL Financial on life insurance companies reported receiving either individual or group annuity considerations. See Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

³⁴² LIMRA, *Preliminary U.S. Annuity Second Quarter 2023 Sales Estimates*, (2023), <https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q2/2q-2023-prelim-annuity-sales-estimates-final.pdf>.

³⁴³ Cerulli Associates, *U.S. Annuity Markets 2021: Acclimating to Industry Trends and Changing Demand*, Exhibit 1.06. The Cerulli Report.

³⁴⁴ See Ramnath Balasubramanian, Rajiv Dattani, Asheet Mehta, & Andrew Reich, *Unbundling Value: How Leading Insurers Identify Competitive Advantage*, McKinsey & Company (June 2022), <https://www.mckinsey.com/industries/financial-services/our-insights/unbundling-value-how-leading-insurers-identify-competitive-advantage>; Sheryl Moore, *The Annuity Model Is Broken*, Wink Intel (June 2022), <https://www.winkintel.com/2022/06/the-annuity-model-is-broken-reprint/>.

³⁴⁵ According to the Insurance Information Institute, in 2022, independent broker dealers accounted for 20 percent of individual annuities sales, independent agents accounted for 18 percent of sales, career agents accounted for 15 percent of sales, banks accounted for 24 of sales, full-service national broker-dealers accounted for 17 percent of sales, direct response accounted for 3 percent of sales, and other methods accounted for 2 percent of sales. For the purposes of this analysis, the Department considers those sales made by career agents and full-service national broker-dealers to be "captive," and those made by independent broker-dealers and independent agents to be "independent." To estimate the proportion of sales completed through "captive" and "independent" channels, the Department excludes the 6% of sales associated with direct response and "other methods" from the calculation. The Department assumes that 46 percent of sales by banks are captive, while 54% of sales by banks are independent. See Insurance Information Institute, *Facts + Statistics: Distribution Channels*, (2023), <https://www.iii.org/fact-statistic/facts-statistics-distribution-channels>.

³⁴⁶ The number of insurance companies using captive distribution channels is estimated as $398 \times 46\% = 183$ insurance companies. The number of insurance companies using independent distribution channels is estimated as $398 - 183 = 215$ insurance companies.

³⁴⁷ LIMRA estimates that, in 2016, 70 insurers had more than \$38.5 million in sales. See LIMRA Secure Retirement Institute, *U.S. Individual Annuity Yearbook: 2016 Data*, (2017).

³⁴⁸ The number of large insurance companies using a captive distribution channel is estimate as: $70 \text{ large insurance companies} \times 46\% = 32 \text{ insurance companies}$. The number of small insurance companies using a captive distribution channel is estimated as: $183 \text{ insurance companies} - 32 \text{ large insurance companies} = 151 \text{ small insurance companies}$.

³⁴⁹ The number of large insurance companies using an independent distribution channel is estimate as: $70 \text{ large insurance companies} \times 54\% = 38 \text{ insurance companies}$. The number of small insurance companies using a captive distribution channel is estimated as: $215 \text{ insurance companies} - 38 \text{ large insurance companies} = 177 \text{ small insurance companies}$.

financial institutions to retirement investors, as well as the financial institutions whose products are recommended. While captive insurance agents are employees of an insurance company, other insurance agents are “independent” and work with multiple insurance companies. Though these independent insurance producers may rely on PTE 2020–02, the Department believes they are more likely to rely on PTE 84–24, which is tailored to the industry under the proposal. For this reason, the Department only considers captive insurance agents in the analysis for PTE 2020–02. The Department requests comment on how captive insurance agents and independent insurance producers would be affected by the proposed amendments to PTE 2020–02 and PTE 84–24.

The Department estimates that the independent agent distribution channel has sales of about \$56 billion since this channel is 18 percent of individual annuity sales and total U.S. annuity sales reached \$312.8 billion in 2022.³⁵⁰

It is challenging to estimate the number of independent producers selling annuities to the retirement market. A new release referencing a study reported that there were approximately 40,000 independent property-casualty agents and brokers in the United States.³⁵¹ The Department assumes that the number of independent producers selling annuities to the retirement market who would use the exemption under its proposed provisions would be about 10 percent of this figure, or 4,000 independent producers. This assumption is based on anecdotal evidence. The Department requests comment on these assumptions, as well as information as to how much of an independent producer's business focuses on the retirement market (*i.e.*, the shares of independent producers serving the retirement market that receive less than one percent of their sales from the

retirement market, between one and twenty-five percent, between twenty-five and seventy-five percent, or more than seventy-five percent).

The proposed amendments would not impose any conditions on insurance intermediaries, such as independent marketing organizations, field marketing organizations, or brokerage general agencies. These entities do not have supervisory obligations over independent insurance producers under state or federal law that are comparable to those of the other entities, such as insurance companies, banks, and broker-dealers, nor do they have a history of exercising such supervision in practice. They are generally described as wholesaling and marketing and support organizations that are not tasked with ensuring compliance with regulatory standards. In addition, they are not subject to the sort of capital and solvency requirements imposed on state-regulated insurance companies and banks.

Pension Consultants

The Department expects that pension consultants would continue to rely on the existing PTE 84–24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.³⁵²

The proposed amendment would exclude pension consultants for plans and IRAs currently relying on the existing PTE 84–24 for investment advice. As such, any pension consultants relying on the existing exemption for investment advice would be required to comply with PTE 2020–02 for relief. In this analysis, the Department includes pension consultants in the affected entities for continued relief for the existing provisions of PTE 84–24 as well as the amended PTE 2020–02. The Department acknowledges that this approach likely overestimates the entities and related costs to complying with the exemptions. The Department requests comment on whether pension consultants would continue to rely on the existing provisions of 84–24 or would rely on the amended 2020–02.

Principal Company Underwriter

The Department expects that some investment company principal

underwriters for plans and IRAs rely on the existing PTE 84–24 for advice. The Department does not have data allowing it to estimate how many investment company principal underwriters would choose to rely on the exemption, but based on its experience, the Department expects investment company principal underwriters relying on PTE 84–24 to be rare. For the purposes of this analysis, the Department assumes that 10 investment company principal underwriters for plans and 10 investment company principal underwriters for IRAs would use this exemption once with one client plan.

The proposed amendment would exclude investment company principal underwriters for plans and IRAs currently relying on the existing PTE 84-24 for investment advice. As such, any principal company underwriter relying on the existing exemption for investment advice would be required to comply with PTE 2020-02 for relief. In this analysis, the Department includes principal company underwriters in the affected entities for continued relief for the existing provisions of PTE 84-24 as well as the amended PTE 2020-02.

The Department acknowledges that this approach likely overestimates the entities and related costs to complying with the exemptions. The Department requests comment on whether principal company underwriters would continue to rely on the existing provisions of 84-24 or would rely on the amended 2020-02.

Banks and Credit Unions

The proposed amendments to PTE 75–1, PTE 80–83, and PTE 2020–02 would affect banks and credit unions. There are 4,672 federally insured depository institutions in the United States, consisting of 4,096 commercial banks and 576 savings institutions.³⁵³ Additionally, there are 4,686 federally insured credit unions.³⁵⁴ In 2017, the GAO estimated that approximately two percent of credit unions have private deposit insurance.³⁵⁵ Based on this estimate, the Department estimates that there are approximately 96 credit unions with private deposit insurance

³⁵⁰ Insurance Information Institute, *Facts + Statistics: Distribution Channels—Sales of Individual Annuities By Distribution Channels, 2018 and 2022*, <https://www.iii.org/fact-statistic/facts-statistics-distribution-channels>. LIMRA: Record Annuity Sales in 2022 Expected to Continue Into First Quarter 2023, (March 8, 2023). <https://www.limra.com/en/newsroom/news-releases/2023/limra-record-annuity-sales-in-2022-expected-to-continue-into-first-quarter-2023/#:~:text=LIMRA%20data%20show%20there%20was,117%25%20to%20%2421.8%20billion.>

³⁵¹ Annemarie McPherson Spears, 7 *Findings From the 2022 Ageazine Universe Study*, (October 13, 2022), https://www.iamagazine.com/news/7-findings-from-the-2022-ageazine-universe-study?_hstc=79369803.5fd6a87d75ca95f94d2e9dc33fed281b9.1691447156981.1691447156981.1691447156981.1691447156981.1&_hssc=79369803.3.1691447156981&_hsfp=2180945085.

³⁵² Internal Department of Labor calculations based on the number of unique service providers listed as pension consultants on the 2021 Form 5500 Schedule C. This could be an underestimate as only plans with one hundred or more participants need to file a Schedule C and then only for service providers paid more than \$5,000 during the plan year. To the extent small plans use different pension consultants the number would be underestimated.

³⁵³ Federal Insurance Deposit Corporation, *Statistics at a Glance- as of March 31, 2023*, <https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf>.

³⁵⁴ National Credit Union Administration, *Quarterly Credit Union Data Summary 2023 Q2*, <https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q2.pdf>.

355 GAO, *Private Deposit Insurance: Credit Unions Largely Complied with Disclosure Rules, But Rules Should be Clarified*, (March 29, 2017), <https://www.gao.gov/products/gao-17-259>.

and 4,782 credit unions in total.³⁵⁶ The Department requests comment on what proportion of credit unions offer IRAs and what proportion sell share certificate products. The Department also requests comment on how many banks and credit unions currently rely on PTE 2020–02, PTE 75–1, and PTE 80–83 for investment advice.

The proposed amendments would exclude entities currently relying on the existing PTE 75–1 and PTE 80–83 for investment advice. The Department does not have a reliable data source on how many banks currently rely on these exemptions. PTE 75–1 allows banks to engage in certain classes of transactions with employee benefit plans and IRAs. The Department assumes that half of these banks, or 2,048 banks would use PTE 75–1. As amended, PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 25 fiduciary-banks with public offering services would rely annually on the amended PTE 80–83. The Department requests comment on how many banks currently rely on PTE 75–1 and PTE 80–83 and how many of these entities rely on the exemptions for relief concerning investment advice.

Banks relying on the existing exemptions for investment advice would be required to comply with PTE 2020–02 for relief for advice. Banks would be permitted to act as financial institutions under PTE 2020–02 if they or their employees are investment advice fiduciaries with respect to retirement investors.

The Department understands that banks most commonly use “networking arrangements” to sell retail non-deposit investment products, including equities, fixed-income securities, exchange-traded funds, and variable annuities.³⁵⁷ Under such arrangements, bank

employees are limited to performing only clerical or ministerial functions in connection with brokerage transactions. However, bank employees may forward customer funds or securities and may describe, in general terms, the types of investment vehicles available from the bank and broker-dealer under the arrangement. Similar restrictions on bank employees’ referrals of insurance products and state-registered investment advisers exist. The Department believes that, in most cases, such referrals would not constitute fiduciary investment advice within the meaning of the proposal. The Department, however, also requests comment on what other types of activities banks or credit unions may engage in that would require reliance on PTE 2020–02.

The Department currently estimates that no banks or credit unions would be impacted by the proposed amendments to PTE 2020–02 but requests comments on this assumption. The Department does not have sufficient data to estimate the costs to banks or credit unions of complying with PTE 2020–02 for investment advice services because it does not know how frequently these entities use their own employees to perform activities that would otherwise be covered by the prohibited transaction provisions of ERISA and the Code. The Department seeks comment on the frequency with which employees recommend their products to retirement investors and how they currently ensure such recommendations are prudent to the extent required by ERISA. The Department invites comments on the magnitude of any such costs and solicits data that would facilitate their quantification in the proposal.

Mutual Fund Companies

The proposed amendments would modify PTE 77–4 such that mutual fund companies providing services to plans can no longer rely on the exemption when giving investment advice. Under the proposal, these mutual funds would need to rely on PTE 2020–02 for relief concerning investment advice.

According to the ICI, in 2022, there were 812 mutual fund companies.³⁵⁸ The Department assumes that all of these companies are service providers to pension plans, providing investment management services.

Mortgage Pool Sponsors

PTE 83–1 provides relief for the sale of certificates in an initial issuance of

certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates. The proposed amendments would modify PTE 83–1 to exclude exemptive relief for investment advice. Under the proposal, these entities would need to rely on PTE 2020–02 for relief concerning investment advice. The Department requests comment on how many of these entities currently rely on PTE 83–1 and how many of these entities rely on PTE 83–1 for investment advice.

5. Benefits and Transfers

The Department believes that, as a result of this proposal, retirement investors would achieve higher net returns on average in the long run by selecting better investments or paying lower fees. More specifically, this proposal would generate economic gains for retirement investors by:

- increasing uniformity in the regulation of financial advice for retirement investors, across different market segments and market participants,
- protecting consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility),
- giving retirement investors increased trust and confidence in their advisers and in the reliability of their advice, and
- facilitating more efficient capital allocation.

These represent gains to investors, which may manifest as pure social welfare “benefits,” as some resources that were previously inefficiently used to acquire financial products and services are now available for more valuable uses. Other improvements may take the form of “transfers” of social welfare to retirement investors from other entities in society. The available data do not allow the Department to quantify the gains to investors or the components social welfare “benefits” and “transfers.” These transfers represent a beneficial gain to retirement investors and are a primary objective of the proposed rule and PTE.

If some transactions have increased net returns for certain parties and decreased returns of equal magnitude for other parties, that would represent a transfer. If the increase in net returns for the first group is larger than the corresponding decrease for the second group, then only the equivalent portion would be transfers and the amount of the additional net returns would represent benefits. For example, non-

³⁵⁶ The total number of credit unions is calculated as: 4,686 federally insured credit unions/ (100% – 2% of credit unions that are privately insured) = 4,782 total credit unions. The number of private credit unions is estimated as: 4,782 total credit unions – 4,686 federally insured credit unions = 96 credit unions with private deposit insurance.

³⁵⁷ For more details about “networking arrangements,” see Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>. Financial institutions that are broker-dealers, investment advisers, or insurance companies that participate in networking arrangements and provide fiduciary investment advice would be included in the counts in their respective sections.

³⁵⁸ Investment Company Institute, *2023 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry*, (2023), <https://www.ici.org/system/files/2023-05/2023-factbook.pdf>.

retirement investors may have previously experienced lower prices and higher returns resulting from timing errors of retirement investors due to conflicted advice. As those conflicts are removed, those transactions may not occur, leading to a transfer from non-retirement investors to retirement investors. Moreover, it is possible that the financial industry would forego profits (e.g., as a result of conflicted advisers charging retirement investors lower fees), resulting in a transfer from investment advisers and associated service providers to retirement investors.

As detailed later in this RIA, the magnitude of the gains to retirement investors, through benefits or transfers, is uncertain. As noted earlier, advisory conflicts—which this proposal, in harmony with federal securities laws, would mitigate—are very costly for retirement investors. The cost is high both on aggregate and for individual retirement investors, such as when a new retiree adheres to conflicted advice to transfer a career’s-worth of 401(k) savings into an over-priced annuity or a high-risk investment.

Both the Department’s 2016 RIA and the SEC’s Regulation Best Interest analyses show that investors stand to gain much from the mitigation of advisory conflicts. This RIA provides a mainly qualitative discussion of the benefits of this proposal. The Department invites comments and data related to how it might quantify these benefits as part of the RIA of any final rule.

Regulatory Uniformity

This proposal would make the rules that govern fiduciary advice to plan and IRA investors more consistent with federal securities laws, and thereby promote clarity and efficiency. Under the current regulatory regime, bad actors are drawn to those markets with the least regulated products, where they are not required to prioritize retirement investors interest over their own when they make investment recommendations. By harmonizing advice regulations across all markets that are used by retirement investors, the Department can ensure that advisers all face the same regulatory standard. It would also remove incentives for investment advisers to steer recommendations in ways that customers cannot monitor and that run counter to the customers’ best interest.

When contemplating a potential “Financial Adviser Reform Act” that would “be uniform in its application of the fiduciary duties of loyalty and care across all financial advisers,” Smith

(2017) noted that, “this uniformity would eliminate the ‘false distinction’ between investment service providers by recognizing the overlapping services they offer.”³⁵⁹ Smith argued that creating a uniform standard “would both reduce consumer confusion as to what constitutes advice or recommendations and ensure that the uniform fiduciary duty is consistently applied in the investor’s favor by taking a broad approach to what constitutes investment advice and recommendations.”³⁶⁰ Simply put, requiring that only some investment advisers advising retirement investors adhere to an ERISA fiduciary standard promotes recommendations that are driven by differences in the regulatory regime rather than by the products or investors’ interests.

Research suggests that the problems resulting from differing regulatory regimes are not unique to the United States. For instance, Anagol et al. (2017) found that when agents selling life insurance in India were required to disclose commissions for one particular product, they were much less likely to recommend it to clients. Instead, the agents recommended products that did not have this requirement, but which had higher and opaque commissions.³⁶¹ The authors conclude, “These results suggest that the disclosure requirements for financial products need to be consistent across the menu of substitutable products.” This underscores that regulatory regimes that are not uniform allow advisers to engage in regulatory arbitrage, leaving their clients vulnerable to conflicts of interest.

This proposed rule would help create a uniform standard, as it would apply to all retirement investment advice. This would address concerns the Department has about lower standards for advice related to insurance products and other investments that are not securities, advice that broker-dealers render to ERISA plan fiduciaries, and robo-advice.³⁶² The proposed rule’s broad

³⁵⁹ Alec Smith, *Advisers, Brokers, and Online Platforms: How a Uniform Fiduciary Duty Will Better Serve Investors*, 2017(3) Colum. Bus. L. Rev. 1200–1243 (2017), <https://doi.org/10.7916/cblr.v2017i3.1730>.

³⁶⁰ *Ibid.*

³⁶¹ Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market*, 99(1) *The Review of Economics and Statistics* 1–15, (2015), https://doi.org/10.1162/REST_a_00625.

³⁶² The Department identifies these areas as areas of concern because non-security investments and investment advice from broker-dealers to ERISA plan fiduciaries are not covered by recent SEC actions and pure robo-advice, while included in the SEC’s actions was excluded from the current PTE

application to all retirement investment advice would help different market participants and different financial products compete on similar terms for IRA and plan business. This would reduce the risk to retirement investors. Uniform, well-designed rules can make markets fairer for competitors and friendlier for customers, leading to more efficient market outcomes. They can also promote efficiency by allowing firms that offer multiple products or make recommendations in both the retail and non-retail market to utilize a common compliance structure.

Financial services firms are already moving toward new approaches in how they offer advice, including more fee-based advice models, flatter compensation models, and integrating technology. The proposed amendments to the rule and exemptions would help ensure that these new approaches evolve toward less conflicted and more innately impartial business models. These types of technology-enhanced models—whether pure robo-adviser or hybrid models—will contain the overall costs associated with providing investment advice and strategies and will help low-balance account holders obtain investment advice at an affordable cost.

This proposal would generate additional economic benefits and transfers by extending important and effective protections broadly to cover all advice given to retirement investors. In this analysis, the Department identifies three specific areas in which retirement investors would benefit from an extension of protections: one-time advice regarding the rollover of assets, advice on non-security annuity products, and advice given to ERISA plan fiduciaries. These types of advice are discussed in the following sections.

Protections Concerning Rollover Investment Advice

The proposal would generate benefits for, and transfers to, savers by reducing conflicts related to one-time advice concerning rollovers. Frequently, participants are better off leaving their 401(k) account in the retirement plan rather than rolling it over to an IRA, particularly if the 401(k) plan has low fees and high-quality investment options. Large 401(k) plans often have lower fees than IRAs, though smaller 401(k) plans sometimes find it difficult to keep fees low.³⁶³ IRAs often utilize

2020–02. For more information, refer to the Baseline discussion.

³⁶³ BrightScope and Washington, DC: Investment Company Institute. *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans*, 2019 (San Diego, CA: 2022). Available at

retail shares in mutual funds with substantially higher fees than the institutional share classes that employer-sponsored plans typically utilize. A 2022 Pew Charitable Trusts study analyzed the difference between median institutional and retail share class expense ratios across all mutual funds that offered at least one institutional share and one retail share in 2019. They found that the median retail shares of equity funds had annual expenses that were 37 percent higher than institutional shares. Over the course of saving for retirement, the impact of even small differences in fees was significant.³⁶⁴

The investment fiduciaries of 401(k) plans also have responsibilities under ERISA to act in the best interests of, and solely for the benefit of, the plan participants, whereas IRA providers do not have such responsibilities.³⁶⁵ Turner and Klein (2014) suggested that the services and investment performance associated with higher fees paid in an IRA are not necessarily justified,³⁶⁶ meaning a plan participant would be able to obtain similar investment performance and services in a lower cost 401(k) plan. For instance, Turner, Klein, and Stein (2015) found that most financial advisers told federal workers about the benefits of rolling over into an IRA, such as having a larger number of investment options and more lenient withdrawal options, without mentioning the higher costs that would be incurred relative to keeping their savings in the Thrift Savings Plan, which has extremely low fees.³⁶⁷

If fewer participants roll over their 401(k) plan account balances into IRAs, and instead keep their account balances in plans sponsored by former or new employers, this would result in transfers between different segments of the market. To consider one example, there may be a transfer from service providers who specialize in serving IRAs to service providers who specialize in serving defined contribution plans. As a

second example, retirement investors often pay lower fees in plans where they can access institutional share classes than they do in IRAs where they use retail share classes. This represents a transfer from actors in the financial industry to retirement investors.

Protections Concerning Annuity Investment Advice

The proposal would generate additional benefits by extending protections to investment advice from insurance agents or independent producers to IRA investors. The annuity products offered by insurance companies are notoriously complex, leaving retirement investors reliant on advice from the insurance agent, broker, or independent producer selling the annuity. The fees and adviser incentives are similarly complex, often in a way that can conceal the full magnitude of the fees. Other regulators have highlighted the complexity of many annuity products. For example, FINRA stated:

Annuities are often products investors consider when they plan for retirement—so it pays to understand them. They also are often marketed as tax-deferred savings products. Annuities come with a variety of fees and expenses, such as surrender charges, mortality and expense risk charges and administrative fees. Annuities also can have high commissions, reaching seven percent or more.³⁶⁸

As described in the baseline discussion above, fixed annuities, variable annuities, and indexed annuities differ significantly in risk. For instance, while the insurer carries the investment risk for fixed annuities, the investor carries the investment risk for variable annuities and indexed annuities.³⁶⁹ Additionally, they differ in regulatory standards and the required protections owed to customers. While variable annuities and some indexed annuities are considered securities subject to SEC and FINRA regulation,³⁷⁰ the standard of care owed to a customer for other types of annuities depends on the state regulation.

One area of concern for the Department is how financial entities selling annuities are compensated, which may result in a conflict of

interest. According to the 2015 Warren Report, which examined 15 of the largest annuity companies in the United States, 87 percent of the annuity companies offered “kickbacks” to their agents in exchange for sales to retirees.³⁷¹ Further, insurance agents, brokers, and independent producers are often compensated through load fees for selling variable and fixed annuities fees.³⁷² As discussed in the Baseline section discussion on market developments in the insurance market, research has found load fees create a conflict of interest in investment advice, leading to decreased returns.³⁷³

The Department is also particularly concerned about vulnerable retirement investors who lack a basic understanding of investment fundamentals and the complexities associated with indexed annuities. FINRA cautions that, “indexed annuities are complex financial instruments, and retirement experts warn that such annuities include a number of features that may result in lower returns than an investor may expect.”³⁷⁴ While indexed annuities have a minimum guaranteed rate of return tied to an underlying index, the guarantee rate does not cover all of a premium.³⁷⁵ Moreover, while the rate of return of the indexed annuity is linked to performance of the index, indexed annuity returns are subject to contractual limitations which effectively cap returns. FINRA identified the following contractual limitations observed in indexed annuities:

- Participation rates explicitly set the percentage of index returns that are credited to the annuity;
- Spread, margin, or asset fees are subtracted from the index returns; and

³⁷¹ Office of Senator Elizabeth Warren, *Villas, Castles, and Vacations: Americans' New Protections from Financial Adviser Kickbacks, High Fees, & Commissions are at Risk* (2017), https://www.warren.senate.gov/files/documents/2017-2-3_Warren_DOL_Rule_Report.pdf.

³⁷² Frank Fabozzi, *The Handbook of Financial Instruments* 576–599, (2002), <https://seekingworldlywisdom.files.wordpress.com/2011/08/the-handbook-of-financial-instruments-fabozzi.pdf>.

³⁷³ Susan Christoffersen, Richard Evans & David Musto, *What Do Consumers' Fund Flows Maximize? Evidence from Their Broker's Incentives*, 68(1) *Journal of Finance* 201–235 (February 2013), <https://doi.org/10.1111/j.1540-6261.2012.01798.x>.

³⁷⁴ Financial Industry Regulatory Authority, *The Complicated Risks and Rewards of Indexed Annuities*, Financial Industry Regulatory Authority, (July 2022), <https://www.finra.org/investors/insights/complicated-risks-and-rewards-indexed-annuities>.

³⁷⁵ Coryanne Hicks & Phillip Moeller, *17 Things You Need to Know About Annuities*, U.S. News and World Report, (May 3, 2021), <https://money.usnews.com/investing/investing-101/articles/things-you-need-to-know-now-about-annuities>.

www.ici.org/files/2022/22-ppr-dcplan-profile-401k.pdf.

³⁶⁴ Pew Charitable Trusts, *Small Differences in Mutual Fund Fees Can Cut Billions from Americans' Retirement Savings*, Pew Charitable Trusts Issue Brief, (June 2022), https://www.pewtrusts.org/-/media/assets/2022/05/smalldifferenceinmutualfunds_brief_v1.pdf.

³⁶⁵ *Ibid.*

³⁶⁶ John Turner & Bruce W. Klein, *Retirement Savings Flows and Financial Advice: Should You Roll Over Your 401(k) Plan?*, 30(4) *Benefits Quarterly* 42–54 (2014), <https://www.iscebs.org/Documents/PDF/bqpublic/bq414f.pdf>.

³⁶⁷ John A. Turner, Bruce W. Klein & Norman P. Stein, *Financial Illiteracy Meets Conflicted Advice: The Case of Thrift Savings Plan Rollovers*, 3(4) *The Journal of Retirement* 47–65 (2015), <https://doi.org/10.3905/jor.2016.3.4.047>.

³⁶⁸ Financial Industry Regulatory Authority, *Annuities*, Financial Industry Regulatory Authority, <https://www.finra.org/investors/investing/investment-products/annuities>.

³⁶⁹ Frank Fabozzi, *The Handbook of Financial Instruments* 579, (2002), <https://seekingworldlywisdom.files.wordpress.com/2011/08/the-handbook-of-financial-instruments-fabozzi.pdf>.

³⁷⁰ Securities and Exchange Commission, *Annuities*, Securities and Exchange Commission, <https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities>.

• Interest caps limit the returns if the underlying index sees large returns.³⁷⁶

FINRA also warns that indexed annuities may be able to change these contractual limitations, depending on the terms of the contract.³⁷⁷

In a 2020 investor alert, the SEC warned, “*You can lose money buying an indexed annuity. Read your contract carefully to understand how your annuity works.*”³⁷⁸ The SEC listed several ways that investors in these products can lose money, including through surrender charges and withdrawals during a specified time period. The SEC further cautioned:

• “Indexed annuity contracts describe both how the amount of return is calculated and what indexing method they use. Based on the contract terms and features, an insurance company may credit your indexed annuity with a lower return than the actual index’s gain.”

• “Indexed annuity contracts commonly allow the insurance company to change some of these features periodically, such as the rate cap. Changes can affect your return. Read your contract carefully to determine what changes the insurance company may make to your annuity.”³⁷⁹

The Department also has concerns about sales tactics of insurance agents, brokers, and independent producers for annuity products. A number of state regulators have issued website alerts regarding deceptive sales practices to sell annuities to seniors, including “high-pressure sales pitch[es]” and “quick-change tactics” in which an agent tries to convince an investor to change coverage quickly without time for adequate research. State regulators also warned that a licensed agent will be more than willing to show credentials and to question an agent’s “[unwillingness or inability] to prove credibility” to prospective customers.³⁸⁰

³⁷⁶ Financial Industry Regulatory Authority, *The Complicated Risks and Rewards of Indexed Annuities*, Financial Industry Regulatory Authority, (July 2022), <https://www.finra.org/investors/insights/complicated-risks-and-rewards-indexed-annuities>.

³⁷⁷ *Id.*

³⁷⁸ Securities and Exchange Commission, *Updated Investor Bulletin: Indexed Annuities*, Securities and Exchange Commission, (July 2020), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-13>.

³⁷⁹ *Id.*

³⁸⁰ See e.g., California Department of Insurance, *Deceptive Sales Practices When Purchasing Annuities*, California Department of Insurance, <http://www.insurance.ca.gov/0150-seniors/0100alerts/DeceptiveSales.cfm>; North Carolina Department of Insurance, *Annuities and Senior Citizens*, North Carolina Department of Insurance,

One regulator noted, “With billions of dollars in sales to be made, insurance companies may offer commissions as high as 10 percent to agents to sell products like long-term deferred annuities to senior citizens.”³⁸¹ As described by the regulator:

Some unscrupulous sellers use high-pressure sales pitches, seminars, and telemarketing. Beware of agents who “cold call” you, contact you repeatedly, offer “limited time offers,” show up without an appointment, or won’t meet with you if your family is present. Beware of estate planning “seminars” that are actually designed to sell annuities. Beware of seminars that offer free meals or gifts. In the end, they are rarely free. Beware of agents who give themselves fake titles to enhance their credibility.³⁸²

Supporting this call for caution, Egan et al. (2019) found substantial amounts of misconduct disputes in the sales of annuities between 2005 and 2015.³⁸³

Research shows that fiduciary protections in the annuity markets lead to better outcomes for investors. By analyzing deferred annuity sales at a large financial services provider during 2013 to 2015, Bhattacharya et al. (2020) found that fiduciary duty increases risk-adjusted returns by 25 basis points.³⁸⁴

<https://www.ncdoi.gov/consumers/annuities/annuities-and-senior-citizens>; Mississippi Insurance Department, *Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities*, Mississippi Insurance Department, <https://www.mid.ms.gov/consumers/annuities-senior-citizens.aspx>; Kentucky Department of Insurance, *Annuities and Senior Citizens Consumer Alert: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities*, Kentucky Department of Insurance, <https://insurance.ky.gov/ppc/Documents/AnnuitiesandSenior.pdf>; Massachusetts Division of Insurance, *Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities*, Massachusetts Division of Insurance, <https://www.mass.gov/service-details/annuities-and-senior-citizens>; Georgia Office of the Commissioner of Insurance and Safety Fire, *Annuity Tips*, Georgia Office of the Commissioner of Insurance and Safety Fire, <https://oci.georgia.gov/insurance-resources/annuity/annuity-tips>; South Dakota Division of Insurance, *Consumer Alert: Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities*, South Dakota Division of Insurance, https://dli.sd.gov/insurance/publications/alerts/documents/annuities_senior_citizens.pdf.

³⁸¹ Minnesota Attorney General, *Annuities: Unsuitable Investments for Seniors*, Minnesota Attorney General, <https://www.ag.state.mn.us/consumer/Publications/AnnuitiesUnsuitableInvforSeniors.asp>.

³⁸² *Ibid.*

³⁸³ Mark Egan, Gregor Matvos, & Amit Seru, *The Market for Financial Adviser Misconduct*, 127(1) *Journal of Political Economy* (February 2019), <https://www.journals.uchicago.edu/doi/10.1086/700735>.

³⁸⁴ Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice*, Working Paper 25861 National Bureau of Economic Research (2020), <https://www.nber.org/papers/w25861>.

This results from a compositional shift in the set of products purchased by investors. Fiduciary duty protections tend to shift sales towards fixed indexed annuities and away from variable annuities. Within variable annuities, sales shifted towards products with more and higher quality investment options. The authors obtained these findings by exploiting the variation in fiduciary duties between broker-dealers and registered investment advisers as well as the variation between states as to whether broker-dealers are subject to a common law fiduciary duty.

Bhattacharya et al. (2020) also found that fiduciary duty led to a 16 percent reduction in the number of broker-dealers, which they described as a “potentially small” effect. There was no change in total annuity sales. Furthermore, the reduction in broker-dealers did not result in poor quality products being sold. The authors developed a model that shows that the benefits of improved advice under a fiduciary standard, offset by the reduction in the number of broker-dealers and the advice they provide, yields an overall effect of increasing average returns by 20 basis points. On the whole, these results indicate that this proposal would improve the quality of advice in the investment market and protect the welfare of investors and retirees.³⁸⁵

The Bhattacharya et al. (2020) model is particularly helpful in that it provides a framework to illustrate the quantitative impact of extending the fiduciary duty. It takes into account both empirical findings—the increase in returns of 25 basis points and the exit of 16 percent of the broker-dealers. While the model illustrates how these results would apply to the larger market, the results are still subject to the limitations of the empirical analysis, which looked only at certain types of annuities sold by one large firm. The authors examined the effects of variation in state-level fiduciary laws, but it is unclear how similar those would be to the effects of a national regulation.

Approximately \$3.8 trillion in pension entitlements are held in annuities at life insurance companies, including those within IRAs.³⁸⁶ The recommendation of many of these assets are already subject to a best interest

³⁸⁵ *Ibid.*

³⁸⁶ Board of Governors of the Federal Reserve System, *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts: First Quarter 2023*, Table L.227 Federal Reserve Statistical Release Z.1. (June 8, 2023), <https://www.federalreserve.gov/releases/z1/>.

standard; for example, they were sold by a registered investment adviser or sold in a state with a fiduciary standard. It is difficult to know exactly how many assets fall into this category, but for illustrative purposes, let us assume that 50 percent of the market is not currently subject to a best interest standard and would be under the proposal and would therefore expect an increase in average returns of 20 basis points as suggested by Bhattacharya et al. In this scenario, the expansion of fiduciary duty would lead to gains for investors (a mix of societal benefits and transfers) of \$3.6 billion, assuming a 20 basis point increase in returns.³⁸⁷

Good regulation may also improve the overall investment advice market. According to Egan, Ge, and Tang (2022), after the Department issued its 2016 Final Rule, total variable annuity sales fell significantly—primarily driven by a 52 percent decrease in annuities with expenses in the highest quartile, suggesting that broker-dealers responded to the 2016 Final Rule by placing greater weight on investor interests. These impacts persisted even after the rule was vacated by the Fifth Circuit. Critics of the Department's 2016 Final Rule often refer to a decline in variable annuity sales as evidence of the 2016 Final Rule having negative effects. Egan, Ge, and Tang (2002) conclude, however, that investors on average experienced a net benefit from the Rule, even taking into account the fact that some investors were no longer participating in the annuity market.³⁸⁸ Other commenters observed that even if the 2016 Final Rule could have reduced investors' access to certain services or products, the impact would have been on services and products that were not in the investors' best interest.³⁸⁹

The benefits of this proposal's application of fiduciary status to investment advice from insurance agents, brokers, and independent producers include eliminating the incentives for regulatory arbitrage by those agents. Without this proposal, insurers and insurance intermediaries can secure excess profits at investors' expense by rewarding investment advice providers for giving biased advice in ways that broker-dealers

operating under Regulation Best Interest cannot.

Protections Concerning Advice Given to Plan Fiduciaries

This proposal would also yield economic benefits by extending protections to advice given to ERISA plan fiduciaries. Accordingly, the proposal would ensure that investors and the Secretary could enforce the fiduciary protections by pursuing claims for fiduciary misconduct involving ERISA-covered plans. When a broker-dealer currently provides advice to plan fiduciaries, the advice is not covered by Regulation Best Interest because the plan fiduciaries are not retail customers.³⁹⁰ Pool et al. (2016) offered evidence that mutual fund companies acting as service providers to 401(k) plans display favoritism toward their own affiliated funds, even when their performance is worse, generating "significant subsequent negative abnormal returns for participants investing in those funds."³⁹¹ This proposal aims to reduce or eliminate such harmful favoritism.

Pool et al. (2022) demonstrated that funds who offer defined contribution plan recordkeepers revenue-sharing payments are more likely to be added as investment options on plan menus and are also more likely to be retained. Additionally, plans whose menus include funds that share revenue had higher expense ratios resulting in significantly higher fees.³⁹² Pool states that this is "consistent with the notion that . . . less transparent indirect payments allow record keepers to extract additional rents from plan participants."³⁹³ Fiduciaries can negotiate the specific formula and methodology under which revenue sharing will be credited to the plan or plan service providers, indirectly reducing the fees the plan pays which could in turn mitigate the conflict, but this requires a sophisticated understanding of the underlying agreement.³⁹⁴ Given the proliferation of

fee arrangements for investment advice that are increasingly less transparent to clients and regulators as well as the variation in standards and safeguards across advice markets, the Department believes it is critical to extend protections associated with fiduciary status under ERISA, to protect retirement investors' assets.

Plan fiduciaries receive advice on many important topics. For defined contribution plans, these topics can include plan design provisions such as investment alternatives, whether the plan should have automatic enrollment, default contribution rates, and default investments. For defined benefit plans, it can include selection of investments and investment strategies as well as distribution options. Given the large number of participants in ERISA plans and the huge asset holdings of such plans, the benefits of protecting the advice received by plan fiduciaries is likely to be substantial.

Increased Confidence in Advisers and in the Reliability of Their Advice

The market for financial advice generally works best when investors trust investment advice providers and their trust is well-placed. Both conditions are necessary for optimal results. If investors distrust investment advice providers, they will incur higher costs to select a provider and monitor their conduct. Their provider may also incur higher costs to counter prospective and existing customers' distrust. Distrustful investors may be less likely to obtain beneficial advice and more likely not to follow beneficial advice.³⁹⁵ Likewise, if investors trust investment advice providers more than is warranted, they may reduce their monitoring of the advisor's actions and accept less transparency in policies, procedures and fees, making them more vulnerable to harm from advice that is biased by advisory conflicts.³⁹⁶ A 2019 survey regarding the Australian financial advice industry reported that the biggest barriers for consumers in accessing financial advice are cost (35 percent), limited financial

³⁹⁰ Advice provided by an investment adviser to a plan fiduciary is subject to the Advisers Act fiduciary duty.

³⁹¹ Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options In 401(K) Plans*, 71(4) *The Journal of Finance* 1779–1812 (August 2016), <https://onlinelibrary.wiley.com/doi/abs/10.1111/jofi.12411>.

³⁹² Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *Mutual Fund Revenue Sharing in 401(k) Plans*, Vanderbilt Owen Graduate School of Management Research Paper (November 8, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3752296.

³⁹³ *Ibid.*

³⁹⁴ See Employee Benefits Security Administration, 2013–03A, Advisory Opinions,

(2013), <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2013-03a>.

³⁹⁵ Paul Gerrans & Douglas A. Hershey, *Financial Adviser Anxiety, Financial Literacy, and Financial Advice Seeking*, 51(1) *Journal of Consumer Affairs* 54–90 (2017), <https://www.jstor.org/stable/44154765>.

³⁹⁶ Winchester, Danielle & Sandra Huston, *Trust Reduces Costs Associated with Consumer-Financial Planner Relationship*, 71(4) *Journal of Financial Service Professionals* 80–91 (2017), <https://web.p.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=0&sid=1ca603cd-53ca-4cbb-99b1-5fd43782b0c4%40redis>.

³⁸⁷ $0.20\% \times \$3.6 \text{ trillion} \times 50\% = \$3.6 \text{ billion}$.

³⁸⁸ Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) *The Review of Financial Studies* 5334–5486 (December 2022), <https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521>.

³⁸⁹ Ashley C. Vicere, *Defining Fiduciary: Aligning Obligations with Expectations*, 82(4) *Brooklyn Law Review* 1783 (2016), <https://brooklynworks.brooklaw.edu/blr/vol82/iss4/8/>.

circumstances in which it is “not worth getting financial advice” (29 percent), the desire to manage an individual’s own finances (26 percent), a lack of trust (19 percent), or a lack of perceived value in paying for financial advice (18 percent).³⁹⁷

By holding all retirement investment advice providers to standards that rightly instill trust, this proposal would facilitate efficient, trust-based relationships between retirement investors and investment advice providers of all types, so investors would be more likely to obtain and follow beneficial advice, at lower cost.

There is extensive evidence that investors, including retail investors and ERISA plan fiduciaries, are often subject to behavioral biases that lead to costly systematic investment errors. There is evidence that good advice can improve saving and investing decisions. Accordingly, the proposal may result in a beneficial reallocation of investment capital. Montmarquette and Viennot-Briot (2015) provided evidence that “having a financial advisor for at least four years has a positive and significant impact on financial assets” and that “the positive effect of advice on wealth creation cannot be explained by asset performance alone: the greater savings discipline acquired through advice plays the major role.”³⁹⁸

Fisch et al. (2016) also provided evidence that “highlight[s] the potential value of professional advice in mitigating the effects of financial illiteracy in retirement planning.”³⁹⁹ Fisch et al. recruited Amazon Mechanical Turk users (MTurk sample), a crowdsourcing marketplace, to allocate a hypothetical ten thousand dollars among ten investments options as part of a 401(k) plan. Separately, professional advisers—registered investment advisers, broker-dealers or dual registrants—were asked to allocate ten thousand dollars on behalf of a hypothetical 30-year-old, single client, with no children, a lower middle-class income and no substantial outside savings or investments. They found that professional advisers, on average,

selected portfolios with higher returns, allocated more money to cheaper index funds, paid lower fees, and accessed more information in connection with the allocation decision than the MTurk sample. For example, professional advisers were “uniformly sensitive to the fact that the equity risk premium and the 30-year time horizon of the allocation decision warranted substantial equity exposure—facts that the low-literacy investors seemed to be unaware.”⁴⁰⁰ Overall, professional advisers had a higher level of financial knowledge, which enabled them to make better retirement investing decisions from which unsophisticated investors could benefit.

Enforcement

Under the proposal, the full range of covered investment advice interactions with Title I plans would be subject to the Department’s robust enforcement program as well as to a private right of action. In general, participants and beneficiaries have the right to bring suit under ERISA 502(a) against fiduciaries who breach their duties and obligations to the plan, including engaging in non-exempt prohibited transactions. This private right of action, which ensures participants and beneficiaries have ready access to the Federal courts, provides critical protection of tax-advantaged retirement plans. For advice interactions not currently covered by relevant standards of conduct, such as much advice provided to plan fiduciaries, these enforcement measures will help to ensure the proposal is implemented effectively. For advice interactions that are subject to state regulation, under the proposal they will likely have stronger oversight, which will provide greater protections to investors.

Charoenwong et al. (2019) showed that regulatory oversight has an important impact on investment advice.⁴⁰¹ They studied a policy reform that did not affect the laws or rules that registered investment advisers were operating under; instead, it changed the regulatory oversight. The reform shifted some advisers from a federal regulator, the SEC, to state-securities regulators. Registered investment advisers who shifted to the state-securities regulators received 30–40 percent more complaints from customers, relative to the unconditional complaint rate. This effect mainly resulted from fiduciary

violations. Furthermore, the vigor of the enforcement program mattered; the more resources a state-securities regulator had, the fewer complaints there tended to be.

The proposal would also ensure the imposition of appropriate excise taxes for prohibited transactions involving both ERISA-covered plans and IRAs. As part of their retrospective review, financial institutions would be required to report to the Department of the Treasury any non-exempt prohibited transactions in connection with fiduciary investment advice, correct those transactions, and pay any resulting excise taxes. Failure to report, correct, and pay an excise tax, in addition to existing factors, would make a financial institution ineligible to rely on PTE 2020–02 and PTE 84–24. The Department believes these additional conditions would provide important protections to retirement investors by enhancing the existing protections of PTE 2020–02 and PTE 84–24.

Implications for Retirement Savings Estimates

To understand the potential magnitude of savings for retirement investors from the proposed rule, the Department believes the experience following the 2016 rulemaking and SEC’s Regulation Best Interest provides context. As discussed in the baseline discussion, the regulatory and market environments have shifted since the 2016 Rule, and accordingly, the Department acknowledges that there is significant uncertainty about the magnitude of savings that would result for retirement investors as a result of the proposed rulemaking. The Department requests comment on this point.

One major market development resulting from the 2016 Final Rule and exemptions involved the development of new mutual fund share classes designed to eliminate advisory conflicts attributable to variation in commissions. As discussed in the Baseline section, Mitchell, Sethi, and Szapiro (2019) found that the share classes that are less likely to have traditional conflicts of interest have become more popular in recent years.⁴⁰² In 2020, 94 percent of 401(k) mutual fund assets were invested in no-load funds, compared to 66 percent in 2000.⁴⁰³

⁴⁰² Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It’s Time to Dive Past Surface-Level Conflicts*, Morningstar (November 2019), https://ccl.yale.edu/sites/default/files/files/wp_Conflicts_Of_Interest_111319%20FINAL.pdf.

⁴⁰³ Investment Company Institute, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, 2020, 27(6) ICI Research Perspective

³⁹⁷ Australian Securities and Investments Commission, *Report 627- Financial Advice: What Consumers Really Think*, Australian Securities and Investments Commission, (August 2019), <https://download.asic.gov.au/media/5243978/rep627-published-26-august-2019.pdf>.

³⁹⁸ Claude Montmarquette & Nathalie Viennot-Briot, *The Value of Financial Advice*, 16(1) *Annals of Economics and Finance* 69–94 (2015), <http://aeconf.com/articles/may2015/ae160104.pdf>.

³⁹⁹ Jill E. Fisch, Tess Wilkinson-Ryan, & Kristin Firth, *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors*, 66(3) *Duke Law Journal* (2016), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3875&context=dlj>.

⁴⁰⁰ *Id.*

⁴⁰¹ Ben Charoenwong, Alan Kwan, & Tarik Umar, *Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation*, 109(10) *American Economic Review* (October 2019), <https://www.aeaweb.org/articles?id=10.1257/aer.20180412>.

In the 2016 RIA, the Department estimated that broker-sold mutual funds underperformed direct-sold mutual funds by approximately 50 basis points per year.⁴⁰⁴ In response to this estimate, Morningstar opined that transparency improvements associated with such shares “should encourage advisors to provide high quality advice to remain competitive” and that “50 basis points is a reasonable estimate of savings to investors from reducing conflicted advice.”⁴⁰⁵ Their support of the Department estimate was based on a study looking at mutual fund T shares. However, this share class has faded following the revocation of the 2016 rule.⁴⁰⁶ As a result, it is largely uncertain how many retirement investors would have adopted the new share class had it been permitted to go fully into effect. For the purposes of this illustration, if it were assumed that half of the roughly \$2.0 trillion assets invested in long-term mutual funds with front-end load fees were transitioned into T shares, investors could have saved approximately \$5 billion.⁴⁰⁷

The Department acknowledges that the Morningstar study only looks at the IRA market, specifically examining share classes designed for retail investors. The proposed rule, of course, applies more broadly than just to IRAs. The Department believes the proposed rule would encourage continued market trends away from share classes with traditional conflicts of interest.

However, Mitchell, Sethi, and Szapiro (2019) also found that the newer share classes appear to have their own conflicts that are opaque to investors and regulators, such as revenue

sharing.⁴⁰⁸ Many of the commonly considered potential conflicts of interest are embedded in a bundled share class arrangement, where the investor pays the mutual fund a load or 12b–1 fee, and the mutual fund pays a portion back to an intermediary, such as the intermediary that sold the fund to the investor. Semi-bundled share classes use revenue sharing or sub-accounting fees.

The damages associated with conflicts of interest in compensation structures are exacerbated in that many of these compensation structures incentivize excessive trading. Good advice can help investors avoid timing errors when trading by reducing panic-selling during large and abrupt downturns. However, conflicted advice providers may profit by encouraging investors’ natural inclination to trade more and “chase returns,” an activity that tends to produce harmful timing errors.⁴⁰⁹

Friesen and Sapp (2007) found that equity mutual fund investors made timing decisions that reduced fund investor average returns by 1.56 percent annually.⁴¹⁰ Their evidence “suggests that those investors who are most likely relying on advice from a broker perform especially poorly from a timing standpoint.” Bullard, Friesen, and Sapp (2008) found that the difference in performance between load and no-load funds has two components: the difference in prospectus returns across share classes and the difference in investor returns resulting from differences in investor timing.⁴¹¹ Additionally, Christoffersen, Evans, and Musto (2013) found that as the size of the load-share increased, mutual fund returns decreased. This suggests that the greater the adviser’s conflict of interest, the worse off the IRA investor can expect to be.^{412 413}

A Department-sponsored study by Panis and Padmanabhan (2023) examined how investors timed the purchase and sale of mutual funds between 2007 and June 2023. During the decade from 2007 to 2016, the authors found that investors in load funds had worse timing than investors in no-load funds, with an excess performance gap, comparing measures of the impact of purchase and sales timing, of 1.12 percent per year for U.S. equity funds and 0.63 percent for all funds. After Regulation Best Interest took effect, the authors observed that there had been dramatic improvement in the timing of trades. Between July of 2020 and June of 2023, the excess performance gap was only 0.13 percent for U.S. equity funds and was negative, –0.11 percent, overall. This means that in the later period, looking across all funds in the aggregate, investors in load funds timed their transactions slightly better than investors in no-load funds. While it is not certain what factors underlie the reduction in timing errors, it is consistent with an interpretation that Regulation Best Interest enhanced the standard of conduct for broker-dealers to act in the best interest of retail customers and persuade their customers to refrain from return chasing behavior.⁴¹⁴

The nature of the conflicts facing broker-dealers in the mutual fund space is similar to that facing insurance agents and independent producers in the annuity space. As discussed in the Baseline section, commissions earned by selling annuities vary considerably even within a certain type of product.⁴¹⁵ For example, commissions for variable annuities vary widely, creating a strong incentive for brokers to sell some variable annuities over others. Egan, Ge, and Tang (2022) showed that variable annuity sales were four times more sensitive to brokers’ financial interests than to investors’ financial interests.⁴¹⁶

Figure 5. (June 2021), <https://www.ici.org/system/files/2021-06/per27-06.pdf>.

⁴⁰⁴ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 162, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

⁴⁰⁵ Aron Szapiro & Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors*, Morningstar Policy Research (April 2017).

⁴⁰⁶ Greg Iacurci, *T Shares Are Dead*, InvestmentNews (December 20, 2018), <https://www.investmentnews.com/t-shares-are-dead-77482>.

⁴⁰⁷ According to the Investment Company Institute, in 2017, the total net assets invested in long-term mutual funds with front-end load fees was \$1.99 trillion. See Investment Company Institute, “Trends in the Expenses and Fees of Funds, 2017.” Figure 20. *ICI Research Perspective* (April 2018), Vol. 24, No. 3. If it were assumed that all \$1.99 trillion in assets were invested in A shares and that they were all then moved to T shares, then this would have translated into an estimated increase in returns of \$4.98 billion for IRA investors.

⁴⁰⁸ Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It’s Time to Dive Past Surface-Level Conflicts*, Morningstar (November 2019), https://ccl.yale.edu/sites/default/files/files/wp_Conflicts_Of_Interest_111319%20FINAL.pdf.

⁴⁰⁹ YiLi Chien, *The Cost of Chasing Returns*, 18 *Economic Synopses* (2014), <https://doi.org/10.20955/es.2014.18>.

⁴¹⁰ Geoffrey Friesen & Travis Sapp, *Mutual Fund Flows and Investor Returns: An Empirical Examination of Fund Investor Timing Ability* 31(9) *Journal of Banking and Finance* 2796–2816 (2007), <https://www.sciencedirect.com/science/article/abs/pii/S0378426607001422>.

⁴¹¹ Mercer Bullard, Geoffrey C. Friesen, & Travis Sapp, *Investor Timing and Fund Distribution Channels*, Social Science Research Network (2008).

⁴¹² Susan Christoffersen, Richard Evans, & David Musto, *What Do Consumers’ Fund Flows Maximize? Evidence From Their Broker’s Incentives*, 68 *Journal of Finance* 201–235 (2013), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6261.2012.01798.x>.

⁴¹³ The performance reduction presented in Christoffersen, Evans and Musto (2013) does not include loads paid by investors in front-end-load funds.

⁴¹⁴ Constantijn Panis & Karthik Padmanabhan, *Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds*, Intensity, LLC. (August 14, 2023). Unpublished draft.

⁴¹⁵ The commission paid varies significantly, from as little as 0 percent to as much as 10 percent of the investment with the most common amount being 7 percent. See Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) *The Review of Financial Studies* 5334–5486 (December 2022), <https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521>.

⁴¹⁶ Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12)

Continued

After the Department published its 2015 proposal, sales of high-expense variable annuities fell by 52 percent, which Egan, Ge, and Tang (2022) attributed to sales becoming more sensitive to expenses and insurers increasing the availability of low-expense products. In fact, the authors stated that the “regulatory change improved the distribution of products available to investors along the extensive margin, in terms of the annuities available for sale, as well as the intensive margin, in terms of the actual annuities sold by brokers.” Thus, the authors concluded, the 2016 Final Rule resulted in improved investor welfare, increasing risk-adjusted returns of investors by up to 30 basis points per year, with two-thirds of the effect associated with investors moving into lower-expense products and the remainder from sales of annuities with more desirable investment options and characteristics.⁴¹⁷ The long-run impact of such a regulation can be estimated by applying the 30 basis point figure to the assets held in variable annuities in 2018, which was \$2.2 trillion, yielding a total annual increase in risk-adjusted returns of approximately \$6.6 billion.⁴¹⁸ Because the 2016 Final Rule was vacated, its long-run effects on the annuity market remain unknown. The current proposal, however, would help ensure a long-run positive impact on the market for variable annuities.

The Department is also concerned about the risks faced by retirement investors purchasing indexed annuities. The benefits from improved investment advice from the proposal would differ from those estimated by Egan, Ge, and Tang (2022), as they would affect a different segment of the market with distinctive characteristics.

The recent SEC actions extended new protections to retail customers advised by broker-dealers on securities transactions. According to the SEC, the Conflict of Interest Obligation under Regulation Best Interest is “intended to reduce the agency costs that arise when a broker-dealer and its associated persons provide a recommendation to a retail customer by addressing the effect of the associated person’s or broker-dealer’s conflicts of interest on the

recommendation.” In its Economic Analysis, the SEC explored the market mechanisms by which this and other provisions would benefit retail investors. The SEC estimated that the present value of potential future mutual fund fee reductions after Regulation Best Interest would be between \$14 billion to \$76 billion.⁴¹⁹ The SEC separately estimated that the potential present value of improved future mutual fund performance net of fees (which would overlap with fee reductions) would be between \$7 billion to \$35 billion. The SEC noted that these estimates represented only “some of the potential benefits” and that more benefits were expected. It also noted that while its estimates focused on mutual funds, it expected that “the same or similar dynamics could apply to other financial products.”

As discussed above, the preliminary evidence that is available for the mutual fund and annuity markets following the 2016 Final Rule and SEC’s Regulation Best Interest reinforces the Department’s view that well-designed reforms that raise advisory conduct standards and mitigate advisory conflicts would benefit retirement investors. The Department requests comment on how the investment advice market has evolved since following the enactment of such regulatory actions, with particular interest in how investment returns, net of fees, have changed for mutual funds and annuities.

6. Impact of the Proposal on Small Savers

Some observers have argued that some small savers, individuals, or households with low account balances or of modest means, will lose access to investment advice under this type of regulation and will be worse off. The Department has considered in detail the overall impact of the proposal on small savers.

The Department recognizes that investment advice is often very valuable for small savers. There is also ample evidence and broad consensus that many U.S. consumers struggle to make and implement good retirement saving and investment decisions without effective help. Many lack the skills, motivation, or discipline to accumulate adequate savings, optimize their investment strategies, and thereby realize financial security in retirement.⁴²⁰ Less sophisticated

investors may benefit from “hand-holding” to make sure they are taking basic steps such as saving adequately and allocating their investments with an appropriate amount of risk.

The Department believes that small savers are especially vulnerable to the detrimental effects of conflicted advice. With fewer economic resources, small savers are particularly susceptible to any practices that diminish their resources by extracting unnecessary fees or by yielding lower returns. These savers cannot afford to lose any of their retirement savings. Yet conflicts sometimes lead advisers to recommend products with lower expected net returns than available alternatives. Consumers’ losses from advisory conflicts tend to exceed what can be justified as fair compensation for good advice as these consumers could often benefit more from competitively priced impartial advice.⁴²¹ However, advisory conflicts have historically distorted the market in ways that have prevented consumers from accessing less conflicted investment alternatives. Less sophisticated investors frequently do not know how much they are paying for advice and are not equipped to effectively monitor the quality of the advice they receive.⁴²² Indeed, Agnew et al. (2021) found in an experimental setting that younger, less financially literate, and less numerate participants were more likely to hire a low-quality adviser.⁴²³ It is possible that they do not

Final Rule and Exemptions, pp. 108, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>. (“many IRA investors lack sophistication”); 136 (older individuals often “lack even a rudimentary understanding of stock and bond prices, risk diversification, portfolio choice, and investment fees”); and 137 (“only one-half of individuals aged 50 and older in the United States can correctly answer two simple financial questions that involve calculations. Many respondents failed to correctly conclude that \$100 would grow to more than \$102 after five years if interest accrues at 2 percent per year, while others were unable to determine that an account earning interest at 1 percent while inflation was 2 percent would lose buying power”).

⁴²¹ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 155–158, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

⁴²² Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 136–40, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

⁴²³ Julie Agnew, Hazel Bateman, Christine Eckert, Fedor Iskhakov, Jordan Louviere, and Susan Thorp. *Who Pays the Price for Bad Advice?: The Role of*

The Review of Financial Studies 5334–5486 (December 2022), <https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521>.

⁴¹⁷ *Id.*

⁴¹⁸ This estimate is based on variable annuity assets in 2018 of \$2.2 trillion, as reported in the referenced study. See Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) *The Review of Financial Studies* 5346 (December 2022), <https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521>.

⁴¹⁹ Regulation Best Interest, 84 FR 33458, 33491 (July 12, 2019).

⁴²⁰ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for*

understand the potential effects of their advisers' conflicts.⁴²⁴ By itself, disclosure directly to the consumer is unlikely to change this without other protections also in place.⁴²⁵

Small investors often save using an ERISA plan. Frequently this is the main vehicle they use to save for retirement; in fact, approximately two-thirds of households participating in a pension plan do not own an IRA.⁴²⁶ This proposal will require advice given to the plan fiduciaries to meet a fiduciary standard. Improvements in plan design and selection of investments on the menu will benefit small savers. The vast majority of small savers choose investments from their plan's platform rather than investing through a brokerage account, if their plan even offers a brokerage account option.⁴²⁷ Research shows that low-income participants tend to be influenced by default options more than high income participants.⁴²⁸ Small savers will benefit from plan fiduciaries choosing default options that are well selected and well monitored.

During the 2016 Rulemaking, the Department devoted considerable

attention to the question of small investors' access to financial services, including advice.⁴²⁹ The Department believed that the rule would benefit small investors and generally would not adversely affect their access to advice.⁴³⁰ It noted ongoing market innovations that promised to make good advice more affordable and predicted that the rule would accelerate these efforts.⁴³¹ However, the Department also acknowledged the potential for short-term disruption and transition costs⁴³² and noted that the services of independent brokers and insurance agents might be most affected.⁴³³

The 2016 Rulemaking was significantly different than the current rulemaking in that it imposed a fiduciary obligation on virtually all investment recommendations specifically directed to retirement investors, imposed demanding contract and warranty requirements in the IRA market, which gave investors a direct cause of action against firms and advisers for breach of the Impartial Conduct Standards, and represented a

significant break from the then-existing regulatory baseline. Confronted with these significant changes, a number of industry commenters both during the rulemaking process of the 2016 Final Rule, and in the period immediately following the rule's finalization, expressed concern that the regulatory changes could erode small investors' access to affordable advice and to some beneficial financial products, primarily based on surveys conducted by the industry of its members.

The Department carefully reviewed such comments and papers prior to the publishing of the 2016 Final Rule and found many contained analytic flaws that rendered the comments' conclusions unsupported and unreliable. The Department accordingly discussed in the 2016 RIA its points of concern with the comments' methods and conclusions.⁴³⁴ The Department also sought assistance from an outside consultant to help review the comment letters and claims.⁴³⁵ The consultant generally found "the studies lacking in rigor, failing to recognize emerging alternatives to traditional offerings of investment advice, incorrectly equating the benefits of conflicted advice to those of non-conflicted advice, or suffering from logical fallacies."

In 2021, the Hispanic Leadership Fund and Quantria prepared a paper on the effects of reinstatement of the 2016 Rule. Based on the same approach as Quantria's prior paper, they estimated that reinstatement of the rule would reduce retirement savings of individuals with incomes below \$100,000 by \$140 billion over 10 years.⁴³⁶ The 2021 findings have shortcomings similar to those identified in the 2014 analysis, such as assuming such policy action would eliminate all financial advice received by these individuals or purporting causation from correlation. Padmanabhan, Panis, and Tardiff (2016)

Financial Vulnerability, Learning and Confirmation Bias, ARC Centre of Excellence in Population Ageing Research, Working Paper 2021/19, (July 1, 2021).

⁴²⁴ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 143–144, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

⁴²⁵ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 268–271, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

⁴²⁶ Constantijn W.A. Panis & Michael J. Brien, *Savers With and Without a Pension* (2015), <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/savers-with-and-without-a-pension.pdf>.

⁴²⁷ In 2022, participants with annual income between \$15,000 and \$150,000 invested less than 0.5% of their defined contribution plan assets through a brokerage account. See Vanguard, *How America Saves*, (2023), <https://institutional.vanguard.com/content/dam/inst/iig-transformation/has/2023/pdf/has-insights/how-america-saves-report-2023.pdf>.

⁴²⁸ John Beshears, Ruofei Guo, David Laibson, Brigitte C. Madrian, & James J. Choi, *Automatic Enrollment with a 12% Default Contribution Rate* (August 18, 2023), <https://spinup-000d1a-wp-offload-media.s3.amazonaws.com/faculty/wp-content/uploads/sites/27/2023/08/JPEF-20230802.pdf>; James Choi, David Laibson, Brigitte Madrian, & Andrew Metrick, *For Better or For Worse: Default Effects and 401(k) Savings Behavior*, In Wise DA (ed.), *Perspectives on the Economics of Aging*, Chicago: University of Chicago Press, pp. 81–121, <https://spinup-000d1a-wp-offload-media.s3.amazonaws.com/faculty/wp-content/uploads/sites/27/2019/06/betterorworse.pdf>.

⁴²⁹ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 312–318 & 366–372, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>. "The Department believes that 'small savers' (that is, those individuals or households with low account balances and/or modest means) are most negatively impacted by the detrimental effects of conflicted advice. With fewer economic resources, small savers are particularly vulnerable to any practices that diminish their resources by extracting unnecessary fees or by yielding lower returns." (p. 366.)

⁴³⁰ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 312–318, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

⁴³¹ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 318–324, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

⁴³² Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 318, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

⁴³³ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 308–309, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

⁴³⁴ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 108–109 & 136–137, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

⁴³⁵ Karthik Padmanabhan, Constantijn Panis & Timothy Tardiff, *Review of Selected Studies and Comments in Response to the Department of Labor's Conflicts of Interest 2015 Proposed Rule and Exemptions*, (March 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/review-of-selected-studies-and-comments-in-response-to-the-dol-coi-2015-proposed-rule-and-exemptions.pdf>.

⁴³⁶ Hispanic Leadership Fund and Quantria Strategies, LLC, *Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement*, (November 2021).

point out that several of the paper's key assertions, such as many advisers will not be willing to operate under the fiduciary standard set out by the Department's rule, do not have empirical support and are not consistent with current practices. Furthermore, the paper's findings are not applicable to the current proposal because it assumes reinstatement of the 2016 Rulemaking, which was markedly different than the current proposal. For instance, the 2016 Final Rule required fiduciary advisers to enter into a written contract with a plan or IRA investor, which is not included in this proposal.

Similarly, the U.S. Chamber of Commerce cited surveys indicating that firms reported they might limit the availability of advice in some customer arrangements after the 2016 Final Rule and predicted that "up to 7 million IRA owners could lose access to investment advice altogether."⁴³⁷ This prediction apparently did not consider the potential for customers to move to different firms or the availability of a full range of investment choices and advisory arrangements in the market as a whole. The Chamber of Commerce and others also pointed to an increase in the number of orphaned accounts from which advisers had resigned and argued that many small customers would move to automated advice arrangements.⁴³⁸

Additionally, in 2017, Deloitte prepared a report that suggested the 2016 Final Rule had accelerated the trend toward fee-based accounts.⁴³⁹ Deloitte interviewed and collected data from 21 Securities Industry and Financial Markets Association (SIFMA) member firms regarding their response to the 2016 Final Rule as of June 9, 2017, its initial applicability date.⁴⁴⁰ Of the member firms that participated in the study, nearly half reported that they maintained advice for all of their brokerage customers, while 29 percent limited advice and 24 percent eliminated advice. Firms that eliminated or limited their advised

brokerage platforms gave retirement investors an option to either transition to a fee-based program, self-directed brokerage account, or in some cases, a new platform they were launching (e.g., robo-advice, call-center, self-directed). According to Deloitte, firms reported that many of the investors that moved into self-directed accounts either did not want to move to a fee-based account, had accounts too small to qualify for fee-based advisory accounts at the same firms, wished to retain investments that were not eligible for the same firms' fee-based accounts, or some combination.

In a report for the Financial Services Institute, a trade group representing independent financial firms and advisers, Oxford Economics (2017), predicted that "smaller investors will be offered robo-investing type account services and that these small, often entry level, novice investors would lose access to personalized financial planning."⁴⁴¹ According to a survey conducted by the Insured Retirement Institute, 70 percent of respondents either already had or were considering exiting smaller markets such as small employer-based plans and lower balance IRAs.⁴⁴² In another survey, two-thirds of responding advisers said they believed that small investors would have less access to professional financial advice.⁴⁴³

The preliminary market reaction to the 2016 Rule, however, differed from those expected by the studies discussed above and are inconsistent with more rigorous academic research. In a survey conducted in September 2017, 82 percent of broker-dealers had not made changes to their handling of smaller, retail retirement accounts, although about 18 percent had raised their minimum account threshold and closed smaller accounts.⁴⁴⁴ In examining the effects of the 2016 Final Rule, Egan, Ge, and Tang (2022) found that while variable annuity sales had decreased, there is no evidence that the change affected investors with less wealth more than others. They concluded that variable annuity sales had become more sensitive to expenses and that insurers had increased the relative availability of low-expense products. Even if there is reporting error in the maximum upfront

commission rates data, it would tend to understate the effect of brokerage commissions on investment transactions. Therefore, the study concluded that investor welfare had improved because of the 2016 Rulemaking, despite the fact that it was vacated.⁴⁴⁵

A majority of surveyed independent registered investment advisers believed that small investors would not lose access to advice due to the 2016 Final Rule.⁴⁴⁶ Some expected that young advisers just starting out would serve any abandoned investors to build their clientele.⁴⁴⁷ According to one report, many larger and more productive registered investment advisers viewed robo-advice platforms as a tool to expand their client base and attract young and low-asset investors, not simply as a tool to reduce costs.⁴⁴⁸

The surveys, papers, and predictions described above do not support a finding that small investors would lose or have lost access to personalized advice as a result of fiduciary protections, even under the 2016 Rulemaking, which imposed more onerous conditions—and liability—on firms and advisers than is true of the proposed rule and exemptions. The proposal broadly comports to Regulation Best Interest, and the Department is not aware of any substantial, documented reductions in access to advice as a result of Regulation Best Interest.

The proposal accommodates different types of business models. Still, it is possible that, as the market evolves, small investors and the firms that serve them will increasingly move away from commission-based full-service or "advised" brokerage accounts or commission-compensated advice from insurance agents. Instead, they may use one or more of the following: target-date funds (which adjusts risk allocation over time based on the target-date); receiving advice directly from investment firms (which allows for interaction with a live adviser though the advice tends to focus on in-house funds and investments); hourly engagement or subscription-based firms (which are particularly useful for financial planning); and robo-advice

⁴³⁷ U.S. Chamber of Commerce, *The Data is In: The Fiduciary Rule Will Harm Small Retirement Savers*, (Spring 2017), https://www.uschamber.com/assets/archived/images/ccmc_fiduciaryrule_harms_smallbusiness.pdf.

⁴³⁸ Investment Company Institute comment letter August 7, 2017. https://www.ici.org/system/files/attachments/17_conduct_sec_clayton_ltr.pdf.

⁴³⁹ Deloitte, *The DOL Fiduciary Rule: A Study in How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors*, (August 9, 2017).

⁴⁴⁰ Deloitte notes in the report that "The findings were made based on the analysis of information and data provided by the study participants to Deloitte. Deloitte has analyzed, aggregated and summarized the information provided, but was not asked to and did not independently verify, validate or audit the information presented by the study participants."

⁴⁴¹ Oxford Economics, *How the Fiduciary Rule Increases Costs and Decreases Choice*, (April 15, 2017).

⁴⁴² Comment letter submitted by dated on April 17, 2017 (#1413).

⁴⁴³ Comment letter by Lincoln Financial Network dated March 17, 2017 (#1420).

⁴⁴⁴ John Crabb, *The Fiduciary Rule Poll*, *International Financial Law Review*, International Finance Law Review (October 2017), <https://media2.mofo.com/documents/171000-fiduciary-rule-poll.pdf>.

⁴⁴⁵ Egan, Mark, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) *The Review of Financial Studies* 5334–5486. (December 2022).

⁴⁴⁶ Cerulli Associates, *U.S. Broker/Dealer Marketplace 2016: Retooling for a New Competitive Landscape*, The Cerulli Report.

⁴⁴⁷ Bruce Kelly, *Plenty of Advisers Eager to Scoop Up 'Orphaned' Accounts*, *Investment News* (August 2017).

⁴⁴⁸ Blackrock, *Elite RIA Study*, (2017).

(which generally provides a customized investment mix based on information about the investor's financial circumstances and existing investment assets).⁴⁴⁹ Robo-advisers and target-date funds, in particular, are rapidly gaining market share.^{450 451}

The Department requests comment on research or data demonstrating how access to advice has changed, particularly for small savers, following the 2016 Final Rule, vacatur of the Final rule, recent regulatory actions taken by the Department and the SEC, and the increased use of technology to provide advice.

The Department expects the proposed rule and exemptions would not significantly impact the overall availability of affordable investment advice but rather improve the quality of this advice as conflicts are removed. This would apply as well to small investors who continue to have access to advice. Furthermore, increasing the quality of advice provided to retirement plan fiduciaries will benefit many workers who are participating in a defined contribution or defined benefit pension plan.

This is supported by the experience in the U.K., which adopted a far more aggressive stance in addressing conflicted advice than the Department proposed in the 2016 Rulemaking or the current proposals. When the U.K. initially banned commissions for investment advice and required more stringent qualifications for advisers under its Retail Distribution Review (RDR) in 2013, the advice rate fell both in the lead up to the regulatory change and in the years immediately following its implementation. However, more recent research has found evidence of improvements in the market since 2017, including a 35 percent increase in the number of U.K. adults that received financial advice, a 5 percent increase in the number of advisers, and a 9-percentage point increase in consumer awareness of automated advice,⁴⁵² which suggested a greater focus on

digital advice as a potential solution to provide low-cost investment advice with specifically tailored outcomes to individual investors at scale.⁴⁵³

The Department has reason to believe that such alternative forms of advice have become more available in the U.S. and, as in the U.K., are beneficial to small investors. In recent years, the investment advice market has seen an increase in financial technology and robo-advice service providers, which cater to small savers. In 2017, Morningstar noted that advances in financial technology could increase personal advisers' productivity and streamline compliance, enabling them to offer higher service levels affordably to small investors even as they adapt business practices to mitigate conflicts of interest.⁴⁵⁴ Because the core portfolio management functions are performed by computer algorithm, robo-adviser services generally can be expanded more easily than traditional advisory services. The marginal cost incurred by a robo-adviser to serve additional customers is very small relative to that incurred by traditional advisers. Robo-advisers often serve investors with assets under \$500,⁴⁵⁵ and some robo-advisers do not require a minimum investment at all.⁴⁵⁶ The financial needs of small investors often can be easily met by basic services and given the low balance of many such accounts, there may be little need or justification for a more intensively personalized (and expensive) strategy. The increasing presence of robo-advice has proved to be such an innovation.

Many robo-advice providers claim to offer relatively conflict-free services, claiming no commission, no performance fees, and no compensation from third parties. Others claim to serve investors as fiduciaries. Robo-adviser offerings are typically comprised of ETFs that, in comparison to mutual funds, offer little room for revenue

streams and payment shares that would create a conflict of interest for investment advisers (e.g., 12b-1 fees, subtransfer agent fees).⁴⁵⁷

Despite the increasing popularity of robo-advisers, empirical evidence on their performance and returns, especially during market downturns, is limited. In 2015, SEC Commissioner Kara Stein stated, "Do investors using robo-advisors appreciate that, for all their benefits, robo-advisors will not be on the phone providing counsel if there is a market crash?"⁴⁵⁸ However, a recent study by Liu et al. (2021) looked specifically at the impact of using robo-advisers on investment performance during the 2020 financial crisis caused by the COVID-19 global pandemic.⁴⁵⁹ Using portfolio and transaction data from investors at a Taiwanese mutual fund online investment platform, Liu et al. (2021) found that robo-advice significantly reduced the losses experienced by investors during the crisis and that investors using robo-advice adjusted risk levels and trading to adapt to changes in the market while other investors did not. Younger users and those with less investment experience benefited the most from robo-advice.

7. Reform in the United Kingdom

As regulators in several countries have identified failures in their investment advice markets, they have undertaken a range of regulatory and legislative initiatives that directly address conflicted investment advice. One of the most studied initiatives occurred in the developed pension markets of the United Kingdom, where the Financial Conduct Authority (FCA) issued new regulations effective January 1, 2013, called the Retail Distribution Review (RDR). The U.K. focused its new regulatory regime on more transparent fee-for-service compensation structures. The U.K. enacted an aggressive reform that banned commissions on all retail investment products, not just those

⁴⁴⁹ Christine Benz & Jeremy Glaser, *The Best Ways for Small Investors to Get Advice*, Morningstar (February 21, 2017), <https://www.morningstar.com/articles/794212/the-best-ways-for-smaller-investors-to-get-advice>.

⁴⁵⁰ Deloitte, *The Expansion of Robo-Advisory in Wealth Management*, (2016).

⁴⁵¹ Sarah Holden, Jack VanDerhei, & Steven Bass, *Target Date Funds: Evidence Points to Growing Popularity and Appropriate Use by 401(k) Plan Participants*, Employee Benefit Research Institute (2021).

⁴⁵² The U.K. Financial Conduct Authority, *Evaluation of the Impact of the Retail Distribution Review and the Financial Advice Market Review*, (December 2020), <https://www.fca.org.uk/publication/corporate/evaluation-of-the-impact-of-the-rdr-and-famr.pdf>.

⁴⁵³ The U.K. Financial Conduct Authority (FCA) has highlighted that digital advice can be more convenient for consumers and can offer efficiency and cost benefits to providers. See FCA, *Feedback Statement on Call for Input: Regulatory Barriers to Innovation in Digital and Mobile Solutions* (March 2016), <http://www.fca.org.uk/static/fca/article-type/feedback%20statement/fs16-02.pdf>.

⁴⁵⁴ Michael Wong, *Financial Services: Weighing the Strategic Tradeoffs of the Fiduciary Rule*, Morningstar (February 2017), <https://www.morningstar.com/articles/798573/financial-services-weighing-the-strategic-tradeoffs-of-the-fiduciary-rule>.

⁴⁵⁵ Wealthfront, *Account Minimums to Invest with Wealthfront*, Wealthfront, <https://support.wealthfront.com/hc/en-us/articles/210994423-Account-minimums-to-invest-with-Wealthfront>.

⁴⁵⁶ One example is Betterment. See Betterment, *Pricing at Betterment*, Betterment, <https://www.betterment.com/pricing/>.

⁴⁵⁷ Jennifer Klass & Eric Perelman, *Chapter 3: The Transformation of Investment Advice: Digital Investment Advisors as Fiduciaries, The Disruptive Impact of FinTech on Retirement Systems*, Oxford University Press 38 (2019).

⁴⁵⁸ Kara M. Stein, Comm'r, SEC, *Surfing the Wave: Technology, Innovation, and Competition—Remarks at Harvard Law School's Fidelity Guest Lecture Series*, (November 9, 2015), <https://www.sec.gov/news/speech/surfing-wave-technology-innovation-and-competition-remarks-harvard-law-schools-fidelity>.

⁴⁵⁹ Che-Wei Liu, Mochen Yang, & Ming-Hui Wen, *Judge Me on My Losers: Does Adaptive Robo-Advisors Outperform Human Investors During the COVID-19 Financial Market Crash?*, Production and Operations Management Forthcoming, (Accessed Aug. 31, 2023), <https://doi.org/10.1111/poms.14029>.

related to retirement savings;⁴⁶⁰ required that customers in the U.K. be charged directly for advice; and raised qualification standards for advisers.

In marked contrast to these reforms, the Department's proposal does not ban commissions or eliminate conflicted compensation structures, but rather relies upon conduct standards and oversight structures designed to minimize the harmful impact of conflicts of interest, while permitting a wide range of business practices and models. The Department's proposal represents a middle ground between no reform and the outright bans on conflicted payments, allowing businesses to use a range of compensation practices while minimizing the harmful impact of conflicts of interest on the quality of advice.

Moreover, the Department's proposed regulatory action is narrower than the rules passed by the U.K. as it does not prescribe additional qualification

standards for existing financial advisers or broadly ban commissions. Those rules also sought to overhaul the entire financial advice market, while this rule focuses on advice to retirement investors and seeks to harmonize all advice to retirement investors under a uniform standard and oversight structure including disclosure requirements, rather than the existing patchwork of regulatory standards. Still, an important aim of all these interventions is to reduce incentives for financial advisers to recommend investments that are not in their client's best interest and thereby increase investor confidence in financial advice.

The experience of the U.K. suggests that while there are transitional costs of overhauling the incentive structure and qualifications of the financial advisers, the changes have resulted in a modest increase in the number of adults accessing financial advice as well as their satisfaction with the advice they

are receiving.⁴⁶¹ In general, the U.K., experience, which was more broadly applied, indicates that these reforms will not result in a significant reduction of advice but will instead increase confidence in that advice's value.

8. Cost

To estimate compliance costs associated with the proposal, the Department considers the marginal cost associated with the proposed amendments. The Department estimates that the proposal would impose total costs of \$253.2 million in the first year and \$216.2 million in each subsequent year. The estimated compliance costs associated with the proposed amendments in the rule and PTEs are summarized in the table below. Over 10 years, the costs associated with the proposal would total approximately \$1,553.1 million, annualized to \$221.1 million per year (using a 7 percent discount rate).⁴⁶²

TABLE 4—SUMMARY OF MARGINAL COST AND PER-ENTITY COST BY EXEMPTION

	Total cost	
	First year	Subsequent years
3(21)(A)(ii) of ERISA:		
PTE 2020–02	\$231,518,275	\$197,282,110
PTE 84–24	18,107,613	15,302,629
Mass Amendments:		
PTE 75–1	3,005,854	3,005,854
PTE 77–4	0	0
PTE 80–83	0	0
PTE 83–1	0	0
PTE 86–128	609,487	609,487
Total	253,241,229	216,200,080

The estimated costs associated with each exemption are broken down and explained below. More details can be found in the Paperwork Reduction Act sections of each respective exemption, also published in today's **Federal Register**.⁴⁶³

The quantified costs are significantly lower than costs in the 2016 RIA due to the smaller scope of the proposal relative to the 2016 Final Rule as well

as compliance structures adopted by the industry to reduce conflicted advice in response to state regulations, Regulation Best Interest, PTE 2020–02, and the Department's 2016 Rulemaking. The methodology for estimating the costs of the proposed amendments to the rule and PTEs is consistent with the methodology and assumptions used in the 2020 analysis for the current PTE 2020–02.

Preliminary Assumptions and Cost Estimate Inputs

The Department acknowledges that not all entities would decide to use the amended PTE 2020–02 and PTE 84–24 for transactions resulting from fiduciary investment advice. Some may instead rely on other existing exemptions that better align with their business models. However, for this cost estimation, the Department assumes that all eligible

⁴⁶⁰ “Non-advised” services, or execution-only sales, where no advice or recommendation is given, fall outside of the RDR. Thus, a commission is still permitted for non-advised annuity sales. The FCA is currently examining the risks that exist with the purchase of “non-advised” annuities. Please see: <http://www.fca.org.uk/static/documents/consultation-papers/cp15-30.pdf>.

⁴⁶¹ UK Financial Conduct Authority, *Evaluation of the Impact of the Retail Distribution Review and the Financial Advice Market Review*, U.K. Financial Conduct Authority, (December 2020), <https://www.fca.org.uk/publication/corporate/evaluation-of-the-impact-of-the-rdr-and-famr.pdf>.

⁴⁶² The costs would be \$1,880.2 million over 10-year period, annualized to \$220.4 million per year if a 3 percent discount rate were applied.

⁴⁶³ As noted above, the Department is proposing to amend the following exemptions: PTE 2020–02 (*Improving Investment Advice for Workers & Retirees*), PTE 84–24 (*Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters*), PTE 75–1 (*Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and*

Banks), PTE 80–83 (*Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans*), PTE 80–83 (*Class Exemption for Certain Transactions Involving Purchase of Securities where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties In Interest*), PTE 83–1 (*Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts*) and PTE 86–128 (*Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers*).

entities would use the PTE 2020–02 and PTE 84–24 for such transactions. The Department recognizes that this may result in an overestimate.

The Department does not have information on how many retirement investors—including plan beneficiaries, plan participants, and IRA owners—receive electronic disclosures from investment advice fiduciaries. For the purposes of this analysis, the Department assumes that the percent of retirement investors receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department's 2020 and 2002 electronic disclosure safe harbors.⁴⁶⁴ Accordingly, the Department estimates that 94.2 percent of the disclosures sent to retirement investors would be sent electronically, and the remaining 5.8 percent would be sent by mail.⁴⁶⁵ For disclosure sent by mail, the Department estimates that entities will incur a cost of \$0.66⁴⁶⁶ for postage and \$0.05 per page for material and printing costs.

Additionally, the Department assumes that several types of personnel would perform the tasks associated with information collection requests at an hourly wage rate of \$63.45 for clerical personnel, \$128.11 for a top executive, \$133.05 for a computer programmer, \$158.94 for an insurance sales agent, \$159.34 for a legal professional, \$190.63 for a financial manager, and \$219.23 for a financial adviser.⁴⁶⁷

Finally, the Department assumes affected entities would likely incur only incremental costs if they were already subject to rules or requirements from the Department or another regulator.

⁴⁶⁴ 67 FR 17263 (Apr. 9, 2002); 85 FR 31884 (May 27, 2020).

⁴⁶⁵ The Department estimates 94.2 percent of retirement investors receive disclosures electronically. This is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2 percent) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36 percent).

⁴⁶⁶ United States Postal Service, *First-Class Mail*, United States Postal Service (2023), <https://www.usps.com/ship/first-class-mail.htm>.

⁴⁶⁷ Internal DOL calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see Internal DOL calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates. See Employee Benefits Security Administration, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations*, Employee Benefits Security Administration, <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

Costs Associated With Amendments to Section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 and Section 4975(e)(3)(B) of the Code

As discussed in the Affected Entities section, the proposed amendment to the rule would change the definition of a fiduciary such that some financial institutions previously not considered fiduciaries would be so under the proposed rule. Additionally, some financial institutions, who already provide fiduciary services for some clients or types of services, would be required to act as a fiduciary for more services under the proposed rule.

Entities may incur some cost associated with the proposed amendments to regulations under section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code. While most of the cost incurred would be associated with the proposed amendments to related PTEs, entities who did not previously identify as a fiduciary may also incur some transition costs. These costs would likely differ significantly by type of financial institution. For instance, retail broker-dealers subject to Regulation Best Interest or registered investment advisers subject to the Investment Advisers Act would be closer to satisfying the requirements of a fiduciary under ERISA than an insurance company or independent producer selling annuity products. The Department requests comment on the costs these entities would incur as a result of becoming a fiduciary under this rule, as well as the underlying data to estimate these costs. The Department is particularly interested in costs that would not be incurred in satisfying the requirements to the PTEs, such as legal costs, fiduciary insurance costs, technology costs, human capital costs, or other costs of this nature. The Department also requests comment on how plans would be affected by the proposed rule.

Costs Associated With PTE 2020–02

The Department proposes to amend PTE 2020–02 to require the provision of additional disclosures to retirement investors receiving advice from financial institutions and to provide more guidance for financial institutions and investment professionals complying with the Impartial Conduct Standards and implementing the policies and procedures. This proposal is intended to align with other regulators' rules and standards of conduct. As such, the Department expects that satisfying the proposal would not be unduly burdensome.

Summary of Affected Entities

The entities that the Department expects to be affected by the proposed amendments to the PTE are also affected by the existing PTE 2020–02. The Department estimates that 19,290 financial institutions, composed of 1,894 broker-dealers, 15,982 registered investment advisers,⁴⁶⁸ 183 insurers, 200 pure robo-advisers, 1,011 pension consultants, and 20 investment company underwriters would be affected by the proposed amendments.⁴⁶⁹

The Department recognizes that the proposed amendments may change the number of financial institutions who choose to rely on PTE 2020–02. Consistent with its initial analysis of the exemption in 2020, this analysis assumes that all eligible entities currently rely on the exemption and would continue to rely on the exemption if amended as proposed. As a result, this analysis does not reflect any change in the number of entities relying on the exemption in response to these amendments. The Department requests comment on how the proposed amendments might change the number of affected entities relying on PTE 2020–02.

Additionally, the Department recognizes that entities within the insurance industry are subject to different regulatory regimes, depending on the types of products they offer. The Department does not have data on what proportion of entities are subject to the requirements in the NAIC Model regulation, or obligations subject to regulation by the SEC or state insurance departments. The analysis below considers cost to comply if the entity currently meets none of the requirements. This likely is an overestimate, as many of these entities are already meeting some, if not most, of the requirements of this proposal. The Department requests comments on this assumption.

Costs To Review the Rule

The Department estimates that all of the 19,290 financial institutions discussed above would be affected by the proposed amendments to PTE 2020–02 and would need to review the rule. The Department estimates that such a review would take a legal professional, on average, nine hours to review the rule, resulting in an estimated cost of

⁴⁶⁸ The Department estimates that 15,982 registered investment advisers that do not provide pure robo-advice.

⁴⁶⁹ For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

\$27.7 million in the first year.⁴⁷⁰ This estimate also assumes all effected financial institutions expend the effort, however, that may not be the case as other arrangements may exist where individual financial firms receive compliance assistants from other sources. The Department asks for comments on this estimate.

Costs Associated With General Disclosures for Investors

Costs Associated With Modifications of Existing Disclosure Requirements

As discussed in the preamble, Section II(b) currently requires financial institutions to provide certain disclosures to retirement investors before engaging in a transaction pursuant to the exemption. These disclosures include:

(1) a written acknowledgment that the financial institution and its investment professionals are fiduciaries;

(2) a written description of the services to be provided and any conflicts of interest of the investment professional and financial institution; and

(3) documentation of the financial institution and its investment professional's conclusions as to whether a rollover is in the retirement investor's best interest, before engaging in a rollover or offering recommendations on post-rollover investments.

As discussed in more detail in the preamble and below, the proposed amendments make minor language edits to the existing disclosures.

The proposed amendment makes minor edits to the written acknowledgment that the financial institution and its investment professionals are fiduciaries. Financial institutions would be required to provide a written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I, the Code, or both when making an investment recommendation. This condition would not be met if the fiduciary acknowledgement states that the financial institution and its investment professionals "may" be fiduciaries or would become fiduciaries only "if" or "when" providing fiduciary investment advice as defined under the applicable regulation.

The Department does not have data on how many financial institutions

would need to modify their disclosures in response to this amendment; however, the Department expects that the disclosures required under the existing form of PTE 2020-02 likely satisfy this requirement for most financial institutions covered under the existing exemption. For the purposes of this analysis, the Department assumes that 10 percent of financial entities under the existing exemption would need to update their disclosures and that it would take a legal professional at a financial institution, on average, 10 minutes to update existing disclosures. Robo-advisers, pension consultants, and investment company underwriters, who are not covered under the existing exemption would need to draft the acknowledgement. The Department estimates that it would take a legal professional at these entities, on average, 30 minutes to draft the acknowledgement. Updating and drafting the acknowledgement is estimated to result in a cost of approximately \$0.1 million in the first year.⁴⁷¹

The proposed amendments would also expand on the existing requirement for a written description of the services provided to also require a statement on whether the retirement investor would pay for such services, directly or indirectly, including through third-party payments. The Department assumes it would take a legal professional at a financial institution under the existing exemption 30 minutes to update existing disclosures to include this information. Robo-advisers, pension consultants, and investment company underwriters, who are not covered under the existing exemption, would need to draft a written description of services provided, which the Department estimates would take a legal professional a large institution five hours and a legal professional at a small institution one hour, on average, to

⁴⁷¹ The number of financial entities needing to update their written acknowledgement is estimated as: $(1,894 \text{ broker-dealers} \times 10\%) + (7,570 \text{ SEC-registered investment advisers} \times 10\%) + (8,412 \text{ state-registered investment advisers} \times 10\%) + (183 \text{ insurers} \times 10\%) = 1,806$ financial institutions updating existing disclosures. The number of financial entities needing to draft their written acknowledgement is estimated as: $200 \text{ robo-advisers} + 1,011 \text{ pension consultants} + 20 \text{ investment company underwriters} = 1,231$ financial institutions drafting new disclosures. The burden is estimated as: $(1,806 \text{ financial institutions} \times (10 \text{ minutes} + 60 \text{ minutes})) + (1,231 \text{ financial institutions} \times (30 \text{ minutes} + 60 \text{ minutes})) = 917$ hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: $[(1,806 \text{ financial institutions} \times (10 \text{ minutes} + 60 \text{ minutes})) + (1,231 \text{ financial institutions} \times (30 \text{ minutes} + 60 \text{ minutes}))] \times \$159.34 = \$146,035$.

prepare such a draft.⁴⁷² The Department requests comment on how long it would take entities of varying size to prepare such a disclosure. This results in an estimated cost of approximately \$1.8 million in the first year.⁴⁷³

The Department requests comment on the average time estimates to satisfy each of the new requirements in the proposed amendments.

Costs Associated With New Disclosure Requirements

As amended, PTE 2020-02 would require financial institutions to provide investors with the following additional disclosures:

(1) a written statement of the best interest standard of care owed; and

(2) a written statement that the retirement investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present full and fair disclosure that is materially accurate in scope, magnitude, and nature, sufficient detail to permit the Retirement Investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest, and describes how the Retirement Investor can get the information, free of charge.

Under the Investment Advisers Act and the SEC's Regulation Best Interest, most registered investment advisers and broker-dealers with retail investors already provide disclosures that the

⁴⁷² As discussed in the Regulatory Flexibility Act analysis, the Department estimates that 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters are considered small entities. For more information, refer to the Affected Entities discussion in the Regulatory Flexibility Act section of this document.

⁴⁷³ The number of financial entities needing to update their written description of services is estimated as: $(1,894 \text{ broker-dealers} + 7,750 \text{ SEC-registered investment advisers} + 8,412 \text{ state-registered investment advisers} + 183 \text{ insurers}) = 18,059$ financial institutions updating existing disclosures. The number of financial entities needing to draft their written description of services is estimated as: $(200 \text{ robo-advisers} + 1,011 \text{ pension consultants} + 20 \text{ investment company underwriters}) = 1,231$ financial institutions drafting new descriptions. Of these, 960 financial institutions, or 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters, are considered small entities. For more information, refer to the Affected Entities discussion in the Regulatory Flexibility Act section of this document. The burden is estimated as: $(18,059 \text{ financial institutions} \times (30/60 \text{ hours})) + (960 \text{ small financial institutions} \times 1 \text{ hour}) + [(1,231 \text{ financial institutions} - 960 \text{ small financial institutions}) \times 5 \text{ hours}] = 11,345$ hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: $\{(18,059 \text{ financial institutions} \times (30/60 \text{ minutes})) + (960 \text{ small financial institutions} \times 1 \text{ hour}) + [(1,231 \text{ financial institutions} - 960 \text{ small financial institutions}) \times 5 \text{ hours}]\} \times \$159.34 = \$1,807,712$.

⁴⁷⁰ The burden is estimated as: $(19,290 \text{ entities} \times 9 \text{ hours}) = 173,610$ hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: $(38,580 \text{ entities} \times 9 \text{ hours}) \times \$159.34 = \$27,663,017$.

Department expects would satisfy these requirements.⁴⁷⁴

The Department expects that the written statement of the Best Interest standard of care owed would not take a significant amount of time to prepare and would be uniform across clients. The Department assumes that a legal professional employed by a broker-dealer or registered investment advisers, on average, would take 30 minutes to modify existing disclosures and that it would take insurers, robo-advisers, pension consultants, and investment company underwriters, on average, one hour to prepare the statement. This results in a cost estimate of approximately \$1.7 million in the first year.⁴⁷⁵

The added requirement of a written statement informing the investor of their right to obtain a written description of the financial institution's policies and procedures and information regarding costs, fees, and compensation would require financial institutions to maintain sufficient records to allow them to meaningfully respond to investors' requests to demonstrate how the financial institution and its investment professionals are compensated in connection with their recommendations. The Department expects that many financial institutions' disclosures already substantially comply with this regulation or would require modest adjustments to do so. To satisfy this requirement, the Department estimates that a legal professional for broker-dealers and registered investment advisers would require, on average, 30 minutes to modify existing statements and that it would take insurers, robo-advisers, pension consultants, and investment company underwriters, on average, one hour to prepare the statement. This results in a cost estimate of approximately \$1.7 million in the first year.⁴⁷⁶

⁴⁷⁴ Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019).

⁴⁷⁵ The burden is estimated as: [(1,894 broker-dealers + 15,982 registered investment advisers) × (30 minutes + 60 minutes)] + [(183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) × 1 hour] = 10,352 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,894 broker-dealers + 15,982 registered investment advisers) × (30 minutes + 60 minutes)] + [(183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) × 1 hour] × \$159.34 = \$1,649,488.

⁴⁷⁶ The burden is estimated as: [(1,894 broker-dealers + 15,982 registered investment advisers) × (30 minutes + 60 minutes)] + [(183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) × 1 hour] = 10,352 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the

The Department requests comment on the average time estimates to satisfy each of the new requirements in the proposed amendments.

Costs Associated With the Provision of Disclosures to Retirement Investors

Financial institutions would incur costs associated with preparing and sending the new disclosure requirements. The Department does not have data on the number of retirement investors that have relationships with financial institutions that would engage in transactions covered under the amended exemption. For the purposes of this analysis, the Department uses the number of participants who roll over defined contribution plan assets to IRAs as a proxy for the number of retirement investors that would receive general disclosures. Accordingly, the Department estimates that approximately 3.2 million retirement investors have relationships with financial institutions and are likely to engage in transactions covered under this PTE.⁴⁷⁷

Of these 3.2 million retirement investors, it is assumed that 5.8 percent, or 184,643 retirement investors would receive paper disclosures.⁴⁷⁸ The Department assumes that there would not be a measurable increase in the time burden for a clerical worker to prepare the additional disclosures for individuals already receiving disclosures. The Department estimates that providing the additional disclosures would require two additional pages, resulting in a material cost estimate of \$18,464.⁴⁷⁹

Financial institutions would also incur costs associated with preparing and sending requested written descriptions of policies and procedures and information regarding costs, fees, and compensation. The Department does not have data on how often investors would request this information. The Department assumes that, on average, each financial institution would receive 10 such

following calculation: [(1,894 broker-dealers + 15,982 registered investment advisers) × (30 minutes + 60 minutes)] + [(159 insurers + 200 robo-advisers + 1,060 pension consultants, and 20 investment company underwriters) × 1 hour] × \$159.34 = \$1,649,488.

⁴⁷⁷ The Department estimates the number of affected plans and IRAs to be equal to 50 percent of rollovers from retirement plans to IRAs. As discussed in the Affected Entities section, the Department estimates that there are 6,367,005 total rollovers annually.

⁴⁷⁸ The number of retirement investors receiving paper disclosures is estimated as: (3,183,503 retirement investors × 5.8%) = 184,643 paper disclosures.

⁴⁷⁹ The cost is estimated as: (184,643 paper disclosures × 2 pages) × \$0.05 = \$18,464.

requests annually and that most financial institutions already have such information available. The Department requests comments on the assumption that financial institutions readily have this information available and the time necessary to gather such information. The Department estimates it would take a clerical worker five minutes to distribute, regardless of whether it is sent electronically or by mail. This results in an estimated cost of approximately \$1.0 million.⁴⁸⁰ As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of these disclosures (11,188 disclosures) would be mailed. Financial institutions would incur \$0.66 for postage and \$0.10 for the paper and printing costs of two pages for each of the disclosures, which the Department estimates to cost approximately \$8,503.⁴⁸¹

Summary Costs Associated With the General Disclosures

The Department estimates that the total cost associated with preparing and providing the general disclosures discussed above would be approximately \$6.3 million in the first year and \$1.0 million in subsequent years.⁴⁸²

Costs Associated With Rollover Documentation and Disclosure for Financial Institutions

Compared to the requirements in the existing exemption, the proposed amendment would clarify the rollover disclosure requirements in Sections II(b)(3) and II(c)(3) of PTE 2020-02. Before engaging in a rollover or making

⁴⁸⁰ The burden is estimated as: (19,290 financial institutions × 10 disclosures) × (5 minutes + 60 minutes) = 16,075 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(19,290 financial institutions × 10 disclosures) × (5 minutes + 60 minutes)] × \$63.45 = \$1,019,959.

⁴⁸¹ The cost is estimated as: (19,290 financial institutions × 10 disclosures × 2 pages × \$0.05) + (19,290 financial institutions × 10 disclosures × \$0.66) × (5.8%) = \$8,503.

⁴⁸² The cost in the first year is estimated as: (\$146,035 to prepare the written acknowledgment + \$1,807,633 to prepare the written description of services provided + \$1,649,488 to prepare the written statement of the Best Interest standard of care + \$1,649,488 to prepare the written statement informing the investor of their right to obtain a written description of the financial institution's policies and procedures + \$18,464 to prepare and send disclosures + \$1,019,959 to prepare requested written policies and procedures + \$8,053 for material costs associated with requested policies and procedures) = \$6,299,569. The cost in subsequent years is attributable to the \$18,464 to prepare and send disclosures + \$1,019,959 to prepare requested written policies and procedures + \$8,503 for material costs associated with requested policies and procedures = \$1,046,926. Note that the total value may not equal the sum of the parts due to rounding.

a recommendation to a plan participant as to the post-rollover investment of assets, the investment professional must consider and document their conclusions as to whether a rollover is in the retirement investor's best interest and provide that documentation to the retirement investor. Relevant factors to consider must include but are not limited to:

(i) the alternatives to a rollover, including leaving the money in the plan or IRA, if applicable;

(ii) the comparative fees and expenses;

(iii) whether an employer or other party pays for some or all administrative expenses; and

(iv) the different levels of fiduciary protection, services, and investments available.

As discussed in the Affected Entities section, the Department estimates that 3,119,832 rollovers would be affected by the proposed amendments to PTE 2020–02.⁴⁸³

As a best practice, the SEC already encourages firms to record the basis for significant investment decisions, such as rollovers, although doing so is not required under Regulation Best Interest. In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required. SIFMA commissioned Deloitte to conduct a survey of its member firms to learn how they expected to implement Regulation Best Interest. The survey was conducted by December 31, 2019, prior to Regulation Best Interest's effective date of June 30, 2020. Just over half (52 percent) of the firms surveyed will require their financial advisers to provide best interest rationale documentation for rollover recommendations.⁴⁸⁴ The Department estimates that documenting each rollover recommendation will require 30 minutes for a personal financial adviser whose firms currently do not require rollover documentations and

five minutes for financial advisers whose firms already require them to do so. This results in an estimated annual cost of approximately \$193.8 million.⁴⁸⁵ The Department requests comment on how long such documentation would take.

The Department assumes financial institutions that do not have enhanced technology capabilities for other regulations will take a mixed approach, combining current technology solutions with manual processes. Accordingly, the Department estimates that financial institutions already requiring rollover documentation will face no more than a nominal burden increase, and only to the extent that their current compliance systems do not meet the requirements of this exemption. Those firms currently not documenting rollover recommendations will likely face a larger, but still somewhat limited burden.

Costs Associated With Disclosures for PEPs

Financial institutions providing investment advice for PEPs must give each participating employer an additional disclosure detailing any amounts the financial institution pays to or receives from the PPP or its affiliates, in addition to any conflicts of interest that arise in connection with the investment advice it provides to a PEP. According to filings submitted to the Department as of August 22, 2023, there are 382 PEPs and 134 PPPs.⁴⁸⁶

The Department does not have data on what percent of PEPs would be affected by the exemption. For the purposes of this analysis, the Department assumes that all PEPs would be affected. The Department requests comment on this assumption. The Department assumes that, on average, one financial institution would need to prepare one disclosure for each PEP in the first year. The Department requests comment on this assumption and how frequently PPPs would provide investment advice to a PEP within the framework of the exemption. The Department estimates that, on average, it would take a legal professional at each entity two hours to prepare the disclosure, resulting in a cost of approximately \$0.1 million in the first year.⁴⁸⁷

⁴⁸⁶ For more information on this estimate, refer to the Affected Entities section.

⁴⁸⁷ The burden is estimated as: (382 financial institutions × 2 hours) = 764 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (382 financial institutions × 2 hours) × \$159.34 = \$121,736.

In addition to providing the disclosure described above to each PEP, financial institutions must also provide these disclosures to each participating employer. According to filings submitted to the Department by August 22, 2023, there are 955 employers in PEPs.⁴⁸⁸ The Department assumes that all of these disclosures will be sent electronically. Distributing the disclosures is estimated to take clerical personnel one minute per disclosure, resulting in an estimated cost of approximately \$1,010.⁴⁸⁹

Costs Associated With Annual Report of Retrospective Review for Financial Institutions

PTE 2020–02 currently requires financial institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of, and achieve compliance with the conditions of this exemption, the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. The Department is clarifying that the Financial Institution must update the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with the exemption. Under the original exemption, financial institutions were already required to maintain their policies and procedures. The Department's estimates for any additional cost for entities updating their policies and procedures are discussed in the discussion of costs associated with written policies and procedures for financial institutions, below.

Robo-advisers, pension consultants, and investment company underwriters, who are not covered under the existing exemption, would incur costs associated with conducting the annual review. The Department does not have data on how many would incur costs associated with this requirement; however, the Department expects that many of these entities already develop an audit report. The Department assumes that 10 percent of these entities do not currently

⁴⁸³ For more information on how the number of IRA rollover is estimated, refer to the Affected Entities section. In light of ongoing litigation, the Department is assuming for purposes of this discussion that all Affected Entities will become subject to these requirements, regardless of whether they currently provide fiduciary investment advice.

⁴⁸⁴ Deloitte, *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package*, Deloitte, (Mar. 6, 2020).

⁴⁸⁵ The burden is estimated as: (3,119,833 rollovers × 48% × (30 minutes + 60 minutes)) + (3,119,833 rollovers × 52% × (5 minutes + 60 minutes)) = 883,953 hours. A labor rate of \$219.23 is used for a personal financial adviser. The labor rate is applied in the following calculation: (3,119,833 rollovers × 48% × (30 minutes + 60 minutes)) + (3,119,833 rollovers × 52% × (5 minutes + 60 minutes)) × \$219.23 = \$193,788,961.

⁴⁸⁸ Estimates are based on 2021 EFAST filings as of August 22, 2023. The inaugural filing deadline for Form 5500 filings for PEPs with plan years beginning after January 1, 2021 was July 31, 2022. The Department based its estimates on those filings it had received by August 22, 2023. However, since this is the first year PEPs could file, the Department anticipates that this understates the true number of PEPs affected by this proposed rule.

⁴⁸⁹ The burden is estimated as: (955 employers × (1 minute + 60 minutes)) = 16 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (955 employers × (1 minute + 60 minutes)) × \$63.45 = \$1,010.

produce an audit report, while the remaining 90 percent would need to make modifications to satisfy the requirements. This results in an estimate of 123 entities not currently producing audit reports, of which 96 are small entities and 27 are large entities.⁴⁹⁰ The Department requests comment on this assumption.

The Department estimates that it would take a legal professional five hours for small firms and ten hours for large firms to produce a retrospective review report, resulting in an estimated cost of \$0.1 million.⁴⁹¹ The Department estimates that it would take a legal professional one hour for small firms and two hours for large firms to modify existing reports, on average. This results in an estimated cost of \$0.2 million.⁴⁹²

The Department estimates it will take a certifying officer two hours for small firms and four hours for large firms to review the report and certify the exemption, resulting in an estimated cost burden of approximately \$0.6 million.⁴⁹³

The results in a total cost annual cost of \$0.9 million.⁴⁹⁴

⁴⁹⁰ The number of total entities affected is estimated as: (200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) $\times$ 10% = 123 entities. As discussed in the Regulatory Flexibility Act analysis of this document, 10-robo advisers, 930 pension consultants, and 20 investment company underwriters are estimated to be small entities. The number of small entities affected is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) $\times$ 10% = 96 small entities.

⁴⁹¹ The burden is estimated as: (96 financial institutions $\times$ 5 hours) + (27 financial institutions $\times$ 10 hours) = 750 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(96 financial institutions $\times$ 5 hours) + (27 financial institutions $\times$ 10 hours)] $\times$ \$159.34 = \$119,505.

⁴⁹² The number of total entities affected is estimated as: (200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) $\times$ 90% = 1,108 entities. As discussed in the Regulatory Flexibility Act analysis of this document, 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters are estimated to be small entities. The number of small entities affected is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) $\times$ 90% = 864 small entities. The burden is estimated as: (905 financial institutions $\times$ 1 hours) + (248 financial institutions $\times$ 2 hours) = 1,401 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(864 financial institutions $\times$ 1 hour) + (244 financial institutions $\times$ 2 hours)] $\times$ \$159.34 = \$215,428.

⁴⁹³ The burden is estimated as: (960 financial institutions $\times$ 2 hours) + ((1,231 – 960 financial institutions) $\times$ 4 hours) = 3,004 hours. A labor rate of \$190.63 is used for a top executive. The labor rate is applied in the following calculation: [(960 financial institutions $\times$ 2 hours) + ((1,231 – 960 financial institutions) $\times$ 4 hours)] $\times$ \$190.63 = \$572,653.

⁴⁹⁴ This is estimated as: (\$119,505 + \$215,428 + \$572,653) = \$907,586.

Costs Associated With Written Policies and Procedures for Financial Institutions

The time required to establish, maintain, and enforce written policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards would depend on the size and complexity as of the financial institution. The Department estimates that this would take a legal professional 10 hours at a large firm and five hours at a small firm in the first year and 30 minutes in subsequent years.⁴⁹⁵ The Department assumes that most financial institutions affected by the existing exemption likely already satisfy much of this requirement, as it would be a customary business practice to periodically review required policies and procedures.

The proposed amendments would also require financial institutions to provide their complete policies and procedures to the Department upon request. Based on the number of past cases as well as current open cases that would merit such a request, the Department estimates that the Department would request 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. The Department assumes that a clerical worker would prepare and send their complete policies and procedures to the Department and that it would take them 15 minutes. The Department requests comment on these assumptions. The Department estimates that the requirement would result an estimated cost of approximately \$2,600 in the first year⁴⁹⁶ and \$790 in subsequent years.⁴⁹⁷ The Department assumes financial institutions would send the documents electronically and thus would not incur costs for postage or materials.

This results in a total cost of \$2.6 million in the first year and \$1.5 million in subsequent years.⁴⁹⁸

⁴⁹⁵ As discussed in the Regulatory Flexibility Act analysis, the Department estimates that 960 entities, consisting of 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters, are considered small entities. For more information, refer to the Affected Entities discussion in the Regulatory Flexibility Act section of this document.

⁴⁹⁶ The burden is estimated as: (165 $\times$ (15 minutes + 60 minutes)) = 41 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (165 $\times$ (15 minutes + 60 minutes)) $\times$ \$63.45 = \$2,617.

⁴⁹⁷ The burden is estimated as: (50 $\times$ (15 minutes + 60 minutes)) = 12.5 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (50 $\times$ (15 minutes + 60 minutes)) $\times$ \$63.45 = \$793.

⁴⁹⁸ The cost in the first year is estimated as: (\$2,635,404 + \$2,617) = \$2,638,021. The cost in

Summary of Total Cost for the Proposed Amendments to PTE 2020–02

The Department estimates that in order to meet the additional conditions of the amended PTE 2020–02, affected entities would incur a total cost of \$231.6 million and a per-firm cost of \$12,002 in the first year and a total cost of \$197.3 million and a per-firm cost of \$10,227 in subsequent years.⁴⁹⁹

Costs Associated With PTE 84–24

Currently, PTE 84–24 provides an exemption for insurance agents, insurance brokers, and pension consultants to receive a sales commission from an insurance company for the purchase of an insurance or annuity contract with plan or IRA assets. Relief is also provided for a principal underwriter for an investment company registered under the Investment Company Act of 1940 to receive a sales commission for the purchase of securities issued by the investment company with plan or IRA assets.

The Department is proposing an amendment to PTE 84–24 that would exclude many investment advice fiduciaries from the existing relief. Except for independent producers, fiduciary advisers would be expected to rely on the relief provided by PTE 2020–02, rather than PTE 84–24. The proposed amendment would provide exemptive relief to fiduciaries who are independent producers that recommend annuities from an unaffiliated financial institution to retirement investors. Relief for independent producers depends on protective conditions that substantially mirror those contained in PTE 2020–02. The conditions are tailored to protect retirement investors from the specific conflicts that arise for independent producers who are compensated through commissions when providing investment advice to retirement investors regarding the purchase of an annuity.

The Department recognizes that entities within the insurance industry are subject to different regulatory regimes, depending on the types of products they offer. The Department does not have data what proportion of

subsequent years is estimated as: (\$1,536,834 + \$793) = \$1,537,627.

⁴⁹⁹ The first-year total cost includes: (\$27,663,017 for rule review + \$6,422,616 for general disclosures + \$193,788,961 for rollover disclosures + 907,585 for the retrospective review + \$2,736,095 for policies and procedures) = \$231,518,275. The total cost in subsequent years includes: (\$1,047,936 for general disclosures + \$193,788,961 for rollover disclosures + 907,585 for the retrospective review + \$1,537,627 for policies and procedures) = \$197,282,110. Note, the total values may not equal the sum of the parts due to rounding.

entities are subject to the requirements in the NAIC Model regulation, SEC, or state insurance departments. The analysis below considers the full cost of compliance. This likely is an overestimate, as many of these entities are already meeting some, if not most, of the requirements of this proposal. The Department requests comment on this assumption.

Summary of Affected Entities

The Department expects that 5,246 financial entities would be affected by the proposed amendments, consisting of 1,011 pension consultants, 10 investment company principal underwriters that service plans, 10 investment company principal underwriters that service IRAs, 4,000 independent producers, and 215 insurance companies would be affected by the proposed amendments to PTE 84–24.⁵⁰⁰ Additionally, the Department estimates that 1,722 plans would be affected by the proposed amendments.⁵⁰¹

Costs to Rule Review

The Department estimates that the financial entities—including pension consultants, investment company principal underwriters, and insurance companies—currently relying on the exemption and independent producers affected by the proposed amendments would need to review the rule. The Department estimates that such a review will take a legal professional, on average, two hours to review the rule, resulting in an estimated cost of approximately \$1.7 million.⁵⁰²

Costs Associated With Disclosures for Investors

The proposed amendment would require independent producers to provide disclosures to retirement investors before engaging in a transaction covered by this exemption. Under the proposed amendments, independent producers seeking relief would be required to provide:

- a written fiduciary acknowledgement,
- a written statement of the Best Interest standard of care owed,
- a written description of the service provided by the independent producer

and the products they are licensed to sell,

- a written statement of the independent producer's material conflicts of interest and the amount of insurance commission paid in connection with the purchase by a retirement investor of the recommended annuity, and
- a written explanation of whether a rollover is in the retirement investor's best interest before engaging in a rollover or making a recommendation to a plan participant.

Costs Associated With Preparing General Disclosure Documents

For more generalized disclosures, the Department assumes that insurance companies would prepare and provide disclosures to independent producers selling their products. However, some of the disclosures are tailored specifically to the independent producer. For these, the Department assumes that the disclosure would need to be prepared by the independent producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures and that the costs associated with the preparation would be covered by a commission retained by the intermediary for its services. The costs for the intermediary to prepare the disclosure may result in an increase in commission. The Department expects that this increase in commission would not exceed the cost of preparing the disclosure in house.

The Department is including model language in the preamble to PTE 84–24 that details what should be included in fiduciary acknowledgment for financial institutions. The Department assumes that the time associated with preparing the disclosures would be minimal. Further, these disclosures are expected to be uniform in nature. Accordingly, the Department estimates that these disclosures would not take a significant amount of time to prepare.

Due to the nature of independent producers, the Department assumes that most financial institutions would make draft disclosures available to independent producers, pertaining to their fiduciary status. However, the Department expects that a small percentage of independent producers may draft their own disclosures. The Department assumes that an in-house attorney for all 215 insurance companies and 5 percent of independent producers, or 200 independent producers, would spend 10 minutes of legal staff time to produce a written acknowledgement in the first year. This results in an estimated cost of

approximately \$11,000 in the first year.⁵⁰³

Regarding the required written statement of the Best Interest standard of care owed by the independent producer, the Department similarly assumes that most financial institutions would make draft disclosures available to independent producers. The Department assumes that an in-house attorney for all 215 insurance companies and 5 percent of independent producers, or 200 independent producers, would spend 30 minutes of legal staff time to prepare the statement in the first year. This results in an estimated cost of approximately \$33,100 in the first year.⁵⁰⁴

The written description of the services provided and the products the independent producer is licensed to sell would likely need to be produced by the independent producer. The Department recognizes that many independent producers may not have the internal resources to prepare such disclosure. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost to the independent producer. The Department requests comment on this assumption.

Accordingly, the Department assumes that all 4,000 independent producers in this analysis would need to prepare the disclosure. The Department assumes that for each of these independent producers, an attorney would spend 30 minutes of legal staff time drafting the written description. This results in an estimated cost of approximately \$0.3 million in the first year.⁵⁰⁵

⁵⁰³ The burden is estimated as: (215 insurance companies + 200 independent producers) × (10 minutes + 60 minutes) = 69 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(215 insurance companies + 200 independent producers) × (10 minutes + 60 minutes)] × \$159.34 = \$11,021.

⁵⁰⁴ The burden is estimated as: (215 insurance companies + 200 independent producers) × (30 minutes + 60 minutes) = 208 hours. A labor rate of approximately \$159.43 is used for a legal professional. The labor rate is applied in the following calculation: [(215 insurance companies + 200 independent producers) × (30 minutes + 60 minutes)] × \$159.34 = \$33,063.

⁵⁰⁵ The burden is estimated as: (4,000 independent producers × (30 minutes + 60 minutes)) = 2,000 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (4,000 independent

⁵⁰⁰ For more information on how the number of each entity type is calculated, refer to the Affected Entities section.

⁵⁰¹ For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

⁵⁰² The burden is estimated as: (5,246 entities × 2 hours) = 10,492 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (5,246 entities × 2 hours) × \$159.34 = \$1,671,795.

Similarly, the Department expects that the statement of the independent producer's material conflicts of interest and the amount of insurance commission paid in connection with the purchase by a retirement investor of the recommended annuity would need to be prepared by the individual producer. As with the written statement on the description of services, the Department recognizes that many independent producers may not have the internal resources to prepare such disclosures, however they may already have similar statements to satisfy other legal requirements. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost to the independent producer. The Department requests comment on this assumption.

Accordingly, the Department assumes that all 4,000 independent producers in this analysis would need to prepare the disclosure. The Department assumes that, for each of these entities, an attorney would spend one hour of legal staff time drafting the written description. This results in an estimated cost of approximately \$0.6 million the first year.⁵⁰⁶

Costs Associated With Documenting Whether a Rollover Is in the Investor's Best Interest, Before Recommending an Annuity, Engaging in a Rollover, or Making a Recommendation to a Plan Participant as to the Post-Rollover Investment of Assets Currently Held in a Plan

In addition, the proposed amendment would require an independent producer to provide a disclosure to investors that documents their consideration as to whether a recommended annuity or rollover is in the retirement investor's best interest. Due to the nature of this disclosure, the Department assumes that the content of the disclosure would need to be prepared by the independent producer. The Department recognizes that some may rely on intermediaries in the distribution channel, and some may

producers $\times$ (30 minutes + 60 minutes)) $\times$ \$159.34 = \$318,680.

⁵⁰⁶ The burden is estimated as: (4,000 independent producers $\times$ 1 hour) = 4,000 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (4,000 independent producers $\times$ 1 hour) $\times$ \$159.34 = \$637,360.

seek external legal support to assist with drafting the disclosures. However, the Department expects that most independent producers would prepare the disclosure themselves. The Department requests comment on this assumption.

The Department estimates that 52,449 retirement investors would receive documentation on whether the recommended annuity is in their best interest each year.⁵⁰⁷ The Department assumes that, for each of these retirement investors, an independent producer would spend one hour of a financial manager's time drafting the documentation. This results in an estimated cost of approximately \$8.3 million annually.⁵⁰⁸

Costs Associated With the Provision of Disclosures to Retirement Investors

The Department does not have data on the number of retirement investors that have relationships with independent producers that would engage in transactions covered under the exemption. For the purposes of this analysis, the Department uses its estimate for the number of new IRA accounts held by insurance companies as a proxy for the number of retirement investors that have relationships with independent producers that would engage in transactions covered under the exemption. As such, the Department estimates that 52,449 retirement investors would receive documentation on whether the recommended annuity is in their best interest each year.⁵⁰⁹

As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of disclosures sent to retirement investors would be mailed. Accordingly, of the estimated 52,449 affected retirement investors, 3,042 retirement investors are estimated to receive paper disclosures.⁵¹⁰ For paper copies, a clerical staff member is assumed to require five minutes to prepare and mail the required information to the retirement investor. This requirement results in an estimated

⁵⁰⁷ For information on this estimate, refer to the estimate of IRAs affected by the proposed amendments to PTE 84–24 in the Affected Entities section.

⁵⁰⁸ The burden is estimated as: (52,449 rollovers $\times$ 1 hour) = 52,449 hours. A labor rate of approximately \$158.94 is used for an independent producer. The labor rate is applied in the following calculation: (52,449 rollovers $\times$ 1 hour) $\times$ \$158.94 = \$8,336,244.

⁵⁰⁹ For information on this estimate, refer to the estimate of IRAs affected by the proposed amendments to PTE 84–24 in the Affected Entities section.

⁵¹⁰ This is estimated as: (52,449 retirement investors $\times$ 5.8%) = 3,042 paper disclosures.

labor cost of approximately \$16,100.⁵¹¹ The Department assumes that this information would include seven pages, resulting annual cost burden for material and paper costs of approximately \$3,100.⁵¹²

Additionally, independent producers would be required to send the documentation to the insurance company. The Department expects that such documentation would be sent electronically and result in a de minimis burden. The Department requests comment on this assumption.

Summary Costs Associated With Disclosures

The estimates described above result in a total cost estimate of \$9.4 million in the first year and \$8.4 million in subsequent years.⁵¹³

Costs Associated With Policies and Procedures

The proposed amendment would require insurance companies to establish, maintain, and enforce written policies and procedures to review each recommendation from an independent producer before an annuity is issued to a retirement investor. The insurance company's policies and procedures must mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the independent producer to place its interests, or those of the insurance, or any affiliate or related entity, ahead of the interests of the retirement investor. Insurance companies' policies and procedures include a prudent process for determining whether to authorize an independent producer to sell the insurance company's annuity contracts to retirement investors, and for taking

⁵¹¹ This is estimated as: (3,042 paper disclosures $\times$ (5 minutes + 60 minutes)) = 253.5 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (3,042 paper disclosures $\times$ (5 minutes + 60 minutes)) $\times$ \$63.45 = \$16,085.

⁵¹² This is estimated as: 3,042 rollovers resulting in a paper disclosure $\times$ [\$0.66 postage + (\$0.05 per page $\times$ 7 pages)] = \$3,072.

⁵¹³ The cost in the first year is estimated as: (\$11,021 for the disclosure confirming fiduciary status + \$33,063 for the written statement of the Best Interest standard of care + \$318,680 for the written description of services provided + \$637,360 for the statement on material conflicts of interest and commissions paid + \$8,336,244 for the rollover disclosure + \$16,085 to prepare and send disclosures + \$3,072 for material and postage costs) = \$9,355,525. The cost in subsequent years is estimated as: (\$8,336,244 for the rollover disclosure + \$16,085 to prepare and send disclosures + \$3,072 for material and postage costs) = \$8,355,401. Note, the total values may not equal the sum of the parts due to rounding.

action to protect retirement investors from independent producers who have failed or are likely to fail to adhere to the impartial conduct standards, or who lack the necessary education, training, or skill. Finally, insurance companies must provide their complete policies and procedures to the Department within 10 days upon request.

These requirements are consistent with, though more protective than, the requirements in NAIC Model Regulation 275. Model Regulation 275 has been updated and revised several times; however, both the 2010 Model Regulation 275⁵¹⁴ and the 2020 revisions to Model Regulation 275⁵¹⁵ include a requirement to “establish and maintain procedures for the review of each recommendation prior to issuance of an annuity.”⁵¹⁶ While the 2010 version required such procedures “are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable,”⁵¹⁷ the 2020 version requires such procedures are “are designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer’s financial situation, insurance needs and financial objectives.”⁵¹⁸ The 2020 revisions impose a higher best interest standard, compared to the suitability standard in 2010 standard.

Most states have adopted some form of the Model Regulation 275, and, to date, 39 states have adopted the most recent version.⁵¹⁹ The Harkin amendment, Section 989J of the Dodd-Frank Act requires states to adopt rules

that meet or exceed the minimum requirements of model regulation modifications within five years of adoption.⁵²⁰

While many insurance companies may have policies and procedures in place that would largely satisfy the requirements of the proposed amendments, the Department expects that many would need to change and improve policies and procedures to be fully compliant. The Department requests comment on how extensive and costly changes to existing policies and procedures would need to be, both in terms of establishing and updating policies and procedures and in terms of the annual review in subsequent years.

The Department expects that satisfying this requirement would be more time consuming for larger entities due to the complexity of their business. The Department assumes that, for each large insurance company, an in-house attorney would spend on average, 10 hours of legal staff time drafting or modifying the policies and procedures, and for each small insurance company, an in-house attorney would spend on average, five hours of legal staff time. This results in an estimated cost of approximately \$0.2 million in the first year.⁵²¹ The Department requests comment on this assumption.

In the following years, the Department assumes for each insurance company, an in-house attorney would spend two hours of legal staff time reviewing. This results in an estimated cost of approximately \$68,500 in subsequent years.⁵²²

The proposed rule would also require insurance companies to review each of the independent producer’s recommendations before an annuity is issued to a retirement investor to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Given the requirements established in both the 2010 and 2020 versions of Model Regulation 275, the Department expects that reviewing recommendations before an annuity is

issued is common industry practice. Accordingly, the Department expects that for those insurance companies already complying with Model Regulation 275, the cost to review and comply with the proposed amendment would be small. The Department lacks data on how many recommendations are already reviewed or how many additional recommendations would need to be reviewed based on this proposal. The Department requests data and comment to inform its estimate.

The proposed amendments would also require insurance companies to provide their complete policies and procedures to the Department upon request. As discussed above for PTE 2020–02, the Department estimates that it would request 165 policies and procedures in the first year and 50 in subsequent years. Assuming that the number of requests for the entities covered under PTE 2020–02 is equivalent to the number of requests for the entities covered under PTE 84–24, the Department assumes that it will request two policies and procedures from insurers in the first year and one request in subsequent years, on average.⁵²³ This results in an estimated cost of approximately \$30 in the first year⁵²⁴ and \$15 in subsequent years.⁵²⁵

The Department believes that policies and procedures requested by the Department under the proposed PTE 84–24 would be accounted for in the paperwork burden of PTE 2020–02. Accordingly, this analysis does not include an additional burden.

The Department estimates that satisfying the requirements described above would result in an estimated total cost of approximately \$0.2 million in first year and \$68,500 in subsequent years.⁵²⁶

⁵¹⁴ NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2010), <https://naic.soutrnglobal.net/Portal/Public/en-GB/RecordView/Index/25201>.

⁵¹⁵ NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2010), <https://naic.soutrnglobal.net/Portal/Public/en-GB/RecordView/Index/25201>; NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2020).

⁵¹⁶ This language was included in both the 2010 and 2020 versions of Model Regulation 275. See NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2010), <https://naic.soutrnglobal.net/Portal/Public/en-GB/RecordView/Index/25201>; NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2020).

⁵¹⁷ NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2010), <https://naic.soutrnglobal.net/Portal/Public/en-GB/RecordView/Index/25201>.

⁵¹⁸ NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2020), <https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf>.

⁵¹⁹ Based on internal Department analysis, the modified Model Regulation #275, including a best interest standard, was adopted by Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

⁵²⁰ NAIC, *Suitability in Annuity Transactions Model Regulation* (#275) Best Interest Standard of Conduct Revisions Frequently Asked Question, (May 2021).

⁵²¹ This is estimated as: (177 small insurance companies × 5 hours) + (38 large insurance companies × 10 hours) = 1,265 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(177 small insurance companies × 5 hours) + (38 large insurance companies × 10 hours)] × \$159.34 = \$201,565.

⁵²² This is estimated as: (215 insurance companies × 2 hours) = 430 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (215 insurance companies × 2 hours) × \$159.34 = \$68,516.

⁵²³ The number of requests in the first year is estimated as 215 insurance companies × (165 requests in PTE 2020–02/19,290 financial institutions in PTE 2020–02) = 2 requests. The number of requests in subsequent years is estimated as: 215 insurance companies × (50 requests in PTE 2020–02/19,290 financial institutions in PTE 2020–02) = 1 request.

⁵²⁴ The burden is estimated as: (2 × (15 minutes + 60 minutes)) = 0.5 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (2 × (15 minutes + 60 minutes)) × \$63.45 = \$32.

⁵²⁵ The burden is estimated as: (1 × (15 minutes + 60 minutes)) = 0.25 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (1 × (15 minutes + 60 minutes)) × \$63.45 = \$16.

⁵²⁶ The cost in the first year is estimated as: (\$201,565 to develop policies and procedures + \$32 to provide policies and procedures upon request) = \$201,597. The cost in subsequent years is estimated as: (\$68,516 to review policies and procedures + \$16 to provide policies and procedures upon request) = \$68,532. Note, the total values may not equal the sum of the parts due to rounding.

Costs Associated With Retrospective Review

The proposed amendment would require insurance companies to conduct a retrospective review at least annually. The review would be required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review would be required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. The retrospective review must also include a review of independent producers' rollover recommendations and the required rollover disclosure. As part of this review, the insurance company must prudently determine whether to continue to permit individual independent producers to sell the insurance company's annuity contracts to retirement investors. Additionally, the insurance company must update the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and comply with the exemption.

The insurance company annually must provide a written report to a Senior Executive Officer which details the review. The Senior Executive must annually certify that (A) the officer has reviewed the report of the retrospective review report; (B) the insurance company has, within 90 days of discovery, reported to the Department of the Treasury any non-exempt prohibited transaction discovered by the insurance company in connection with investment advice covered under Code section 4975(e)(3)(B), advised the independent producer of the violation and any resulting excise taxes owed under Code section 4975, and notified the Department of Labor of the violation via email; (C) the insurance company has established policies and procedures prudently designed to ensure that independent producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and (D) the insurance company has in place a prudent process to modify such policies and procedures.

Insurers would also be required to provide the independent producer with the underlying methodology and results

of the retrospective review. The Department assumes that the insurance company would provide the methodology and results electronically.

The Department lacks data on the average number of independent producers selling annuities per insurance company. For the purposes of this analysis, the Department assumes that, on average, each independent producer sells the products of three insurance companies. From each of these insurance companies, they may sell multiple products. As such, the Department assumes that each year, insurance companies would need to prepare a total 12,000 retrospective reviews,⁵²⁷ or on average, each insurance company would need to prepare approximately 56 retrospective reviews.⁵²⁸ The Department requests comment on this estimate.

The Department assumes that, for each independent producer selling an insurance company's products, an in-house attorney at the insurance company would spend one hour of legal staff time, on average, conducting and drafting the retrospective review. This results in an estimated cost of approximately \$1.9 million.⁵²⁹

The Department assumes it would take a Senior Executive Officer 15 minutes to review and certify the report. This results in an estimated annual cost of approximately \$0.4 million.⁵³⁰

The Department assumes that the insurance company would provide the methodology and results electronically. The Department requests comment on this assumption. The Department estimates that it would take clerical staff five minutes each to prepare and send each of the estimated 12,000 retrospective reviews. This results in an estimated annual cost of approximately \$63,500.⁵³¹ The Department expects that the results would be provided

⁵²⁷ This is estimated as: (4,000 independent producers × 3 insurance companies covered) = 12,000 retrospective reviews.

⁵²⁸ This is estimated as: (12,000 retrospective reviews/215 insurance companies) = 55.8 retrospective reviews, on average.

⁵²⁹ This is estimated as: (12,000 retrospective reviews × 1 hour) = 12,000 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (12,000 retrospective reviews × 1 hour) × \$159.34 = \$1,912,080.

⁵³⁰ This is estimated as: (12,000 retrospective reviews × (15 minutes ÷ 60 minutes)) = 3,000 hours. A labor rate of \$128.11 is used for a senior executive officer. The labor rate is applied in the following calculation: (12,000 retrospective reviews × (15 minutes ÷ 60 minutes)) × \$128.11 = \$384,330.

⁵³¹ This is estimated as: (12,000 retrospective reviews × (5 minutes ÷ 60 minutes)) = 1,000 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (12,000 retrospective reviews × (5 minutes ÷ 60 minutes)) × \$63.45 = \$63,450.

electronically, thus the Department does not expect there to be any material costs with providing independent producers with the retrospective review.

The Department estimates that satisfying the requirements for retrospective reviews would result in an estimated total annual cost of approximately \$2.4 million.⁵³²

Costs Associated With Recordkeeping

The proposed amendment would change the current recordkeeping requirements to incorporate a new provision that is similar to the recordkeeping provision in PTE 2020–02. This requirement would replace the more limited existing recordkeeping requirement in the current version of PTE 84–24, which requires sufficient records to demonstrate that the conditions of the exemption have been met. The Department does not have data on how many pension consultants, insurance companies, and investment company principal underwriters would continue to rely on PTE 84–24 as amended without also complying with the amended PTE 2020–02. In this analysis, the Department assumes that all of the pension consultants and investment company principal underwriters continuing to rely on the amended PTE 84–24 would also rely on the amended on the PTE 2020–02. Thus, to avoid double counting the compliance cost, this analysis does not include the cost associated with the proposed recordkeeping requirement for these entities.

For this analysis, the Department only considers the cost for insurance companies and independent producers complying with the proposed recordkeeping requirements. The Department estimates that the additional time needed to maintain records to be consistent with the exemption would require an independent producer two hours, resulting in an estimated cost of \$1.3 million.⁵³³

The proposed amendment would require fiduciaries engaging in all transactions covered by the exemption to maintain records necessary for the

⁵³² The annual cost is estimated as: (\$1,912,080 to conduct the retrospective review + \$384,330 for the review of the retrospective review + \$63,450 for the provision of the report to Independent Producers) = \$2,359,860.

⁵³³ This is estimated as: (4,000 independent producers + 215 insurance companies) × 2 hours = 8,430 hours. A labor rate of \$158.94 is used for an independent producer and \$159.34 for a legal professional at an insurance company. The labor rate is applied in the following calculation: (4,000 independent producers × 2 hours × \$159.34) + (215 insurance companies × 2 hours × \$158.94) = \$1,340,036.

following entities to determine whether the conditions of this exemption have been met.

(1) any authorized employee of the Department or the IRS or another state or federal regulator,

(2) any fiduciary of a plan that engaged in a transaction pursuant to this exemption,

(3) any contributing employer and any employee organization whose members are covered by a plan that engaged in a transaction pursuant to this exemption, or

(4) any participant or beneficiary of a plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

The Department does not have data on how often independent producers would receive requests for records. For the purposes of this analysis, the Department assumes that, on average, independent producer would receive 10 requests per year and that preparing and sending each request would take a legal professional, on average, 30 minutes. Based on these assumptions, the Department estimates that the proposed amendments would result in an annual cost of approximately \$3.2 million.⁵³⁴ The Department requests comment on how often financial institutions would receive requests for records, who would prepare such reports, and how long the preparation of such records would take.

This results in a total annual cost of \$4.5 million associated with recordkeeping.⁵³⁵

Summary of Total Cost for the Proposed Amendments to PTE 84–24

The Department estimates that in order to meet the additional conditions of the amended PTE 84–24, affected entities would incur a total cost of \$18.1 million in the first year and \$15.3 million in subsequent years.⁵³⁶

⁵³⁴ The burden is estimated as: (4,000 independent producers × 10 requests) × (30 minutes + 60 minutes) = 20,000 hours. A labor rate of \$158.94 is used for an independent producer. The labor rate is applied in the following calculation: [(4,000 independent producers × 10 requests) × (30 minutes + 60 minutes)] × \$158.94 = \$3,178,800.

⁵³⁵ The annual cost is estimated as: (\$1,340,036 to maintain records + \$3,178,800 to distribute records) = \$4,518,836.

⁵³⁶ The first-year total cost includes: (\$1,671,795 for rule review + \$9,355,525 for general disclosures + \$201,597 for policies and procedures + \$2,359,860 for the retrospective review + \$4,518,836 for recordkeeping) = \$18,107,613. The total cost in subsequent years includes: (\$8,355,401 for disclosures + \$68,532 for policies and procedures + \$2,359,860 for the retrospective review + \$4,518,836 for recordkeeping) = \$15,302,629. Note, the total values may not equal the sum of the parts due to rounding.

Costs Associated With the Mass Amendments

The following analysis summarizes the proposed changes and associated costs to PTE 75–1, PTE 77–4, PTE 1980–3, and 86–128. For more information on the cost estimates, refer to the Paperwork Reduction Act statements for the proposed amendments, published elsewhere in today's edition of the **Federal Register**.

Costs Associated With PTE 75–1 Summary of Affected Entities

The amendment to PTE 75–1 would affect banks, reporting dealers, and broker-dealers registered under the Security Exchange Act of 1934. As discussed in the Affected Entities section above, the Department estimates that 1,894 broker-dealers and 2,048 banks would use PTE 75–1.⁵³⁷

Costs Associated With Disclosure Requirements in Part V

The Department proposes to amend PTE 75–1 Part V to allow an investment advice fiduciary to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if (1) the potential failure of the purchase or sale of the securities is not caused by such fiduciary or an affiliate, and (2) the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties. Prior to the extension of credit, the plan or IRA receives written disclosure, including the interest rate or other fees that will be charged on the credit extension as well as the method of determining the balance upon which interest will be charged. The Department believes that it is a usual and customary business practice to maintain records required to demonstrate compliance with SEC-mandated disclosure distribution regulations. The Department believes that this new requirement is consistent with the disclosure requirement mandated by the SEC in 17 CFR 240.10b-16(1) for margin transactions.⁵³⁸ Therefore, the Department concludes that this

⁵³⁷ For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

⁵³⁸ Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 258, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

requirement produces no additional burden to the public.

Costs Associated With Recordkeeping in Parts II and V

The Department is also amending PTE 75–1 Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRAs to financial institutions. The amended class exemption requires financial institutions engaging in the exempted transactions (rather than the plans or IRAs) to maintain all records pertaining to such transactions for six years and provide access to the records upon request to the specified parties.

The Department has estimated that the amount of time needed for financial professional to maintain records for the financial institutions to be consistent with the exemption and to make the record available for inspection would require four hours, on average, resulting in an estimated cost of \$3.0 million.⁵³⁹

Costs Associated With Removing Fiduciary Investment Advice From Parts III and IV

Finally, the Department is proposing to amend PTE 75–1 Parts III and IV, which currently provide relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide records and documentation under PTE 2020–02, this amendment would not result in additional costs.

Summary of Total Cost for the Proposed Amendments to PTE 75–1

The Department estimates that in order to meet the additional conditions of the amended PTE 75–1, affected entities would annually incur a total cost of \$3.0 million.⁵⁴⁰

Costs Associated With PTE 77–4, PTE 80–83, PTE 83–1

Summary of Affected Entities

The amendment to PTE 77–4 would affect mutual fund companies. As discussed in the Affected Entities section, the Department estimates that

⁵³⁹ The burden is estimated as: (3,942 financial institutions × 4 hours) = 15,768 hours. A labor rate of \$190.63 is used for a financial manager. The labor rate is applied in the following calculation: (3,942 × 4 hours) × \$190.63 = \$3,005,854.

⁵⁴⁰ This cost is the estimated \$3,005,854 cost to maintain recordkeeping.

825 mutual fund companies would be affected by the amended PTE 77–4.⁵⁴¹

PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 25 fiduciary-banks with public offering services would be affected by the amended PTE 80–83.⁵⁴²

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

Summary of Total Cost for the Proposed Amendments to PTE 77–4, PTE 80–83, and PTE 83–1

The Department is proposing to amend PTE 77–4, PTE 80–83, and PTE 83–1 which currently include relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide documentation under PTE 2020–02, these amendments would not result in additional costs.

Costs Associated With PTE 86–128

The Department is proposing to amend Section VI of PTE 86–128 to require financial institutions to maintain for six years the records necessary for the Department, the IRS, the plan fiduciary, the contributing employer, or employee organization whose members are covered by the plan, plan participants, plan beneficiaries, and IRA owners to determine whether conditions of this exemption have been met.

In addition, the amendment would extend and impose conditions on IRAs. Section III of PTE 86–128 imposes requirements on investment advice providers and the independent plan fiduciaries authorizing the IRA to engage in the transactions with the investment advice providers (“authorizing fiduciary”) under the conditions contained in the exemption.

⁵⁴¹ For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

⁵⁴² For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

Summary of Affected Entities

The amendment to PTE 86–128 would affect fiduciaries of employee benefit plans that effect or execute securities transactions and independent plan fiduciaries that authorize the plan or IRA to engage in the transactions. As discussed in the Affected Entities section, the Department estimates that 1,894 investment advice providers would be affected by the proposed amendments to PTE 86–128.

Additionally, the Department estimates that 10,000 IRAs will engage in transactions covered under this class exemption, of which 210 are new IRAs.⁵⁴³

With the removal of exemptive relief for investment advice, the Department requests comment on what types of financial institutions would continue to rely on PTE 86–128, as well as how many entities would do so. Additionally, the Department requests comment on how many plans or managed IRAs would receive services from these entities.

Costs Associated With Recordkeeping

Each of the estimated 1,894 investment advice providers will maintain these records on behalf of their client plans in their normal course of business. The Department estimates that the additional time needed to maintain records consistent with the exemption would require a financial professional 30 minutes annually, resulting in an estimated cost of \$0.2 million.⁵⁴⁴ The Department estimates that the proposed amendments would also require 15 minutes of clerical time to prepare and send the documents for inspection, resulting estimated cost of approximately \$30,000.⁵⁴⁵

Costs Associated With Written Authorization From the Authorizing Fiduciary to the Investment Advice Provider

Authorizing fiduciaries of IRAs entering into a relationship with an investment advice provider are required to provide the investment advice

⁵⁴³ For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

⁵⁴⁴ The burden is estimated as: (1,894 investment advice providers × (30 minutes + 60 minutes)) = 947 hours. A labor rate of \$190.63 is used for a financial manager. The labor rate is applied in the following calculation: (1,894 investment advice providers × (30 minutes + 60 minutes)) × \$190.63 per hour = \$180,527.

⁵⁴⁵ The burden is estimated as: (1,894 investment advice providers × (15 minutes + 60 minutes)) = 474 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (1,894 investment advice providers × (15 minutes + 60 minutes)) × \$63.45 per hour = \$30,044.

provider with advance written authorization to perform transactions for the IRA. The Department estimates that there are approximately 210 IRAs that are new or that enter new arrangements each year.⁵⁴⁶ Therefore, the Department estimates that approximately 210 authorizing fiduciaries are expected to send an advance written authorization. It is assumed that a legal professional will spend 15 minutes per IRA reviewing the disclosures and preparing an authorization form, resulting in an estimated cost of approximately \$8,400.⁵⁴⁷

As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of these authorizations will be mailed. For paper and electronic authorizations, the Department assumes that clerical staff will spend five minutes per participant to prepare and send the authorization, resulting in an estimated labor cost of approximately \$1,100.⁵⁴⁸ It is assumed that the authorization will be two pages and paper authorizations will cost \$0.76 each, which results in a cost burden of approximately \$9.⁵⁴⁹

This results in a total cost for the written authorization of approximately \$9,500.⁵⁵⁰

Cost Associated With the Provision of Materials for the Evaluation of Authorization of Transaction

Prior to a written authorization, the investment advice provider must provide the authorizing fiduciary with a copy of the exemption, a form for termination of authorization, a description of broker’s placement

⁵⁴⁶ The Department estimates that there are 10,000 managed IRAs. Of these managed IRAs, the Department assumes that 2.1 percent are new accounts or new financial advice relationships. See Cerulli Associates, “U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,” Exhibit 6.02. The Cerulli Report., and that 100 percent of these managed IRAs will engage in transactions covered under this class exemption. These assumptions are applied in the following manner: 10,000 managed IRAs × 2.1 percent of plans are new × 100 percent of plans with broker-dealer relationships = 210 IRAs.

⁵⁴⁷ The burden is estimated as: (210 IRAs × (15 minutes + 60 minutes) per IRA) = 52.5 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (210 IRA × (15 minutes + 60 minutes)) per IRA × \$159.34 per hour = \$8,365.

⁵⁴⁸ The burden is estimated as: (210 IRA × (5 minutes + 60 minutes) per IRA) = 17.5 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (210 IRA × (5 minutes + 60 minutes) per IRA) × \$63.45 = \$1,110.

⁵⁴⁹ The burden is estimated as: (2 pages × \$0.05 per page) + \$0.66 for postage = \$0.76; The mailing rate is applied in the following calculation: (210 authorizations for IRAs × 5.8%) × \$0.76 = \$9.

⁵⁵⁰ This is estimated as: (\$8,365 to prepare the written authorization + \$1,110 to send the written authorization + \$9 for material costs) = \$9,485.

practices, and any other reasonably available information. The Department assumes that this information is readily available. As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of these authorizations will be mailed, while the remaining 94.2 percent will be delivered electronically. A clerical staff member is assumed to require five minutes per participant to electronically send and mail the required information to the authorizing fiduciary. This information will be sent to the authorizing fiduciaries of 210 IRAs entering into an agreement with an investment advice provider. Based on the above, the Department estimates that this requirement results in estimated cost of approximately \$1,100.⁵⁵¹ It is assumed that this information will be seven pages and paper distribution will cost \$1.01 each, which results in an estimated cost of approximately \$12.⁵⁵²

This results in a total cost of approximately \$1,100.⁵⁵³

Costs Associated With the Provision of an Annual Termination Form

Investment advice providers must annually supply each authorizing fiduciary with a form expressly providing an election to terminate the written authorization. It is assumed that legal professionals with each of the estimated 1,894 investment advice providers would spend one hour preparing the termination forms, which results in an estimated cost of approximately \$0.3 million.⁵⁵⁴

As discussed in the Affected Entities section, the Department estimates that 10,000 IRAs will engage in transactions covered under this class exemption and would receive the form.⁵⁵⁵ As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of IRAs will receive paper copies of the termination forms. The Department

estimates that clerical staff will spend five minutes per IRA preparing and distributing the paper and electronic termination forms, resulting in an estimated cost of approximately \$52,900.⁵⁵⁶ It is assumed that the form will be two pages, so paper copies will cost \$0.76 each for materials and postage, which results in a cost burden of approximately \$441.⁵⁵⁷

This results in a total cost of 0.4 million.⁵⁵⁸

Cost Associated With Transaction Reporting

The investment advice provider engaging in a covered transaction must give the authorizing fiduciary either a confirmation slip for each securities transaction or a quarterly report. As discussed above, the provision of the confirmation is already required under SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending confirmation slips or quarterly reporting, no additional hour and cost burden will occur.

Costs Associated With the Annual Statement

Investment advice providers are required to send to each authorizing fiduciary an annual report that contains the same information as the quarterly report, including all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio. As such, the Department does not expect that financial institutions would incur an additional burden to produce the annual statement, aside from what is already incurred to produce the quarterly report. Additionally, the Department assumes that this information could be sent with the annual termination form. Therefore, the clerical staff hours required to prepare and distribute the report, as well as postage costs, have been included with the provision of annual termination form requirement, and no additional burden has been reported. It is assumed that the annual statement will be five pages, and the paper and print costs are \$0.25 each. Therefore, the

overall cost burden for the paper and print costs are approximately \$145.⁵⁵⁹

Costs Associated With the Report of Commissions Paid

A discretionary trustee must provide an authorizing fiduciary with an annual report that separately shows the commissions paid to affiliated brokers and non-affiliated brokers on both a total dollar basis and a cents-per-share basis. The clerical hour burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually. However, the collecting and generating information for the report of commissions paid is reported as a cost burden.

An investment advice provider that is a discretionary trustee must provide each of the 10,000 authorizing fiduciaries with this annual commissions report.⁵⁶⁰ As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of investment advice providers will mail the annual reports. As the report is sent annually, it is assumed that it could be sent with the transaction report, therefore postage costs are not counted here. It is assumed that the report will be two pages, and the paper and print costs are \$0.10 each. Therefore, the overall cost burden of the paper and print costs is approximately \$58.⁵⁶¹

Investment advice providers are required to report the total of all transaction-related charges incurred by the plan in connection with covered transactions, the allocation of such charges among various persons, as well as a conspicuous statement about the negotiability of brokerage commissions and an estimate of future commission rates to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. It is assumed that it costs the investment advice provider \$3.30 per IRA to track this information.⁵⁶² With approximately 10,000 affected IRAs, this results in a cost burden of approximately \$33,000 annually.⁵⁶³

⁵⁵¹ The burden is estimated as: (210 IRAs × (5 minutes + 60 minutes) per IRA) = 17.5 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (210 IRAs × (5 minutes + 60 minutes) per IRA) × \$63.45 = \$1,110.

⁵⁵² The burden is estimated as: (7 pages × \$0.05 per page) + \$0.66 for postage = \$1.01; The mailing rate is applied in the following calculation: (210 materials packages for IRAs × 5.8%) × \$1.01 = \$12.

⁵⁵³ This is estimated as: (\$1,110 to prepare the information + \$12 for materials and postage) = \$1,123.

⁵⁵⁴ The burden is estimated as: (1,894 investment advice providers × 1 hour per broker-dealer) = 1,894 hours; A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (1,894 investment advice providers × 1 hour per broker-dealer) × \$159.34 per hour = \$301,790.

⁵⁵⁵ For more information on how the number of IRAs is estimated, refer to the Affected Entities section.

⁵⁵⁶ The burden is estimated as: (10,000 IRAs × (5 minutes + 60 minutes) per IRA) = 833 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (10,000 IRAs × (5 minutes + 60 minutes) per IRA) × \$63.45 per hour = \$52,875.

⁵⁵⁷ The mailing cost is estimated as: (2 pages × \$0.05 per page) + \$0.66 for postage = \$0.76; The mailing rate is applied in the following calculation: (10,000 IRAs × 5.8%) × \$0.76 = \$441.

⁵⁵⁸ This cost is estimated as: (\$301,790 to prepare the termination form + \$52,875 to distribute the termination form + \$441 for material and postage costs) = \$355,106.

⁵⁵⁹ The mailing cost is estimated as: (5 pages × \$0.05 per page) = \$0.25. The mailing cost is applied in the following calculation: (10,000 IRAs × 5.8%) × \$0.25 = \$145.

⁵⁶⁰ For more information on how the number of IRAs is estimated, refer to the Affected Entities section.

⁵⁶¹ The mailing cost is estimated as: (2 pages × \$0.05 per page) = \$0.10. The mailing cost is applied in the following calculation: (10,000 IRAs × 5.8%) × \$0.10 = \$58.

⁵⁶² This estimate is based on information from a Request for Information and from industry sources.

⁵⁶³ This burden is estimated as: (10,000 IRAs × \$3.30) = \$33,000.

This results in a total cost of approximately \$33,100.⁵⁶⁴

Summary of Total Cost for the Proposed Amendments to PTE 86–128

The Department estimates that in order to meet the additional conditions of the amended PTE 86–128, affected entities would annually incur a total cost of \$0.6 million.⁵⁶⁵

9. Regulatory Alternatives

The Department considered various alternative approaches in developing this proposal. Those alternatives are discussed below.

Broader Rule

The Department considered proposing a definition of an investment advice fiduciary that would be broader in scope, similar to the 2016 Final Rule. In promulgating the 2016 Final Rule, the Department expanded the definition of a fiduciary beyond the five-part test included in the 1975 regulation. The 2016 Final Rule covered as fiduciary investment advice:

- recommendations by a person who represents or acknowledges their fiduciary status under the Act or the Code;
- advice rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the retirement investor;
- recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA; and
- recommendations to buy, sell or hold assets held in IRAs and non-ERISA plans.

In developing this proposal, the Department has crafted a more focused definition that would consider the scope issues identified by the Fifth Circuit while still protecting retirement investors. The Department was also cognizant of stated concerns of some stakeholders that the compliance costs associated with the broader 2016 Final

Rule would lead to adverse consequences such as increases in the cost of investment advice and potential loss of access by retirement investors with small account balances.

The current proposal bases investment advice fiduciary status on circumstances that indicate the retirement investor may place trust and confidence in the recommendation as a professional recommendation based upon the particular needs of the investor. The proposal reflects the Department's interpretation of the text of the statute, as informed by the Fifth Circuit's emphasis on relationships of trust and confidence. Accordingly, the proposed definition, unlike the 2016 Final Rule, does not automatically treat as fiduciary advice all compensated recommendations directed to a specific retirement investor regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA. For example, an entity can satisfy the test under (c)(1)(ii) of this proposal, only if they satisfy each part, including the requirement that the retirement adviser provides investment advice on a regular basis as part of their business. This is more limiting than the 2016 Final Rule, and it ensures that individuals like human resource professionals discussing 401(k) investment options, and the car salesman who recommends a retiree cash in their 401(k) for a new convertible are not caught up in the definition. In publishing this proposal, the Department was mindful of concerns with respect to the 2016 Final Rule, specifically regarding access to investment advice for all retirement investors.

No Amendment to PTE 2020–02

The Department considered not amending PTE 2020–02 and leaving the exemption in its present form. The Department supports the existing PTE 2020–02 and has retained its core components in the amendment, including the Impartial Conduct Standards and the requirement for strong policies and procedures. These are fundamental investor protections that are necessary to ensure the financial institutions and investment professionals provide investment advice that is in the best interest of retirement investors. The retention of the core elements of PTE 2020–02 will also ensure that any work financial institutions have done to comply with PTE 2020–02 will prepare them to comply with the amended exemption.

However, the Department believes that additional protections are necessary

to ensure that fiduciary investment advice providers adhere to the stringent standards outlined in PTE 2020–02. Therefore, as discussed in detail earlier, the proposed amendments clarify and tighten the existing text of PTE 2020–02 to enhance the disclosure requirements. In order to more fully protect retirement investors, the Department is proposing additional disclosures to ensure that investors have sufficient information to make informed decisions about the costs of an investment advice transaction and about the significance and severity of the investment advice fiduciary's conflicts of interest.

In addition to the need for additional protections, upon reviewing the implementation of PTE 2020–02, the Department determined it is necessary to provide financial institutions and investment professionals with additional guidance on implementing the exemption's core elements. As a result, the proposed amendment would also provide more guidance on how to best comply with the Impartial Conduct Standards and implement the policies and procedures condition.

No Amendment to PTE 84–24

The Department is aware that insurance companies sometimes sell insurance products through independent agents that sell multiple insurance companies' products. In connection with this business structure, when the Department finalized PTE 2020–02, the Department explained that insurance companies could rely on either PTE 2020–02 or PTE 84–24. As a result, the Department considered the option of leaving PTE 84–24 unaltered.

Through outreach with financial institutions after issuing PTE 2020–20, the Department heard concerns from insurance companies that distribute annuities through independent agents and believed that they may not be able to effectively comply with PTE 2020–02. This is primarily due to the difficulty insurers confront when overseeing independent insurance producers who do not work for any one insurance company and are not obligated to recommend only one company's annuities. The Department understands that this compliance issue has been resolved by reliance on PTE 84–24.

However, the Department is concerned that PTE 84–24, if left in its current state, offers few of the protections provided by PTE 2020–02. Further, insurance companies' continued reliance on PTE 84–24 instead of PTE 2020–02 could prevent retirement investors from being able to fully compare varying products and services. In order to address these

⁵⁶⁴ This cost is estimated as: (\$58 for material and post costs + \$33,000 to track relevant information for mailing annual reports) = \$33,058.

⁵⁶⁵ The annual cost is estimated as: (\$180,527 for recordkeeping + \$30,044 for preparing and sending documents for inspection + \$9,485 for the written authorization + \$1,123 for the materials for the evaluation of authorization of transaction + \$355,106 for the annual termination form + \$145 for materials for the annual statement + \$33,058 for the report on commissions paid) = \$609,487. Note, the total may not equal the sum of components due to rounding.

concerns, the Department proposes to amend PTE 84–24 to provide an exemption to independent insurance producers to sell annuities or other insurance products. The proposed amendment addresses insurance industry concerns regarding the workability of PTE 2020–02’s conditions, while providing a tailored exemption for insurance companies and independent agents that ensures that fiduciary investment advice with respect to all products is delivered pursuant to the same core principles that protect retirement investors.

Including an Individual Contract Requirement

The Department also considered amending PTE 2020–02 to include an enforceable written contract between the financial institution and the retirement investor. While the predecessor to PTE 2020–02, the Best Interest Contract Exemption,⁵⁶⁶ required such an enforceable contract, PTE 2020–02 did not include a contract or warranty provision enforceable by IRA owners.

In crafting the proposed amendment, the Department reviewed the decision to not include an enforceable written contract in PTE 2020–02 but concluded that the better course of action was not to include such a requirement. Given that the Fifth Circuit found that the contractual requirement for IRAs exceeded the scope of the Department’s authority, a proposal attempting to reinstate that requirement would likely be invalidated in the Fifth Circuit, leading to uncertainty in the regulated community. Such uncertainty could lead to the potential for disruption in the market for investment advice, and in crafting an exemption that does not include an enforceable written contract, the Department intends to avoid this potential disruption.

Instead, the exemption includes many protective measures and targeted opportunities for the Department to review compliance within its existing oversight and enforcement authority under ERISA. For example, financial institutions’ reports regarding their retrospective review are required to be certified by a senior executive officer of the financial institution and provided to the Department within 10 business days of request. The exemption also includes eligibility provisions, which the Department believes will encourage financial institutions and investment professionals to maintain an appropriate focus on compliance with legal requirements and with the exemption.

The Department also intends to ensure that financial institutions relying on the exemption comply with excise tax provisions. The Department has proposed to bolster this protection by requiring financial institutions, as part of their retrospective review, to report to the Department of the Treasury any non-exempt prohibited transactions in connection with fiduciary investment advice, correct those transactions, and pay any resulting excise taxes. Further, the proposed amendment would add failure to report, correct, and pay an excise tax to the list of factors that could make a financial institution ineligible to rely on PTE 2020–02. The Department believes these additional conditions would provide important protections to retirement investors by enhancing the existing protections of PTE 2020–02.

Relying on Disclosure Alone

Some commenters responding to the 2015 NPRM⁵⁶⁷ argued that disclosure of potential adviser conflicts is, by itself, sufficiently protective of plan and IRA investors’ interests. According to these comments, if conflicts are transparent, then investors can choose between more and less conflicted advisers. The commenters advocated that the Department should issue broad PTEs that exempt all or almost all existing and potential adviser business models and compensation arrangements on the sole condition that material conflicts be disclosed. The Department does not believe that disclosure alone is adequately protective of retirement investors. The Department chose not to take that approach in the 2016 Final Rule and chooses not to take that approach with this proposal.

As discussed above in the “Need for Regulatory Action” section, most retirement investors are not financially sophisticated, and even those who are financially sophisticated are unlikely to detect lapses in the quality of financial advice. Due to the complexity of some disclosures as well as investors’ propensity to ignore lengthy disclosures, disclosures often fail to accomplish their goals. Retirement investors regularly fail to understand advisers’ conflicts, let alone the impacts that those conflicts could have on their investments. A large body of research discussed in the RIA for the 2016 Final Rule suggested that disclosures alone can have, at best, a minor impact on conflicts, and can sometimes exacerbate the conflicted behavior.⁵⁶⁸ Advisers may inflate the bias in their advice to counteract any discounting that might

occur because of the disclosure of conflicts.⁵⁶⁹ In addition, even when inexperienced retirement investors receive easy-to-understand disclosures alerting them to conflicts, there is no ready way for them to use that knowledge to improve investment outcomes, inasmuch as they are still dependent on the adviser’s recommendations and expertise.

Adding a Requirement for a Web Disclosure

The Department considered amending PTE 2020–02 and PTE 84–24 to require financial institutions to disclose the sources of third-party compensation received in connection with recommended investment products on a public web page. The Department believes such disclosures would allow market-based forces to extend protections to consumers by discouraging and eliminating the most conflicted compensation practices. Moreover, public disclosure of firms’ compensation arrangements with the third parties whose products they recommend would provide an additional focus on firm-level, as opposed to individual adviser-level, conflicts of interest.

Such public disclosure could produce market effects similar to public disclosures required by the SEC (e.g., public companies’ 10–K filings). Conflicted compensation practices are often complex, opaque, and shrouded from view. Requiring public disclosure of conflicted compensation practices would allow investment professionals, experts, and consultants, as well as academic researchers, to draw attention to the concerning aspects of the conflicts and even rate firms based on the scope of their conflicts. As noted by Landier and Thesmar (2011), data availability feeds research intensity.⁵⁷⁰ A wide range of literature suggest that when financial data are available to researchers, these researchers uncover problematic behaviors and draw attention to the behaviors, which has the effect of curbing the practices in the future.⁵⁷¹ Making compensation

⁵⁶⁹ George Loewenstein, Daylian M. Cain & Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101(3) *American Economic Review* 423–28, (May 2011).

⁵⁷⁰ Augustin Landier & David Thesmar, *Regulating Systemic Risk Through Transparency: Tradeoffs in Making Data Public*, Working Paper 17664 National Bureau of Economic Research (December 2011), 320, https://www.nber.org/system/files/working_papers/w17664/w17664.pdf.

⁵⁷¹ For example: Randall A. Heron & Erik Lie, *Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?*, 83(2) *Journal of Financial Economics* 271–295 (2007).; Randall A. Heron & Erik Lie, *What Fraction of Stock*

⁵⁶⁶ See 81 FR 21002 (Apr. 8, 2016).

⁵⁶⁷ See FR 21927 (Apr. 20, 2015).

⁵⁶⁸ See FR 20946, 20950–51 (Apr. 8, 2016).

information publicly available could allow intermediaries and consultants to package this information as part of their ratings and evaluations, likely improving investor information.

Further, a web disclosure of this nature may encourage financial institutions to stop engaging in conflicted behaviors due to litigation risk from unsatisfied clients, risk of complaints made to the Department that might result in enforcement actions, and the risk to their public reputations.

The Department estimates that, if such a disclosure were required, it would require eight hours of labor annually from a computer programmer, on average, resulting in an annual cost of approximately \$20.5 million for PTE 2020–02⁵⁷² And \$4.5 million for PTE 84–24.⁵⁷³ The Department welcomes comments on the accuracy of Department's estimates on the required time to maintain the disclosure, and how many financial institutions currently have the technology infrastructure to post a web disclosure. The Department is also interested in the benefits of such a disclosure, as well as in any data that commenters may have that estimate how frequently retirement investors may visit a web page that includes such disclosures, and the extent to which various consultants and financial intermediaries would likely use the website to assist retirement investors and others.

Allowing for More Parties To Review Records

For the proposed amendment to PTE 2020–02, the Department considered allowing more parties to review the records necessary to determine whether the exemption is satisfied, such as:

- any authorized employee of the Department or the Department of the Treasury,

- any fiduciary of a plan that engaged in a transaction pursuant to this exemption,

- any contributing employer, any employee organization whose members are covered by a plan that engaged in a transaction pursuant to this exemption, and

- any participant or beneficiary of a plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

The Department does not have data on how often financial institutions would receive such requests. For the purposes of this analysis, the Department assumes that, on average, financial institutions would receive 10 requests per year and that preparing and sending each request would take a legal professional, on average, 30 minutes. Based on these assumptions, the Department estimates that the proposed amendments would result in an annual cost of approximately \$15.4 million.⁵⁷⁴ The Department requests comment on how often financial institutions would receive requests for records, who would prepare such reports, and how long the preparation of such records would take.

10. Uncertainty

In estimating costs associated with rollover documentations, the Department faces uncertainty in determining the number of rollovers affected by the amendments to PTE 2020–02 and PTE 84–24. Some financial services professionals who do not generally serve as fiduciaries may act in a fiduciary capacity when making certain rollover recommendations, and thus will be affected by the exemptions. Alternatively, the opposite can also be true. Financial services professionals who generally serve as fiduciaries may act in a non-fiduciary capacity in handling certain rollover recommendations, and thus will not be affected by the exemptions. Thus, there is uncertainty in estimating the cost of compliance.

The Department welcomes any comments and data that can help estimate the number of rollovers affected by the exemptions. The Department also invites comments about financial services professionals' practices for documenting rollover recommendations, particularly the extent to which financial services

professionals use standardized forms or templates to document the reasons for recommending rollovers and how long on average it would take for a financial services professional to document a rollover recommendation.⁵⁷⁵

While the Department expects that the proposed rule would result in lower fees and expenses for plan participants, the Department faces uncertainty in estimating the magnitude of savings. The Department welcomes any comments and data that can help estimate the amount of decrease in fees and expenses. The Department also expects the proposed rule would result in a reallocation of capital, but the Department faces uncertainty on estimating the new market equilibrium across products and services. The Department welcomes any comments and data that can help estimate how much capital may be reallocated and how much efficiency will be gained.

G. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and Federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department is soliciting comments regarding the information collection request (ICR) included in the proposed amendments to the prohibited transaction exemptions. To obtain a copy of the ICR, contact the PRA addressee below or go to *RegInfo.gov*. The Department has submitted a copy of

Option Grants to Top Executives Have Been Backdated or Manipulated?, 55(4) *Management Science* 513–525.; Mark Carhart, Ron Kaniel & Adam Reed, *Leaning for the Tape: Evidence of Gaming Behavior in Equity Mutual Funds*, 57(2) *Journal of Finance* 661–693 (2002).; Truong X. Duong & Felix Meschke, *The Rise and Fall of Portfolio Pumping Among U.S. Mutual Funds*, 60 *Journal of Corporate Finance* (February 2020).

⁵⁷² The burden is estimated as: (19,290 entities × 8 hours) = 154,320 hours. A labor rate of \$133.05 is used for a computer programmer professional. The labor rate is applied in the following calculation: (19,290 entities × 8 hours) × \$133.05 = \$20,532,276.

⁵⁷³ The burden is estimated as: (215 insurance companies + 4,000 independent producers) × 8 hours = 33,720 hours. A labor rate of \$133.05 is used for a computer programmer professional. The labor rate is applied in the following calculation: (215 insurance companies + 4,000 independent producers) × 8 hours × \$133.05 = \$4,486,446.

⁵⁷⁴ The burden is estimated as follows: (19,290 financial institutions × 10 requests) × (30 minutes + 60 minutes) = 96,450 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(19,290 financial institutions × 10 requests) × (30 minutes + 60 minutes)] × \$159.34 = \$15,368,343.

⁵⁷⁵ The Department assumes that financial services professionals would spend, on average, 10 minutes to document the basis for rollover recommendations in addition to their work researching and determining the recommendations. The Department understands that financial services professionals seek and gather information regarding investor profiles in accordance with other regulators' rules. Further, financial professionals often discuss the basis for their recommendations and associated risks with their clients as a best practice. After collecting relevant information and discussing the basis for certain recommendations with clients, the Department believes that it would take a relatively short time to document justifications for rollover recommendations. However, the Department welcomes comments about the burden hours associated with documenting rollover recommendations.

the rule to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronically delivered responses).

Commenters may send their views on the Departments' PRA analysis in the same way they send comments in response to the proposed rule as a whole (for example, through the www.regulations.gov website), including as part of a comment responding to the broader proposed rule. Comments are due by January 2, 2024 to ensure their consideration.

ICRs are available at RegInfo.gov (reginfo.gov/public/do/PRAMain). Requests for copies of the ICR can be sent to the PRA addressee:

By mail: James Butikofer, Office of Research and Analysis, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5718, Washington, DC 20210.

By email: ebbsa.opr@dol.gov.

There is no paperwork burden associated with the proposed rule. However, there is paperwork burden associated with the amendments to PTEs 75-1, 84-24, 86-128, and 2020-02. The Department estimates that the proposed amendments would not affect the paperwork burden related to PTEs 77-4, 80-3, and 83-1. The PRA analysis for the amendments is included with each of the respective amendments.

PTE 75-1

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Exemption 75-1 (Security Transactions

with Broker-Dealers, Reporting Dealers and Banks).

OMB Control Number: 1210-0092.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 3,942.

Estimated Number of Annual Responses: 3,942.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 15,768 hours.

Estimated Total Annual Burden Cost: \$0.

PTE 84-24

Type of Review: Revision of an Existing Collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters.

OMB Control Number: 1210-0158.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 7,221.

Estimated Number of Annual Responses: 119,376.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 123,726 hours.

Estimated Total Annual Burden Cost: \$8,457.

PTE 86-128

Type of Review: Revision to an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: PTE 86-128 (Securities Broker-Dealers).

OMB Control Number: 1210-0059.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 2,179.

Estimated Number of Annual Responses: 33,570.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 2,929 hours.

Estimated Total Annual Burden Cost: \$37,034.

PTE 2020-02

OMB Control Number: 1210-0163.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 19,290.

Estimated Number of Annual Responses: 6,504,119.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 1,044,050 hours.

Estimated Total Annual Burden Cost: \$167,296.

H. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)⁵⁷⁶ imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.⁵⁷⁷ Under section 603 of the RFA, agencies must submit an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. Below is the Department's IRFA.

1. Need for and Objectives of the Rule

As discussed earlier, the Department believes that changes to the marketplace since 1975, when "fiduciary" was first defined, have made the existing definition inadequate and obsolete. This proposal will update the definition of "fiduciary" to reflect changes to the retirement and financial advice marketplaces since 1975 and add important protections to existing prohibited transaction class exemptions. More detail can be found in the "Need for Regulatory Action" section of this RIA.

Smaller plans may be more exposed to conflicts of interest on the part of service providers, because they are less likely than larger plans to receive investment assistance from a service provider that is acting as a fiduciary. Smaller plans have historically received investment assistance from insurance brokers or broker-dealers, who may be subject to conflicts of interest.⁵⁷⁸ Larger plans may also have sufficient resources and in-house expertise to make investment decisions without outside assistance.⁵⁷⁹ Additionally, many sponsors of smaller plans may have a lack of knowledge of whether the providers to the plan are fiduciaries and how the provider's compensation varies

⁵⁷⁶ 5 U.S.C. 601 et seq.

⁵⁷⁷ 5 U.S.C. 601(2), 603(a); also see 5 U.S.C. 551.

⁵⁷⁸ U.S. Government Accountability Office, GAO-11-119, 401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest, U.S. Government Accountability Office (2011), <http://www.gao.gov/products/GAO-11-119>.

⁵⁷⁹ Id.

based on the investment options selected.⁵⁸⁰

2. Affected Small Entities

The Small Business Administration (SBA)^{581 582} defines small businesses and issues size standards by industry.

The SBA defines a small business in the financial investments and related activities sector as a business with up to \$47.0 million in annual receipts. Over 97 percent of broker-dealers⁵⁸³ and 99 percent of registered investment

advisers⁵⁸⁴ are small businesses according to the SBA size standards.

The Department requests comments on the appropriateness of the size standards used to evaluate the impact of the proposal on small entities.

TABLE 5—AFFECTED SMALL FINANCIAL ENTITIES

	Prohibited transaction exemptions					
	2020–02	84–24	75–1	77–4	80–83	86–128
Broker-Dealers	1,835	.....	1,835	.....	.....	.....
Registered Investment Advisers	15,775	.....	.....	.....	.....	.....
<i>Pure Robo-Advisers</i>	10	.....	.....	.....	.....	.....
Discretionary Fiduciaries .....	.....	.....	.....	.....	.....	1,835
Insurance Companies	151	177	.....	.....	.....	.....
Insurance Producers .....	.....	3,960	.....	.....	.....	.....
Banks .....	.....	.....	1,568	.....	19	.....
Mutual Fund Companies .....	.....	.....	.....	796	.....	.....
Investment Company Principal Underwriters	20	20	.....	.....	.....	20
Pension Consultants	930	930	.....	.....	.....	930

In its economic analysis for its 2020 rulemaking, the Department included all entities eligible for relief on a variety of transactions and compensation that may not have been covered by prior exemptions in its cost estimate. In 2020, the Department acknowledged that not all these entities will serve as investment advice fiduciaries to plans and IRAs within the meaning of Title I and the Code. Additionally, the Department acknowledged that because other exemptions are also currently available to these entities, it is unclear how widely financial institutions will rely upon the new exemptions and which firms are most likely to choose to rely on it.

This analysis, like the analysis from 2020, includes all entities eligible for relief in its cost estimate. These estimates are subject to caveats like those in 2020, though this proposal will expand the parties that will be considered investment advice fiduciaries and also will narrow the exemption alternatives.

The Department requests comments on which, and how many, entities may rely on each of the exemptions, as amended.

Registered Investment Advisers

Small, registered investment advisers who provide investment advice to

retirement plans or retirement investors and registered investment advisers who act as pension consultants would be directly affected by the proposed amendments to PTE 2020–02. As discussed in the Affected Entities section of the RIA, the Department estimates that 16,182 registered investment advisers, including 200 robo-advisers, would be affected by the proposed amendments.⁵⁸⁵ The Department estimates that 98.7 percent of broker-dealers are small businesses according to the SBA size standards.⁵⁸⁶ Based on these statistics, the Department estimates that 15,775 registered investment advisers, including those registered with the SEC and the state, would be affected by the proposed amendments.⁵⁸⁷

Robo Advisers

The proposed changes to PTE 2020–02 would affect robo-advisers. As discussed in the RIA, the Department estimates that 200 robo-advisers will be affected by the proposed amendments. The Department does not have information on how many of these robo-advisers would be considered small entities. The Department expects that most robo-advisers would not be considered small. For the purposes of this analysis, the Department assumes that 5 percent of robo-advisers, or 10

robo-advisers, are small entities. The Department requests comment on these estimates.

Broker-Dealers

Small broker-dealers who provide investment advice to retirement plans or retirement investors and registered investment advisers who act as pension consultants would be directly affected by the proposed amendments to PTE 2020–02. Additionally, the proposed amendments would modify PTE 75–1 and PTE 86–128 such that small broker-dealers would no longer be able to rely on the exemption for investment advice. The Department does not have information about how many small broker-dealers provide investment advice to plan fiduciaries, plan participants and beneficiaries, and IRA owners. However, the Department believes that few broker-dealers, including small broker-dealers, will continue to rely on PTE 75–1 and PTE 86–128 for transactions that do not involve investment advice.

As discussed in the RIA, the Department assumes that 1,894 broker-dealers would be affected by the proposed amendments.⁵⁸⁸ The Department estimates that 96.9 percent of broker-dealers are small businesses according to the SBA size standards.⁵⁸⁹ Accordingly, the Department assumes

⁵⁸⁰ *Id.*

⁵⁸¹ 13 CFR 121.201.

⁵⁸² 15 U.S.C. 631 *et seq.*

⁵⁸³ This is estimated on the percent of entities with less than \$47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>.

⁵⁸⁴ This is estimated on the percent of entities with less than \$47.0 million for the industry Investment Advice, NAICS 523930. See NAICS

Association, Count by NAICS Industry Sectors, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>.

⁵⁸⁵ For more information on this estimate, refer to the Affected Entities section of the RIA.

⁵⁸⁶ This is estimated on the percent of entities with less than \$47.0 million for the industry Investment Advice, NAICS 523930. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>.

⁵⁸⁷ The number of small investment advisers, who do not provide pure robo-advice, is estimated as: (16,182 investment advisers – 200 robo-advisers) × 98.7% = 15,775 small investment advisers.

⁵⁸⁸ For more information on this estimate, refer to the Affected Entities section of the RIA.

⁵⁸⁹ This is estimated on the percent of entities with less than \$47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>.

that 1,835 small broker-dealers would be affected by the proposed amendments.⁵⁹⁰ The Department requests comment on this estimate.

Discretionary Fiduciary

The proposed amendments to PTE 86–128 would delete Section IV(a), which provides an exclusion from the conditions of the exemption for certain plans not covering employees, including IRAs, to increase the safeguards available to these retirement investors. Therefore, investment advice fiduciaries to IRAs would have to rely on another exemption, such as PTE 2020–02. Fiduciaries that exercise full discretionary authority or control with respect to IRAs could continue to rely on PTE 86–128, as long as they comply with all of the exemption’s conditions. Under PTE 86–128, discretionary fiduciaries would still be able to effect or execute securities transactions. Any discretionary fiduciaries seeking relief for investment advice, however, would be required to rely on the amended PTE 2020–02. The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption.

For the purposes of this analysis, the Department assumes that the number of discretionary fiduciaries relying on the exemption is no larger than the estimated number of broker-dealers estimated to be affected by the amendments to PTE 2020–02. As discussed in the RIA, the Department assumes that 1,894 broker-dealers would be affected by the proposed amendments.⁵⁹¹ The Department estimates that 96.9 percent of broker-dealers are small businesses according to the SBA size standards.⁵⁹² Accordingly, the Department assumes that 1,835 small discretionary fiduciaries would be affected by the proposed amendments.⁵⁹³

The Department requests comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data.

⁵⁹⁰ The estimated of retail broker-dealers affected by this exemption is estimated as: $(1,894 \text{ broker-dealers} \times 96.9\%) = 1,835 \text{ broker-dealers}$.

⁵⁹¹ For more information on this estimate, refer to the Affected Entities section of the RIA.

⁵⁹² This is estimated on the percent of entities with less than \$47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>.

⁵⁹³ The estimated of retail broker-dealers affected by this exemption is estimated as: $(1,894 \text{ broker-dealers} \times 96.9\%) = 1,835 \text{ broker-dealers}$.

Insurance Companies

The proposed amendments to PTE 2020–02 and PTE 84–24 would affect small insurance companies and captive agents. The existing version of PTE 84–24 granted relief for captive insurance agents, overseen by insurance companies; however, the proposed amendments would exclude insurance companies and captive agents currently relying on the exemption for investment advice. These entities would be required to comply with the requirements of PTE 2020–02 for relief involving investment advice.

As discussed in the RIA, the Department estimates that 398 insurance companies would be affected by the proposed rulemaking. The Department estimates that 70 of these entities are large entities.⁵⁹⁴ The Department does not have data on whether small insurance companies are more likely to rely on captive or independent distribution channels. For the purposes of this analysis, the Department assumes the percent of small insurance companies using each distribution channel is the same as for all insurance companies. That is, the Department assumes that 46 percent of insurance companies (183 insurance companies) sell annuities through captive distribution channels, of which 151 are estimated to be small insurance companies and 32 are estimated to be large insurance companies.⁵⁹⁵ Additionally, 54 percent (215 insurance companies) sell annuities through independent distribution channels, of which 177 are estimated to be small insurance companies and the remaining 38 are large insurance companies.⁵⁹⁶ The Department requests comment on this assumption.

Captive Insurance Agents

Additionally, as discussed in the Affected Entities section of the RIA, the Department estimates that 1,577 captive insurance agents would be affected by

⁵⁹⁴ LIMRA estimates that, in 2016, 70 insurers had more than \$38.5 million in sales. See LIMRA, *U.S. Individual Annuity Yearbook: 2016 Data*, LIMRA Secure Retirement Institute (2017).

⁵⁹⁵ The number of large insurance companies using a captive distribution channel is estimated as: $(70 \text{ large insurance companies} \times 46\%) = 32 \text{ insurance companies}$. The number of small insurance companies using a captive distribution channel is estimated as: $(183 \text{ insurance companies} - 32 \text{ large insurance companies}) = 151 \text{ small insurance companies}$.

⁵⁹⁶ The number of large insurance companies using an independent distribution channel is estimated as: $(70 \text{ large insurance companies} \times 54\%) = 38 \text{ insurance companies}$. The number of small insurance companies using an independent distribution channel is estimated as: $(215 \text{ insurance companies} - 38 \text{ large insurance companies}) = 177 \text{ small insurance companies}$.

the proposed amendments. The Department estimates that 99 percent of these captive agents work for small entities.⁵⁹⁷ Thus, the Department estimates there are 1,561 captive insurance agents and brokers that would be affected by the proposed amendments.⁵⁹⁸

Independent Producers

The proposal would also affect independent insurance producers that recommend annuities from unaffiliated financial institutions to retirement investors, as well as the financial institutions whose products are recommended. While captive insurance agents are employees of an insurance company, other insurance agents are “independent” and work with multiple insurance companies. Though these independent insurance producers may rely on PTE 2020–02, the Department believes they are more likely to rely on PTE 84–24. For this reason, the Department only considers captive insurance agents in the analysis for PTE 2020–02. The Department requests comment on how captive insurance agents and independent insurance producers would be affected by the proposed amendments to PTE 2020–02 and PTE 84–24.

The Independent Insurance Agents and Brokers of America estimated that there were 40,000 independent producers in 2022. The Department does not have data on what percent of independent producers serve the retirement market. For the purposes of this analysis, the Department assumes that 10 percent, or 4,000, of these independent producers serve the retirement market. The Department estimates that 99 percent of these entities are small entities.⁵⁹⁹ As such, the Department estimates that 3,960

⁵⁹⁷ This is estimated on the percent of entities with annual receipts less than \$15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), <https://www.sba.gov/document/support-table-size-standards>.

⁵⁹⁸ The number of captive insurance agents is calculated as: $(1,577 \text{ captive agents} \times 99.0\%) = 1,561 \text{ captive insurance agents serving the annuity market}$.

⁵⁹⁹ This is estimated on the percent of entities with annual receipts less than \$15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), <https://www.sba.gov/document/support-table-size-standards>.

small independent producers would be affected by the proposed amendment.

Pension Consultants

The Department expects that pension consultants would continue to rely on the existing 84–24; however, the proposed amendment would exclude pension consultants for plans and IRAs currently relying on the existing PTE 84–24 for investment advice. As such, any pension consultants relying on the existing exemption for investment advice would be required to comply with PTE 2020–02 for relief. In this analysis, the Department includes pension consultants in the affected entities for continued relief for the existing provisions of PTE 84–24 as well as the amended PTE 2020–02.

As discussed in the Affected Entities section of the RIA, the Department estimates that 1,011 pension consultants serve the retirement market. The Department estimates that approximately 92 percent of these entities are small entities.⁶⁰⁰ As such, the Department estimates that 930 pension consultants would be affected by the proposed amendments.

Principal Company Underwriter

The Department expects that some investment company principal underwriters for plans and IRAs rely on the existing PTE 84–24. The proposed amendment would exclude investment company principal underwriters for plans and IRAs currently relying on the existing PTE 84–24 for investment advice. As such, any principal company underwriter relying on the existing exemption for investment advice would be required to comply with PTE 2020–02 for relief. In this analysis, the Department includes principal company underwriters in the affected entities for continued relief for the existing provisions of PTE 84–24 as well as the amended PTE 2020–02.

As discussed in the Affected Entities section, the Department assumes that 10 investment company principal underwriters for plans and 10 investment company principal underwriters for IRAs will use this exemption once with one client plan. The Department estimates that approximately 97 percent of these

entities are small entities.⁶⁰¹ As a result, the Department estimates that all 10 of the estimated small investment company principal underwriters for plans and all 10 of the estimated small investment company principal underwriters for IRAs would be affected by the proposed amendments.

Banks and Credit Unions

The proposed amendments to PTE 80–83, PTE 75–1, and PTE 2020–02 would affect banks. The proposed amendments would exclude banks currently relying on the existing PTE 80–83 and PTE 75–1 for investment advice. Banks relying on the existing exemptions for investment advice would be required to comply with PTE 2020–02 for relief. Banks with discretionary control could still rely on PTE 80–83 and PTE 75–1.

The Department estimates that approximately 77 percent of commercial banks are small banks.⁶⁰² As discussed in the Affected Entities section of the RIA, the Department estimates that 4,096 banks would use the amended PTE 75–1, of which 3,135 commercial banks are estimated to be small.⁶⁰³ Additionally, in the Affected Entities section of the RIA, the Department estimates that 25 fiduciary-banks with public offering services would use the amended PTE 80–83, of which, 19 are estimated to be small.⁶⁰⁴ The Department recognizes that these estimates assume that the proportion of small banks using the aforementioned PTEs would be the same as the proportion of all banks using the PTEs. The Department recognizes that the banking industry within the United States is characterized by high market concentration.⁶⁰⁵ The Department

requests comment on whether small banks are equally as likely as large banks to rely on such exemptions.

The Department requests comments on how many small banks would seek exemptive relief under PTE 80–83 and PTE 75–1.

As discussed in the Affected Entities section of the RIA, the proposed amendments could also affect credit unions that offer IRAs. The Department estimates that there are approximately 4,782 credit unions.⁶⁰⁶ In 2023, the SBA estimated that there are 4,586 small credit unions.⁶⁰⁷ The Department requests comment on what proportion of small credit unions offer IRAs and what proportion sell share certificate products. Additionally, the Department requests comment on how many of these entities currently rely on PTE 2020–02, 75–1, and PTE 80–83 for investment advice.

Mutual Fund Companies

The proposed amendments would modify PTE 77–4 such that mutual fund company as their providing services to plans can no longer rely on the exemption when giving investment advice. Under the proposal, these mutual funds would need to rely on PTE 2020–02 for relief concerning investment advice.

As discussed in the Affected entities section of the RIA, the Department estimates that 812 mutual fund companies would be affected by the proposed amendments to PTE 77–4. The Department estimates that approximately 98 percent of these mutual fund companies, or 796 mutual fund companies, are small.⁶⁰⁸

Mortgage Pool Sponsors

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates. The proposed amendments would exclude exemptive relief for investment advice. Under the proposal, these

has-the-banking-industry-become-too-concentrated.pdf.

⁶⁰⁶ For more information on how the number of credit unions is estimated, refer to the Affected Entities section of the RIA.

⁶⁰⁷ 88 FR 18906 (March 29, 2023).

⁶⁰⁸ This is estimated on the percent of entities with annual receipts less than \$40 million for the industry Open End Investment Fund, NAICS 525910. See NAICS Association, *Count by NAICS Industry Sectors*, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), <https://www.sba.gov/document/support-table-size-standards>.

⁶⁰⁰ This is estimated on the percent of entities with annual receipts less than \$45.5 million for the industry Third Party Administration of Insurance and Pension Funds, NAICS 524292. See NAICS Association, *Count by NAICS Industry Sectors*, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), <https://www.sba.gov/document/support-table-size-standards>.

⁶⁰¹ This is estimated on the percent of entities with less than \$47.0 million for the industry Investment Banking and Securities Intermediation, NAICS 523150. See NAICS Association, *Count by NAICS Industry Sectors*, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>.

⁶⁰² This is estimated on the percent of commercial banks with assets less than \$850 million. See Federal Deposit Insurance Corporation, *FOIA RIS Data Bulk Download*, Federal Deposit Insurance Corporation, (December 2022), <https://www.fdic.gov/foia/ris/index.html>; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), <https://www.sba.gov/document/support-table-size-standards>.

⁶⁰³ The number of small commercial banks that would use PTE 75–1 is estimated as: (4,096 banks × 76.5%) = 3,135 small banks.

⁶⁰⁴ The number of small banks that would use PTE 80–83 is estimated as: (25 fiduciary-banks with public offering services × 76.5%) = 19 banks.

⁶⁰⁵ Jim DiSalvo, *Banking Trends: Has the Banking Industry Become Too Concentrated?*, Federal Reserve Bank of Philadelphia, (2023), <https://www.philadelphiafed.org/-/media/frbp/assets/economy/articles/economic-insights/2023/q1/bt->

entities would need to rely on PTE 2020–02 for relief concerning investment advice. The Department requests comment on how many small entities currently rely on PTE 83–1, and how many of these entities rely on PTE 83–1 for investment advice.

3. Impact of the Rule

The Department believes the costs associated with the proposed amendments are modest because the proposal was developed in

consideration of other regulatory conduct standards. The Department believes that many financial institutions and investment professionals have already developed compliance structures for similar regulatory standards. The Department does not expect that the proposal will impose a significant compliance burden on small entities. As discussed, the Department estimates that the proposal would impose costs of approximately \$253.2 million in the first year and \$216.2

million in each subsequent year, of which approximately \$248.0 million in the first year and \$212.7 million in each subsequent year would be imposed on small financial institutions.

The table below summarizes the estimated aggregate cost for small entities due to the proposed amendments to each exemption. The following section describes estimated cost for each entity type for each exemption.

TABLE 6—SUMMARY OF TOTAL COST AND AVERAGE PER-ENTITY COST BY EXEMPTION

	Total cost		Per-entity cost	
	First year	Subsequent years	First year	Subsequent years
PTE 84–24	\$17,425,393	\$14,733,328	\$3,425	\$2,896
PTE 2020–02	227,505,836	194,922,497	18,029	2,757
Mass Amendments:				
PTE 75–1	2,594,856	2,594,856	763	763
PTE 77–4	0	0	0	0
PTE 80–83	0	0	0	0
PTE 83–1	0	0	0	0
PTE 1986–128	444,296	444,296	242	242
Total	247,970,380	212,694,976	22,459	6,657

Note: The sum of the columns may not sum to total due to rounding.

Preliminary Assumptions and Cost Estimate Inputs

The Department also assumes affected entities will likely incur only incremental costs if they are already subject to rules or requirements from the Department or another regulator. The Department acknowledges that not all entities will decide to use the amended PTE 2020–02 and PTE 84–24 for transactions resulting from fiduciary investment advice. Some may instead rely on other existing exemptions that better align with their business models. However, for this cost estimation, the Department assumes that all eligible entities will use the PTE 2020–02 and PTE 84–24 for such transactions. The Department recognizes that this may result in an overestimate, as not all entities will necessarily rely on these exemptions.

The Department does not have information on how many retirement investors—including plan beneficiaries, plan participants, and IRA owners—receive electronic disclosures from investment advice fiduciaries. For the purposes of this analysis, the Department assumes that the percent of retirement investors receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department's 2020 and 2002 electronic

disclosure safe harbors.⁶⁰⁹ Accordingly, the Department estimates that 94.2 percent of the disclosures sent to retirement investors would be sent electronically, and the remaining 5.8 percent would be sent by mail.⁶¹⁰ The Department requests comment on these assumptions.

Additionally, the Department assumes that various types of personnel will perform the tasks associated with information collection requests at an hourly wage rate of \$63.45 for clerical personnel, \$128.11 for a top executive, \$133.05 for a computer programmer, \$158.94 for an insurance sales agent, \$159.34 for a legal professional, \$190.63 for a financial manager, and \$219.23 for a financial adviser.⁶¹¹

⁶⁰⁹ 85 FR 31884 (May 27, 2020); 67 FR 17263 (Apr. 9, 2002).

⁶¹⁰ The Department estimates approximately 94.2 percent of retirement investors receive disclosures electronically. This is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2 percent) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36 percent).

⁶¹¹ Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates. See Employee Benefits Security Administration, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations*, Employee Benefits Security

Cost Associated With PTE 2020–02 Summary of Affected Entities

As discussed in the Affected Entities section of the Regulatory Flexibility Analysis, the Department estimates that 18,721 small financial institutions would be affected by the proposal, comprised of 1,835 broker-dealers, 15,775 registered investment advisers, 10 robo-advisers, 151 insurance companies, 20 investment company principal underwriters, and 930 pension consultants.⁶¹²

Cost To Review the Rule

The Department estimates that all 18,721 of the small financial institutions affected would each need to review the rule, as it applies to their business. The Department estimates that such a review will take a legal professional, on average, nine hours to review the rule, resulting in a total cost of \$26.9 million.⁶¹³

Administration, <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

⁶¹² For more information on how the number of each type of entity is estimated, refer to the Affected Entities section of the Regulatory Flexibility Act analysis.

⁶¹³ The burden is estimated as: (18,721 entities × 9 hours) = 168,489 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is

Cost Associated With Disclosures

The proposed amendments would require small entities to modify existing general disclosures and develop additional general disclosures to those required under the existing exemption. For more information on the changed requirements for each disclosure, refer to the descriptions in the preamble and RIA of this document. The Department estimates the marginal cost for each of the disclosure requirements as:

- Drafting or updating a written acknowledgement that the financial institution and its investment professional are fiduciaries is estimated to result in an aggregate cost of approximately \$123,647.⁶¹⁴
- Drafting or updating a written description of service provided is estimated to result in an aggregate cost of \$1.6 million in the first year.⁶¹⁵
- Drafting the written statement of the Best Interest standard of care owed is estimated to result in an aggregate cost of \$1.6 million in the first year.⁶¹⁶

applied in the following calculation: (18,721 entities × 9 hours) × \$159.34 = \$26,847,037.

⁶¹⁴ The number of financial entities needing to update their written acknowledgement is estimated as: (1,835 broker-dealers × 10%) + (15,775 registered investment advisers × 10%) + (151 insurers × 10%) = 1,776 financial institutions updating existing disclosures. The number of financial entities needing to draft their written acknowledgement is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) = 960 financial institutions drafting new disclosures. The burden is estimated as: (1,776 financial institutions × (10 minutes + 60 minutes)) + (960 financial institutions × (30 minutes + 60 minutes)) = 776 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,776 financial institutions × (10 minutes + 60 minutes)) + (960 financial institutions × (30 minutes + 60 minutes))] × \$159.34 = \$123,647. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶¹⁵ The number of financial entities needing to update their written description of services is estimated as: (1,835 broker-dealers + 15,775 registered investment advisers + 151 insurers) = 17,761 financial institutions updating existing disclosures. The number of financial entities needing to draft their written description of services is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) = 960 financial institutions drafting new descriptions. The burden is estimated as: (17,761 financial institutions × (30 minutes + 60 minutes)) + (960 financial institutions × 1 hour) = 9,841 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(17,761 financial institutions × (30 minutes + 60 minutes)) + (960 financial institutions × 1 hour)] × \$159.34 = \$1,567,985. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶¹⁶ The burden is estimated as: [(1,835 broker-dealers + 15,775 registered investment advisers) × (30 minutes + 60 minutes)] + [(151 insurers + 10 robo-advisers + 930 pension consultants + 20 investment company underwriters) × 1 hour] = 9,896 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,835 broker-dealers +

• Drafting a written statement informing the investor of their right to obtain a written description of the financial institution's policies and procedures and information regarding costs, fees, and compensation is estimated to result in an aggregate cost of \$1.6 million in the first year.⁶¹⁷

• Preparing and sending the general disclosures described above is estimated to result in a de minimis marginal cost.⁶¹⁸

• Preparing and sending requested written descriptions of policies and procedures and information regarding costs, fees, and compensation is estimated to result in an annual cost of \$1.0 million.⁶¹⁹

• Preparing disclosures for PEPs detailing any amounts the financial institution pays to or receives from the PPP or its affiliates, in addition to any conflicts of interest that arise in connection with the investment advice it provides to a PEP is estimated to result in an annual cost of approximately \$118,230 in the first

15,775 registered investment advisers) × (30 minutes + 60 minutes)] + [(151 insurers + 10 robo-advisers + 930 pension consultants, and 20 investment company underwriters) × 1 hour] × \$159.34 = \$1,576,828. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶¹⁷ The burden is estimated as: [(1,835 broker-dealers + 15,775 registered investment advisers) × (30 minutes + 60 minutes)] + [(151 insurers + 10 robo-advisers + 930 pension consultants + 20 investment company underwriters) × 1 hour] = 9,916 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,835 broker-dealers + 15,775 registered investment advisers) × (30 minutes + 60 minutes)] + [(151 insurers + 10 robo-advisers + 930 pension consultants, and 20 investment company underwriters) × 1 hour] × \$159.34 = \$1,580,015. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶¹⁸ Based on FOCUS data, the SEC reported that in 2018, there were 143,333,278 cumulative customer broker-dealer accounts. Of these accounts, the SEC estimates that the 287 small retail broker-dealers held 5,281 customer accounts. The Department used this to estimate that small broker-dealers hold 0.004 percent of the total customer accounts. The Department assumes that the market for other types of financial institutions matches the broker-dealer market and applied this percentage to all other accounts. Accordingly, the burden is estimated as: [(3,183,503 paper disclosures × 0.004%) × 2 pages] × \$0.05 = \$0.74. The Department considers this to be a de minimis cost.

⁶¹⁹ The burden is estimated as: (18,721 financial institutions × 10 disclosures) × (5 minutes + 60 minutes) = 15,601 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(18,721 financial institutions × 10 disclosures) × (5 minutes + 60 minutes)] × \$63.45 = \$989,873. The material cost is estimated as: (18,721 financial institutions × 10 disclosures × 2 pages × \$0.05) + (18,721 financial institutions × 10 disclosures × \$0.66) × (5.8%) = \$8,252. The total cost is estimated as: \$989,873 + \$8,252 = \$998,125. For more information on the assumptions included in this calculation, refer to the RIA of this document.

year.⁶²⁰ The Department estimates that this would result in 928 disclosures sent to employers of PEPs.⁶²¹ This results in an annual cost of approximately \$981.⁶²²

The Department estimates that the total cost for 18,721 small financial institutions to update their disclosure materials and distribute the newly required disclosures is \$6.0 million during the first year and \$1.0 million in each subsequent year.

Cost Associated With Rollover Documentation and Disclosure

As discussed in the cost section of the RIA, the Department estimates that, 3,119,832 rollovers would be affected.⁶²³ The Department lacks reliable data on the number of rollovers that would involve small financial institutions. For the purposes of this analysis, the Department assumes the percent of rollovers conducted by small institutions is proportional to the percent of small financial institutions. Accordingly, the Department estimates that 99 percent of these rollovers, or 3,088,633 rollovers, would involve small financial institutions. The Department requests comments on these assumptions.

Applying these assumptions to the 18,721 small financial institutions, using the same methodology described above to calculate the rollover

⁶²⁰ The Department assumes that the percent of PEPs that are serviced by small institutions is proportionate the percent of financial institutions that are estimated to be small. This percentage is estimated as: (18,721 small financial institutions / 19,290 financial institutions) = 97.1%. The number of PEPs serviced by small financial institutions is estimated as: (382 PEPs × 97.1%) = 371 PEPs. The burden is estimated as: (371 financial institutions × 2 hours) = 742 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (371 financial institutions × 2 hours) × \$159.34 = \$118,230. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶²¹ As discussed in the RIA, according to filings submitted to the Department by August 22, 2023, there are 955 employers in PEPs. The Department does not have data on how many of these disclosures are service by small financial institutions. For the purposes of this analysis, the Department estimates that the number of employers in PEPs serviced by small financial institutions is proportionate the number of PEPs serviced by small financial institutions. Accordingly, the Department estimates the number of disclosures sent to employers of PEPs in this context as: 955 PEPs × (371/382) = 928 PEPs.

⁶²² The burden is estimated as: (928 PEPs × 1 minute) = 15 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (928 PEPs × 1 minute) × \$63.45 = \$981. The Department expects that these disclosures would be sent electronically. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶²³ For more information on how the number of IRA rollovers is estimated, refer to the Affected Entities section of the RIA.

documentation costs for all firms, the Department estimates a total annual cost of approximately \$191.9 million.⁶²⁴

Costs Associated With Annual Report of Retrospective Review for Financial Institutions

PTE 2020–02 requires financial institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of and achieve compliance with the conditions of this exemption, Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. While entities covered by the existing exemption would not incur additional costs with this requirement, robo-advisers, pension consultants, and investment company underwriters, who are not covered under the existing exemption, would incur costs associated with conducting the annual review. This requirement is estimated to result in an annual aggregate cost of \$0.2 million.⁶²⁵

Additionally, the Department estimates the cost for a certifying officer to review the report and certify the exemption would result in an estimated annual cost burden of approximately \$366,000.⁶²⁶

Cost Associated With Written Policies and Procedures

Entities that were not previously complying with PTE 2020–02 would incur the cost to develop policies and procedures in the first year. The requirements to maintain and review policies and procedures is estimated to result in an aggregate cost of \$2.2 million in the first year⁶²⁷ and \$1.5 million in subsequent years.⁶²⁸

The proposed amendments would also require financial institutions to provide their complete policies and procedures to the Department upon request. Based on the number of past cases as well as current open cases that would merit such a request, the Department estimates that the Department would request a total of 165 policies and procedures in the first year

and 50 policies and procedures in subsequent years. Assuming the number of requests from small institutions is proportionate to the number of small financial institutions, the Department estimates that it would request 160 policies and procedures in the first year and 49 in subsequent years.⁶²⁹ The Department estimates that the requirement would result an estimated cost of approximately \$2,538 in the first year⁶³⁰ and \$777 in subsequent years.⁶³¹ The cost for a firm receiving the request would be approximately \$80 in years when a request is made and no cost in most years when no request is made.

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 2020–02, affected entities would incur a total cost of \$227.5 million in the first year and \$194.9 million in subsequent years. The cost by requirement and entity type is summarized in the table below.

TABLE 7—THREE-YEAR AVERAGE COST BY TYPE OF ENTITY AND REQUIREMENT

	Broker-dealer	SEC registered investment adviser	State-registered investment adviser	Insurance company	Robo-adviser	Pension consultant	Investment company underwriter
Rule Review:							
<i>Total</i>	\$877,167	\$3,571,765	\$3,969,000	\$72,181	\$4,780	\$444,559	\$9,560
<i>Per-Entity</i>	478	478	478	478	478	478	478
Disclosure:							
<i>Total</i>	249,624	1,016,368	1,129,414	28,559	2,414	224,469	4,827
<i>Per-Entity</i>	136	136	136	189	241	241	241
Rollover Disclosure:							
<i>Total</i>	18,804,898	76,572,316	85,088,322	1,547,433	102,479	9,530,548	204,958
<i>Per-Entity</i>	2	2	2	2	2	2	2
Policies and Procedures:							
<i>Total</i>	146,328	595,837	662,103	12,041	3,453	321,138	6,906
<i>Per-Entity</i>	80	80	80	80	345	345	345
Retrospective Review:							
<i>Total</i>					6,043	562,032	12,087
<i>Per-Entity</i>					604	604	604

⁶²⁴ The burden is estimated as: (3,088,633 rollovers × 48% × (30 minutes + 60 minutes)) + (3,088,633 rollovers × 52% × (5 minutes + 60 minutes)) = 875,113 hours. A labor rate of \$219.23 is used for a personal financial adviser. The labor rate is applied in the following calculation: (3,088,633 rollovers × 48% × (30 minutes + 60 minutes)) + (3,088,633 rollovers × 52% × (5 minutes + 60 minutes)) × \$219.23 = \$191,850,954. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶²⁵ The number of small entities not currently producing audit reports is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) × 10% = 96 small entities. The number of small entities needing to modify existing audit reports is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) × 90% = 864 small entities. The burden is estimated as: (96 financial institutions × 5 hours) + (864 financial institutions × 1 hour) = 1,344 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(96 financial institutions × 5 hours) + 864 financial institutions

× 1 hour] × \$159.34 = \$214,153. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶²⁶ The burden is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) × 2 hours = 1,920 hours. A labor rate of \$190.63 is used for a financial manager. The labor rate is applied in the following calculation: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) × 2 hours × \$190.63 = \$366,010.

⁶²⁷ The burden is estimated as: (17,761 × (30 minutes + 60 minutes)) + (960 × 5 hours) = 13,681 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(17,761 × (30 minutes + 60 minutes)) + (960 × 5 hours)] × \$159.34 = \$2,179,851. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶²⁸ The burden is estimated as: (18,721 small financial institutions × (30 minutes + 60 minutes)) = 9,361 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (18,721 small financial

institutions × (30 minutes + 60 minutes)) × \$159.34 = \$1,491,502.

⁶²⁹ The percent of financial institutions that are small is estimated as: (18,721 small financial institutions/19,290 financial institutions) = 97.1%. The number of policies and procedures requested from small financial entities in the first year is estimated as: (165 × 97.1%) = 160. The number of policies and procedures requested from small financial entities in the first year is estimated as: (50 × 97.1%) = 49.

⁶³⁰ The burden is estimated as: (160 × (15 minutes + 60 minutes)) = 40 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (160 × (15 minutes + 60 minutes)) × \$63.45 = \$2,538. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶³¹ The burden is estimated as: (49 × (15 minutes + 60 minutes)) = 12 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (49 × (15 minutes + 60 minutes)) × \$63.45 = \$777. For more information on the assumptions included in this calculation, refer to the RIA of this document.

TABLE 7—THREE-YEAR AVERAGE COST BY TYPE OF ENTITY AND REQUIREMENT—Continued

	Broker-dealer	SEC registered investment adviser	State- registered investment adviser	Insurance company	Robo-adviser	Pension consultant	Investment company underwriter
Total:							
<i>Total</i>	20,078,016	81,756,286	90,848,839	1,660,214	119,169	11,082,746	238,339
<i>Per-Entity</i>	696	696	696	749	1,671	1,671	1,671
SBA:							
Threshold (in millions)	47.0	47.0	47.0	47.0	47.0	45.5	47.0
Per-Entity Cost as a Percentage of SBA Threshold:	0.001%	0.001%	0.001%	0.002%	0.004%	0.004%	0.004%

Cost Associated With PTE 84–24

Summary of Affected Entities

As discussed in the Affected Entities section of the Regulatory Flexibility Analysis, the Department expects that 5,087 small financial entities would be affected by the proposed amendments, including 930 pension consultants, 20 investment company principal underwriters, 3,960 independent producers, and 177 insurance companies.⁶³²

Cost To Review the Rule

The Department estimates that all 5,087 of the small financial institutions affected would each need to review the rule, as it applies to their business. The Department estimates that such a review will take a legal professional, on average, two hours to review the rule, resulting in a total cost of \$1.6 million in the first year.⁶³³

Costs Associated With Disclosures

The proposed amendment would require small independent producers to provide disclosures to retirement investors before engaging in a transaction covered by this exemption. For more information on the changed requirements for each disclosure, refer to the descriptions in the preamble and RIA of this document. The Department estimates the marginal cost for each of the disclosure requirements as:

- Drafting or updating a written acknowledgement that the financial institution and its investment professional are fiduciaries is estimated to result in an aggregate cost of approximately \$10,000.⁶³⁴

⁶³² For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

⁶³³ The burden is estimated as: (5,087 entities × 2 hours) = 10,174 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (5,087 entities × 2 hours) × \$159.34 = \$1,621,125.

⁶³⁴ The burden is estimated as: [177 financial institutions + (3,960 independent producers × 5%)] × (10 minutes + 60 minutes) = 63 hours. A labor rate of approximately \$159.34 is used for a legal

- Drafting the written statement of the Best Interest standard of care owed is estimated to result in an aggregate cost of \$29,900.⁶³⁵

- Drafting or updating a written description of service provided is estimated to result in an aggregate cost of \$0.3 million.⁶³⁶

- Drafting a written statement of the independent producer's material conflicts of interest and the amount of insurance commission paid in connection with the purchase by a retirement investor of the recommended annuity is estimated to result in an aggregate cost of \$0.6 million.⁶³⁷

For small entities, the Department estimates that developing the disclosures described above would result in a total cost of \$1.0 million the first year.

professional. The labor rate is applied in the following calculation: [(177 financial institutions + 3,960 independent producers × 5%) × (10 minutes + 60 minutes)] × \$159.34 = \$9,959. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶³⁵ The burden is estimated as: [177 financial institutions + (3,960 independent producers × 5%)] × (30 minutes + 60 minutes) = 188 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(177 financial institutions + 3,960 independent producers × 5%) × (30 minutes + 60 minutes)] × \$159.34 = \$29,876. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶³⁶ The burden is estimated as: (3,960 independent producers × (30 minutes + 60 minutes)) = 1,980 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (3,960 independent producers × (30 minutes + 60 minutes)) × \$159.34 = \$315,493. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶³⁷ The burden is estimated as: (3,960 independent producers × 1 hour) = 3,960 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (3,960 independent producers × 1 hour) × \$159.34 = \$630,986. For more information on the assumptions included in this calculation, refer to the RIA of this document.

Cost Associated With Rollover Documentation and Disclosure

The proposed amendment would require an independent producer to provide a rollover disclosure that is similar to the disclosure required in the proposed amendment to PTE 2020–02. As discussed in the RIA, the Department assumes that such disclosures would be prepared by the independent producer. The Department requests comment on whether this would be true for small independent producers.

In the RIA, the Department estimates that 52,449 retirement investors would receive documentation on whether the recommended annuity is in their best interest each year.⁶³⁸ The Department does not have data on what proportion of rollovers would be produced by small independent producers. For the purposes of this analysis, the Department assumes that the proportion of rollovers advised by small independent producers is equal to the proportion of independent producers that are small. The Department estimates that 99 percent of rollovers would be produced by small independent producers.⁶³⁹ The Department estimates small independent producers would need to provide 51,925 rollover disclosures annually. This results in an estimated cost of approximately \$8.3 million annually.⁶⁴⁰ These costs likely reflect an

⁶³⁸ For information on this estimate, refer to the estimate of IRAs affected by the proposed amendments to PTE 84–24 in the Affected Entities section of the RIA.

⁶³⁹ This is estimated on the percent of entities with annual receipts less than \$15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. See NAICS Association, *Count by NAICS Industry Sectors*, NAICS Association, <https://www.naics.com/business-lists/counts-by-naics-code/>; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), <https://www.sba.gov/document/support-table-size-standards>.

⁶⁴⁰ The burden is estimated as: (51,925 rollovers × 1 hour) = 51,925 hours. A labor rate of approximately \$158.94 is used for an independent producer. The labor rate is applied in the following calculation: (51,925 rollovers × 1 hour) × \$158.94

Continued

overestimate of the total cost, as it assumes that small independent producers would make the same number of recommended rollovers as the average independent producer. The Department requests comment on how many rollover recommendations a small independent producer is likely to make in a given year, on average.

Costs Associated With the Provision of Disclosures to Retirement Investors

The Department estimates that the number of disclosures that would need to be provided to retirement investors is equal to the number of rollover disclosures, or 51,925 disclosures. Preparing and sending the general disclosures described above is estimated to result in an estimated cost of approximately \$18,968.⁶⁴¹

Additionally, independent producers would be required to send the documentation to the insurance company. The Department expects that such documentation would be sent electronically and result in a de minimis burden. The Department requests comment on this assumption.

Costs Associated With the Retrospective Review

The proposed amendment would require small insurance companies to conduct a retrospective review at least annually. The review would be required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review would be required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. Insurance companies would be required to annually provide a written report that details the review to a senior executive officer for certification. Insurance companies would also be required to provide the independent producer with

= \$8,252,960. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁴¹ The labor cost is estimated as: (51,925 disclosures × 5.8% sent by mail × (5 minutes + 60 minutes)) = 251 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (51,925 disclosures × 5.8% sent by mail × (5 minutes + 60 minutes)) × \$63.45 = \$15,926. The material cost is estimated as: 3,012 rollovers resulting in a paper disclosure × [\$0.66 postage + (\$0.05 per page × 7 pages)] = \$3,042. The total cost is estimated as: \$15,926 + \$3,042 = \$18,968. For more information on the assumptions included in this calculation, refer to the RIA of this document.

the underlying methodology and results of the retrospective review.

As discussed in the RIA, the Department estimates that insurance companies would need to prepare a total of 12,000 retrospective reviews.⁶⁴² The Department does not have data on the proportion of retrospective reviews that would be prepared by small insurance companies. For the purpose of this analysis, the Department assumes that the number of retrospective reviews prepared by small insurance companies is proportionate to the number of small insurance companies. This results in an estimate of 9,879 retrospective reviews.⁶⁴³

The Department estimates that conducting and drafting the retrospective review would result in an estimated annual cost of \$1.6 million.⁶⁴⁴ Additionally, the Department estimates the cost for a certifying officer to review the report and certify the exemption would result in an estimated cost burden of \$0.3 million.⁶⁴⁵ Finally, the Department estimates that the requirement to provide the methodology and results to each independent producer would result in an annual cost of approximately \$52,200.⁶⁴⁶

Costs Associated With Policies and Procedures

The proposed amendment would require insurance companies to establish, maintain, and enforce written policies and procedures for the review of each independent producer's recommendation before an annuity is issued to a retirement investor. The insurance company's policies and procedures must mitigate conflicts of

⁶⁴² For more information on this estimate, refer to the RIA.

⁶⁴³ The number of retrospective reviews prepared by small insurance companies is estimated as: $[12,000 \times (177/215)] = 9,879$ retrospective reviews.

⁶⁴⁴ This is estimated as: (9,879 retrospective reviews × 1 hour) = 9,879 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (9,879 retrospective reviews × 1 hour) × \$159.34 = \$1,574,120. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁴⁵ The burden is estimated as: (9,879 retrospective reviews × (15 minutes ÷ 60 minutes)) = 2,470 hours. A labor rate of \$128.11 is used for a top executive. The labor rate is applied in the following calculation: (9,879 retrospective reviews × (15 minutes ÷ 60 minutes)) × \$128.11 = \$316,400. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁴⁶ This is estimated as: (9,879 retrospective reviews × (5 minutes ÷ 60 minutes)) = 823 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (9,879 retrospective reviews × (5 minutes ÷ 60 minutes)) × \$63.45 = \$52,235. For more information on the assumptions included in this calculation, refer to the RIA of this document.

interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the independent producer to place its interests, or those of the insurance, or any affiliate or related entity, ahead of the interests of the retirement investor. Insurance companies' policies and procedures include a prudent process for determining whether to authorize an independent producer to sell the insurance company's annuity contracts to retirement investors, and for taking action to protect retirement investors from independent producers who have failed or are likely to fail to adhere to the impartial conduct standards, or who lack the necessary education, training, or skill. Finally, insurance companies must provide their complete policies and procedures to the Department within 10 days upon request. Finally, insurance companies must provide their complete policies and procedures to the Department within 10 days upon request.

The Department estimates that drafting or modifying the policies and procedures would result in an estimated cost of approximately \$0.1 million in the first year.⁶⁴⁷ The requirement to review policies and procedures annually would result in an estimated cost of approximately \$56,400 in subsequent years.⁶⁴⁸ Providing policies and procedures to the Department upon request is estimated to result in a de minimis annual cost.⁶⁴⁹

⁶⁴⁷ This is estimated as: (177 small insurance companies × 5 hours) = 885 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (177 small insurance companies × 5 hours) × \$159.34 = \$141,016. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁴⁸ This is estimated as: (177 insurance companies × 2 hours) = 354 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (177 insurance companies × 2 hours) × \$159.34 = \$56,406. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁴⁹ The number of requests in the first year is estimated as 177 small insurance companies × (39 requests in PTE 2020–02/4,430 small financial institutions in PTE 2020–02) = 2 requests. The number of requests in subsequent years is estimated as: 177 insurance companies × (12 requests in PTE 2020–02/4,430 small financial institutions in PTE 2020–02) = 1 request. The burden is estimated as: ((2 × 15 minutes) ÷ 60 minutes) = 0.50 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: ((2 × 15 minutes) ÷ 60 minutes) × \$63.45 = \$31.73.

Costs Associated With the Recordkeeping

The proposed amendment would amend the current recordkeeping requirements to incorporate new provisions that are similar to the recordkeeping provision in PTE 2020–02 for all entities relying on the exemption. The Department estimates that the additional time needed to

maintain records for the financial institutions to be consistent with the exemption would require an insurance company and independent producer two hours annually, resulting in an estimated annual cost of \$1.3 million.⁶⁵⁰ Additionally, the Department estimates that the requirement to distribute records upon request would result in an estimated annual cost of \$3.1 million.⁶⁵¹

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 84–24, affected entities would incur a total cost of \$17.4 million in the first year and \$14.7 million in subsequent years. The per-entity cost by type of entity is broken down in the table below.

TABLE 8—COST BY TYPE OF ENTITY AND REQUIREMENT, FIRST YEAR

	Independent producer	Insurance agents and pension consultants	Financial institutions/ insurance companies	Mutual fund underwriters
Rule Review:				
Total	\$1,261,973	\$296,372	\$56,406	\$6,374
Per-Entity	319	319	319	319
Disclosure:				
Total:	9,239,440	.....	18,802	.....
Per-Entity	2,434	.....	106	.....
Policies and Procedures:				
Total .....	.....	.....	141,048	.....
Per-Entity .....	.....	.....	1,115	.....
Retrospective Review:				
Total .....	.....	.....	1,942,755	.....
Per-Entity .....	.....	.....	10,976	.....
Recordkeeping:				
Total	4,405,817	.....	56,406	.....
Per-Entity	397	.....	319	.....
Total				
Total Cost	14,907,230	296,372	2,215,417	6,374
Per-Entity Cost	3,960	319	12,835	319
SBA:				
Threshold (in millions)	15.0	45.5	47.0	47.0
Per-Entity Cost as a Percentage of SBA Threshold	0.021%	0.001%	0.027%	0.001%

Costs Associated With the Mass Amendments

Cost Associated With PTE 75–1

Summary of Affected Entities

The amendment to PTE 75–1 would affect banks, reporting dealers, and broker-dealers registered under the Security Exchange Act of 1934. As discussed in the Affected Entities section above, the Department estimates that 3,403 financial institutions, comprised of 1,835 broker-dealers and 1,568 banks, would use PTE 75–1.⁶⁵²

Costs Associated With Disclosure Requirements in Part V

The Department proposes to amend PTE 75–1 Part V to allow an investment advice fiduciary to receive reasonable

compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if certain conditions are met.⁶⁵³ Prior to the extension of credit, the plan or IRA must receive written a disclosure, including the interest rate or other fees that will be charged on the credit extension as well as the method of determining the balance upon which interest will be charged. As discussed in the RIA, the Department expects that these disclosures are common business practice and would not create an additional burden on small broker-dealers or banks.

Costs Associated With Recordkeeping in Parts II and V

Additionally, the Department proposes to amend Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRAs to financial institutions. The amended class exemption requires financial institutions engaging in the exempted transactions (rather than the plans or IRAs) to maintain all records pertaining to such transactions for six years and provide access to the records upon request to the specified parties. The Department estimates that the total cost for small financial institutions to maintain recordkeeping and provide access to records upon request is approximately \$2.6 million annually

⁶⁵⁰ This is estimated as: (3,960 independent producers + 177 insurance companies) × 2 hours = 8,274 hours. A labor rate of \$158.94 is used for an independent producer. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(3,960 independent producers × 2 hours × \$158.94) + (177 insurance companies × 2 hours × \$159.34)] = \$1,315,211.

⁶⁵¹ The burden is estimated as: (3,960 independent producers × 10 requests) × (30 minutes + 60 minutes) = 19,800 hours. A labor rate of \$158.94 is used for an independent producer. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(3,960 independent producers × 10 requests) × (30 minutes + 60 minutes)] × \$158.94 = \$3,147,012.

⁶⁵² For more information on how the number of each type of entity is estimated, refer to the Affected Entities sections of the RIA and the Regulatory Flexibility Analysis.

⁶⁵³ For more information on these conditions, refer to the Preamble and RIA of this document.

and the per-firm cost is approximately \$763 annually.⁶⁵⁴

Costs Associated With Removing Fiduciary Investment Advice From Parts III and IV

Finally, the Department is proposing to amend Parts III and IV, which currently provide relief for investment advice fiduciaries, by removing fiduciary investment advice from the

covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide records and documentation under PTE 2020–02, this amendment would not result in additional costs.

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 75–1, affected entities would annually incur a total cost of approximately \$2.6 million and a per-firm cost of approximately \$763. The per-entity cost by type of entity is broken down in the table below.

TABLE 9—COST BY TYPE OF ENTITY AND REQUIREMENT

	Broker-dealers	Commercial banks
Recordkeeping:		
Total	\$1,399,224	\$1,195,631
Per-Entity	763	763
Total:		
Total	1,399,224	1,195,631
Per-Entity	763	763
SBA		
Threshold (in millions)	47.0	850
Per-Entity Cost as a Percentage of SBA Threshold	0.0016%	0.0001%

Cost Associated With PTE 77–4, PTE 80–83, and PTE 83–1

Summary of Affected Entities

The amendment to PTE 77–4 would affect mutual fund companies. As discussed in the Affected Entities section, the Department estimates that 812 mutual fund companies would be affected by the amended PTE 77–4.⁶⁵⁵

PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 19 small fiduciary-banks with public offering services would be affected by the amended PTE 80–83.⁶⁵⁶

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

Summary of Total Cost

The Department is proposing to amend PTE 77–4, PTE 80–83, and PTE 83–1 by removing fiduciary investment advice from the covered transactions.

Investment advice providers would instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide such documentation under these exemptions, these amendments would result in a de minimis change for investment advice providers. Thus, these amendments would not result in measurable additional costs.

Cost Associated With PTE 86–128

Summary of Affected Entities

The amendment to PTE 86–128 would affect fiduciaries of employee benefit plans that affect or execute securities transactions and independent plan fiduciaries that authorize the plan or IRA. As discussed in the Affected Entities section, the Department estimates that 1,835 investment advice providers would be affected by the proposed amendments to PTE 86–128.

As discussed in the RIA, the Department estimates that 10,000 IRAs, will engage in transactions covered under this class exemption, of which 210 are new IRAs.⁶⁵⁷ The Department

estimates that 96.9 percent of these IRAs would be overseen by a small investment advice provider.⁶⁵⁸ As such, the Department estimates that, each year, there are 9,690 IRAs, of which 203 are new IRAs that would be overseen by a small investment advice provider.⁶⁵⁹

Costs Associated With Recordkeeping

The Department is proposing to amend Section VI of PTE 86–128 to require financial institutions to maintain for six years the records necessary for the Department, IRS, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether conditions of this exemption have been met. As discussed above, the Department estimates that 395 small-business investment advice providers will be affected by this recordkeeping requirement. Applying this assumption to the cost calculations described above, the Department estimates that the total cost for small-business investment advice providers to maintain recordkeeping is \$204,011

⁶⁵⁴ The burden is estimated as: (3,403 small financial institutions × 4 hours) = 13,612 hours. A labor rate of \$190.63 is used for a financial manager. The labor rate is applied in the following calculation: (3,403 small financial institutions × 4 hours) × \$190.63 = \$2,594,856.

⁶⁵⁵ For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

⁶⁵⁶ For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

⁶⁵⁷ For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

⁶⁵⁸ Based on data from the NAICS Association for NAICS code 523120, the Departments estimate the percent of businesses within the industry of Securities Brokerage with less than \$47 million in

annual sales. (See NAICS Association. “Market Analysis Profile: NAICS Code Annual Sales.” <https://www.naics.com/business-lists/counts-by-naics-code/>.)

⁶⁵⁹ The number of IRAs overseen by a small investment provider is estimated as: 10,000 IRAs × 96.9% = 9,690 IRAs. The number of new IRAs overseen by a small investment provider is estimated as: 210 IRAs × 96.9% = 203 IRAs.

annually⁶⁶⁰ and the per-firm cost is \$111 annually.

Cost Associated With the Written Authorization From the Authorizing Fiduciary to the Broker-Dealer

Authorizing fiduciaries of IRAs entering into a relationship with an investment advice provider are required to provide the investment advice provider with advance written authorization to perform transactions for the IRA. As discussed in the Summary of Affected Entities section for this exemption in this analysis, the Department estimates that approximately 44 authorizing fiduciaries are expected to send an advance written authorization. Applying this assumption to the cost calculations described above, the Department estimates that the total cost to send an advance written authorization is approximately \$9,169 annually.⁶⁶¹ The per-transaction cost is \$45 annually, and the per-firm cost is \$5 annually.

Cost Associated With the Provision of Materials for Evaluation of Authorization of Transaction

Prior to a written authorization being made, the financial institution must provide the authorizing fiduciary with a copy of the exemption, a form for termination of authorization, a description of placement practices, and any other reasonably available information. This information is assumed to be readily available. As described above, the Department assumes this information will be sent to the 203 IRAs that enter into an

agreement with a financial institution. Applying this assumption to the cost calculations described above, Department estimates that the total cost to send the materials is \$1,085 annually.⁶⁶² The per-transaction cost is \$5 annually, and the per-firm cost is \$0.59 annually.

Cost Associated With the Provision of an Annual Termination Form

Financial institutions must annually supply each authorizing fiduciary with a form expressly providing an election to terminate the written authorization. The Department estimates that 395 investment advice providers would prepare the termination form, and 9,690 IRAs would receive the form. Applying these assumptions to the cost calculations described above, Department estimates that the total cost to prepare and send the annual termination form is approximately \$197,857 annually.⁶⁶³ The per-transaction cost is \$20 annually, and the per-firm cost is \$108 annually.

Transaction Reporting

The investment advice provider engaging in a covered transaction must give the authorizing fiduciary either a confirmation slips for each securities transaction or a quarterly report containing specified information. As discussed above, the provision of the confirmation is already required under SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending confirmation slips,

no additional hour and cost burden will occur.

Annual Statement

Broker-dealers are required to send an annual report to each authorizing fiduciary containing the same information as the quarterly report and all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio. The Department assumes this information could be sent together. Therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement, and no additional burden has been reported.

However, collecting and generating the information required for the annual report is reported as a burden. As discussed above, the Department estimates that 2,100 IRAs will receive an annual report. Applying these assumptions to the cost calculations described above, the Department estimates that the total cost to collect and generate information for the annual report is \$141 annually.⁶⁶⁴ The per-account cost is \$0.01 annually, and the per-firm cost is \$0.08 annually.

Report of Commissions Paid

A discretionary trustee must provide each authorizing fiduciary with an annual report that separately shows the commissions paid to affiliated brokers and non-affiliated brokers on both a total dollar basis and a cents-per-share basis. The burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually. However, the collection and generation of the information for the quarterly report is reported as a burden. As described above, the Department estimates that 2,100 IRAs will receive a report of the commissions paid. Applying this assumption to the cost calculations described above, the Department estimates that the total cost to collect and generate information for the report of commission paid is \$56 annually.⁶⁶⁵ The per-account cost is

⁶⁶⁰ The burden is estimated as: 1,835 broker-dealers $\times$ ((30 minutes + 15 minutes) + 60 minutes) = 1,376 hours. The labor rates of \$190.63 and \$63.45 are used for a financial manager and a clerical worker, respectively. The labor rate is applied in the following calculation: (1,835 broker-dealers $\times$ (30 minutes + 60 minutes) $\times$ \$190.63 per hour) + (1,835 broker-dealers $\times$ (15 minutes + 60 minutes) $\times$ \$63.45) = \$204,011. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁶¹ The burden for a legal professional to prepare the authorization form is estimated as: 203 IRAs $\times$ (15 minutes + 60 minutes) per IRA = 51 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: 203 IRA $\times$ (15 minutes + 60 minutes) per IRA $\times$ \$159.34 per hour = \$8,087. The burden of clerical staff to send the authorization is estimated as: 203 IRA $\times$ (5 minutes + 60 minutes) per IRA = 16 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: 203 IRA $\times$ (5 minutes + 60 minutes) per IRA $\times$ \$63.45 = \$1,073. The material cost and postage cost associated with the authorization is estimated as: 203 authorizations for IRAs $\times$ 5.8% paper $\times$ \$0.76 = \$9. Therefore, the total cost to send an advance written authorization is estimated as: \$8,087 + \$1,073 + \$9 = \$9,169. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁶² The burden for a clerical worker to prepare the information is estimated as: 203 IRAs $\times$ (5 minutes + 60 minutes) per IRA = 17 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: 203 IRAs $\times$ (5 minutes + 60 minutes) per IRA $\times$ \$63.45 per hour = \$1,073. The material and postage cost are estimated as: 203 IRAs $\times$ 5.8% paper $\times$ (7 pages $\times$ \$0.05 per page + \$0.66 for postage) = \$12. Therefore, the total cost to send the materials is estimated as: \$1,073 + \$12 = \$1,085. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁶³ The burden for a legal professional to prepare the forms is estimated as: 1,835 broker-dealers $\times$ (30 minutes + 60 minutes) = 918 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: 1,835 broker-dealers $\times$ (30 minutes + 60 minutes) $\times$ \$159.34 = \$146,194. The burden for a clerical worker to prepare and send the forms is estimated as: 9,690 IRAs $\times$ (5 minutes + 60 minutes) = 808 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: 9,690 IRAs $\times$ (5 minutes + 60 minutes) $\times$ \$63.45 = \$51,236. The material and postage cost associated with the forms is estimated as: 9,690 IRAs $\times$ 5.8% paper $\times$ (2 pages $\times$ \$0.05 per page + \$0.66 for postage) = \$427. Therefore, total cost to prepare and send the annual termination form is estimated as: \$146,194 + \$51,236 + \$427 = \$197,857. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁶⁴ The mailing cost is estimated as: 5 pages $\times$ \$0.05 per page = \$0.25. The mailing rate is applied in the following calculation: 9,690 IRAs $\times$ 5.8% paper $\times$ \$0.25 = \$141. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁶⁵ The mailing cost is estimated as: 2 pages $\times$ \$0.05 per page = \$0.10. The mailing cost is applied in the following calculation: 9,690 IRAs $\times$ 5.8% $\times$ \$0.10 = \$56. For more information on the assumptions included in this calculation, refer to the RIA of this document.

\$0.01 annually, and the per-firm cost is less than \$0.03 annually.

Financial institutions are also required to report total of all transaction-related charges incurred by the plan in connection with covered transactions, the allocation of such charges among various persons, as well as a conspicuous statement about the negotiability of brokerage commissions and an estimate of future commission rates to the plan fiduciaries. The

information must be tracked, assigned to specific plans, and reported. As described above, the Department estimates that 9,690 IRAs will be affected by this requirement. Applying this assumption to the cost calculations described above, the Department estimates that the total cost to report this information is \$31,977 annually.⁶⁶⁶ The per-account cost is \$3.30 annually, and the per-firm cost is \$17 annually.

This results in a total annual cost of \$32,033.⁶⁶⁷

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 86–128, affected entities would annually incur a total cost of \$444,296 and a per-firm cost of \$242. The per-entity cost is broken down in the table below.

TABLE 10—COST BY TYPE OF ENTITY AND REQUIREMENT

	Total cost	Per-entity cost
Recordkeeping	\$204,011	\$111
Written Authorization from the Authorizing Fiduciary to the Broker-Dealer	9,169	5
Provision of Materials for Evaluation of Authorization of Transaction	1,085	0.59
Annual Termination Form	197,857	108
Annual Statement	141	0.08
Report of Commissions Paid	32,033	17
Total	444,296	242
SBA Threshold (in millions)		47.0
Per-Entity Cost as a Percentage of SBA Threshold		0.0005%

4. Duplicate, Overlapping, or Relevant Federal Rules

The rules in ERISA and the Code that govern advice on the investment of retirement assets overlap with SEC rules that govern the conduct of investment advisers and broker-dealers that advise retail investors. The Department considered conduct standards set by other regulators, such as SEC, NAIC, and FINRA, in developing the proposal, with the goal of avoiding overlapping or duplicative requirements. If the requirements overlap, compliance with the other disclosure or recordkeeping requirements can be used to satisfy the exemption, as long as the conditions are satisfied.

5. Description of Alternatives Considered

Section 604 of the RFA requires the Department to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. The Department tried to align the requirements in this proposal with the requirements set by other regulators to minimize regulatory burden.

The Department considered not amending PTE 2020–02 and leaving the exemption in its present form. The Department supports the existing PTE

2020–02 and has retained its core components in the amendment, including the Impartial Conduct Standards and the requirement for strong policies and procedures. However, the Department believes that additional protections are necessary to ensure that fiduciary investment advice providers adhere to the stringent standards outlined in PTE 2020–02. Therefore, the proposed amendments clarify and tighten the existing text of PTE 2020–02 to enhance the disclosure requirements and strengthen the disqualification provisions.

The Department has considered requiring financial institutions to disclose the sources of third-party compensation received in connection with recommended investment products on a public web page in PTE 2020–02. When considering this requirement, the Department discussed exempting small financial institutions from this disclosure. The Department estimates that such a disclosure would cost small entities \$4.8 million⁶⁶⁸ with an average per-entity cost of \$1,064. The Department requests comment on whether small financial institutions current provide website disclosures or have the technological infrastructure to do so.

I. Unfunded Mandate Reform Act

Title II of the Unfunded Mandates Reform Act of 1995⁶⁶⁹ requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector. That threshold is approximately \$177 million in 2023.

For purposes of the Unfunded Mandates Reform Act, this proposal is expected to have an impact on the private sector. For the purposes of the proposal, the RIA shall meet the UMRA obligations.

J. Federalism Statement

Executive Order 13132 outlines the fundamental principles of federalism. It also requires federal agencies to adhere to specific criteria in formulating and implementing policies that have “substantial direct effects” on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must

⁶⁶⁶ This burden is estimated as: 9,690 IRAs × \$3.30 = \$31,977. For more information on the assumptions included in this calculation, refer to the RIA of this document.

⁶⁶⁷ This burden is estimated as: \$56 + \$31,977 = \$32,033.

⁶⁶⁸ This estimate is based on the assumption that satisfying this requirement would require a computer programmer to spend, on average, 8 hours. A labor rate of \$133.05 is used for a computer programmer professional. The cost is

estimated as: (4,512 small financial institutions × 8 hours) × \$133.05 = \$4,802,573.

⁶⁶⁹ Unfunded Mandates Reform Act of 1995, *Public Law 104–4, 109 Stat. 48*, (1995).

consult with state and local officials throughout the process of developing the proposed regulation.

As discussed throughout this analysis, this proposed regulatory action would affect the insurance industry pertaining to annuities. These entities are also regulated by states, many of whom, as discussed in the discussion of the regulatory baseline, have taken regulatory or legislative actions. The Department has carefully considered the regulatory landscape in the states and worked to ensure that its proposed regulations would not impose obligations on advisers that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these proposed regulations impose obligations or costs on the state regulators. As discussed above, however, the Department has increased the protections afforded by many of these laws, consistent with its own responsibilities under ERISA, and has endeavored to lend greater uniformity on the provision of advice to retirement investors, so that advisers covered by the rule must all abide by a uniform fiduciary standard. The Department has had discussions with state insurance regulators and state-regulated parties about these issues including the need to ensure that retirement investors have sufficient protection when receiving investment advice. The Department expects to continue discussions with state insurance regulators to ensure that this proposed regulation complements the protections provided by the NAIC Model Rule. The Department also expects to continue its discussion with state securities regulators.

Authority

This regulation is proposed pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894 (Sept. 2, 1974); 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713 (Oct. 17, 1978)), 3 CFR, 1978 Comp. 332, effective December 31, 1978 (44 FR 1065 (Jan. 3, 1979)), 3 CFR, 1978 Comp. 332, 5 U.S.C. App. 237, and under Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012).

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions, Plan assets.

For the reasons set forth in the preamble, the Department is proposing to amend part 2510 of subchapter B of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

■ 1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(1)–(8), 1002(13)–(16), 1002(20), 1002(21), 1002(34), 1002(37), 1002(38), 1002(40)–(44), 1031, and 1135; Div. O, Title I, Sec. 101, Pub. L. 116–94, 133 Stat. 2534 (Dec. 20, 2019); Div. T, Title I, Sec. 105, Pub. L. 117–328, 136 Stat. 4459 (Dec. 29, 2022); Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012); Secs. 2510.3–21, 2510.3–101 and 2510.3–102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237 (E.O. 12108, 44 FR 1065 (Jan. 3, 1979)), and 29 U.S.C. 1135 note. Section 2510.3–38 also issued under Sec. 1(b) Pub. L. 105–72, 111 Stat. 1457 (Nov. 10, 1997).

■ 2. Revise § 2510.3–21 to read as follows:

§ 2510.3–21 Definition of “Fiduciary.”

(a)–(b) [Reserved]

(c) *Investment advice.* (1) For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act), section 4975(e)(3)(B) of the Internal Revenue Code (Code), and this paragraph, a person renders “investment advice” with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property (as defined in paragraph (f)(10) of this section) to the plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary (retirement investor), and the person satisfies paragraphs (c)(1)(i), (ii), or (iii) of this section:

(i) The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;

(ii) The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or

(iii) The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.

(iv) For purposes of this paragraph, when advice is directed to a plan or IRA fiduciary, the relevant retirement investor is both the plan or IRA and the fiduciary.

(v) Written statements by a person disclaiming status as a fiduciary under the Act, the Code, or this section, or disclaiming the conditions set forth in paragraph (c)(1)(ii) of this section, will not control to the extent they are inconsistent with the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.

(2) A person who is a fiduciary with respect to a plan or IRA by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such person does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such person from the definition of the term “party in interest” (as set forth in section 3(14)(B) of the Act) or “disqualified person” (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

(d) *Execution of securities transactions.* (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a

fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code, with respect to a plan or an IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan or IRA in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify

(A) The security to be purchased or sold,

(B) A price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), a price which is determined in accordance with Rule 22c–1 under the Investment Company Act of 1940 (17 CFR 270.22c–1),

(C) A time span during which such security may be purchased or sold (not to exceed five business days), and

(D) The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to a plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to

render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition, of the term “party in interest” (as set forth in section 3(14)(B) of the Act) or “disqualified person” (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

(e) *For a fee or other compensation, direct or indirect.* For purposes of section 3(21)(A)(ii) of the Act and section 4975(e)(3)(B) of the Code, a person provides investment advice “for a fee or other compensation, direct or indirect,” if the person (or any affiliate) receives any explicit fee or compensation, from any source, for the advice or the person (or any affiliate) receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase, sale, or holding of a security or other investment property or the provision of investment advice, including, though not limited to, commissions, loads, finder’s fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative’s new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation. A fee or compensation is paid “in connection with or as a result of” such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or the provision of advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of advice.

(f) *Definitions.* For purposes of this section—

(1) The term “affiliate” means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee, representative, or relative (as defined in paragraph (f)(12) of this section) of such person; and any corporation or partnership of which such person is an officer, director, or partner.

(2) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(3) The term “IRA” means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(4) The term “IRA owner” means, with respect to an IRA, either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) The term “IRA fiduciary” means a person described in section 4975(e)(3) of the Code with respect to an IRA.

(6) The term “plan” means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code.

(7) The term “plan fiduciary” means a person described in section (3)(21)(A) of the Act and/or 4975(e)(3) of the Code with respect to a plan. For purposes of this section, a participant or beneficiary of the plan who is receiving advice is not a “plan fiduciary” with respect to the plan.

(8) The term “plan participant” or “participant” means, for a plan described in section 3(3) of the Act, a person described in section 3(7) of the Act.

(9) The term “beneficiary” means, for a plan described in section 3(3) of the Act, a person described in section 3(8) of the Act.

(10) The phrase “recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property” means recommendations:

(i) As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;

(ii) As to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

(iii) As to rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.

(11) The term “investment property” does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.

(12) The term “relative” means a person described in section 3(15) of the Act and section 4975(e)(6) of the Code or a brother, a sister, or a spouse of a brother or sister.

(g) *Applicability.* Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237, transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. Accordingly, in addition to defining a “fiduciary” for purposes of section 3(21)(A)(ii) of the Act, this section applies to the parallel provision in section 4975(e)(3)(B) of the Code, which defines a “fiduciary” of a plan defined in Code section 4975 (including an IRA) for purposes of the prohibited transaction provisions in the Code. For example, a person who satisfies paragraphs (c)(1) and (e) of this section in connection with a recommendation to a retirement investor that is an employee benefit plan as defined in section 3(3) of the Act, a fiduciary of such a plan, or a participant or beneficiary of such plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to Title I of the Act.

(h) *Continued applicability of State law regulating insurance, banking, or securities.* Nothing in this section shall be construed to affect or modify the provisions of section 514 of Title I of the Act, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities.

Signed at Washington, DC, this 24th day of October, 2023.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 2023–23779 Filed 11–2–23; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12057]

ZRIN 1210–ZA32

Proposed Amendment to Prohibited Transaction Exemption 2020–02

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Notice of Proposed Amendment to Class Exemption PTE 2020–02.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to class prohibited transaction exemption (PTE) 2020–02, which provides relief for certain compensation received by investment advice fiduciaries. The proposed amendment would affect participants and beneficiaries of Plans, IRA owners, and fiduciaries with respect to such Plans and IRAs.

DATES: *Public Comments.* Comments are due on or before January 2, 2024.

Public Hearing. The Department anticipates holding a public hearing approximately 45 days following the date of publication in the **Federal Register**. Specific information regarding the date, location, and submission of requests to testify will be published in a notice in the **Federal Register**.

Applicability Date. The Department proposes to make the final amendment effective 60 days after it is published in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendment should be sent to the Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor through the Federal eRulemaking Portal and identified by Application No. D–12057:

Federal eRulemaking Portal: Visit <http://www.regulations.gov>. Follow the instructions for sending comments.

Docket: For access to the docket to read background documents or comments, including the plain-language summary of the proposal required by the Providing Accountability Through Transparency Act of 2023, please go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

FOR FURTHER INFORMATION CONTACT: Susan Wilker, telephone (202) 693–

8540, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Comment Instructions

Warning: All comments received will be included in the public record without change and will be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number), or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the <http://www.regulations.gov> website is an “anonymous access” system, which means EBSA will not know your identity or contact information unless you provide it. If you send an email directly to EBSA without going through <http://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

Background

The proposed amendment to PTE 2020–02 would provide additional protections for employee benefit plans described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A) (Plans) and investors and additional clarity for investment advice fiduciaries seeking to receive compensation for their advice, including as a result of advice to roll over assets from a Plan to an individual retirement account (IRA), and to engage in principal transactions, that would otherwise violate the prohibited transaction provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and Internal Revenue Code (Code) section 4975.

As described elsewhere in this edition of the **Federal Register**, the Department is proposing to amend the regulation defining when a person renders “investment advice for a fee or other compensation, direct or indirect” with

respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a “fiduciary” in section 3(21)(A)(ii) of ERISA and in section 4975(e)(3)(B) of the Code. The Department also is proposing amendments to existing prohibited transaction exemptions (PTEs) 75–1, 77–4, 80–83, 83–1, 86–128, and 84–24 elsewhere in this edition of the **Federal Register**.

Description of the Proposed Amendment to PTE 2020–02

The Department is proposing to amend PTE 2020–02, which was designed to promote investment advice that is in the best interest of retirement investors (for example, Plan participants and beneficiaries, and IRA owners) by permitting advisers to receive compensation for the advice that is otherwise barred by statute so long as advisers comply with the terms of the exemption. The current exemption conditions emphasize mitigating conflicts of interest and ensuring that retirement investors receive advice that is prudent and loyal. An important objective of the existing exemption is to require fiduciary investment advice providers to adhere to stringent standards that are designed to ensure that their investment recommendations reflect the best interest of Plan and IRA investors. Accordingly, under the current framework of PTE 2020–02, Financial Institutions and Investment Professionals relying on the existing exemption must:

- acknowledge their fiduciary status¹ in writing;
- disclose their services and material conflicts of interest;
- adhere to Impartial Conduct Standards requiring them to:
 - investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would (in other words, their recommendations must be “prudent”);
 - act with undivided loyalty to retirement investors when making recommendations (in other words, they must never place their own interests ahead of the retirement investor’s interest, or subordinate the retirement investor’s interests to their own);
 - charge no more than reasonable compensation and comply with Federal

securities laws regarding “best execution”; and

- avoid making misleading statements about investment transactions and other relevant matters;
 - adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest that could otherwise cause violations of those standards;
 - document and disclose the specific reasons that any rollover recommendations are in the retirement investor’s best interest; and
 - conduct an annual retrospective compliance review.

The Department is proposing to maintain all of these core protections in PTE 2020–02 that provide fundamental investor protections.

This proposed amendment would build on these existing conditions to provide more certainty for Retirement Investors receiving advice and Financial Institutions and Investment Professionals complying with the exemption’s conditions. In this regard, the Department is proposing additional disclosures to ensure that Retirement Investors have sufficient information to make informed decisions about the costs of the investment advice transaction and about the significance and severity of the investment advice fiduciary’s Conflicts of Interest. The proposed amendment also would provide more guidance for Financial Institutions and Investment Professionals complying with the Impartial Conduct Standards and implementing their policies and procedures.

Importantly, the Department is not proposing to require a contract for investment advice to IRAs, as it did in 2016. Neither the existing PTE 2020–02 nor the proposed amendment creates any new causes of action or requires Financial Institutions to provide enforceable warranties to Retirement Investors. The primary penalty for an IRA fiduciary that engages in a non-exempt prohibited transaction by failing to satisfy the exemption conditions of amended PTE 2020–02 would be the prohibited transaction excise tax imposed under Code section 4975 and enforced by the Department of the Treasury and the Internal Revenue Service (IRS). This proposal would require Financial Institutions, as part of their retrospective review, to report any non-exempt prohibited transactions in connection with fiduciary investment advice by filing IRS Form 5330, correcting those transactions, and paying any resulting excise taxes. The proposed amendment would add failure to correct prohibited transactions, report

those transactions to the IRS on Form 5330, and pay the resulting excise tax imposed under Code section 4975 to the list of behaviors that could make a Financial Institution ineligible to rely on PTE 2020–02 for ten years. The Department believes these proposed conditions would provide important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02.

Effective Date

PTE 2020–02 was originally published on December 18, 2020, and it became effective on February 16, 2021. The Department proposes that the amendment to PTE 2020–02 will be effective on the date that is 60 days after the publication of a final amendment in the **Federal Register**. This current exemption (PTE 2020–20) will remain effective under its existing conditions until the effective date of a final amendment, if granted.

To provide absolute clarity, the Department confirms that the restrictions of ERISA section 406(a)(1)(A), 406(a)(1)(D), and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F), would not apply to the receipt of compensation by a Financial Institution, Investment Professional, or any Affiliate and Related Entity in connection with investment advice, if the recommendation were made before the effective date of the final amendment to PTE 2020–02, or if the compensation was received pursuant to a systematic purchase program established before the effective date of the final amendment. Also, no party would be required to comply with the amended conditions for a transaction that occurred before the effective date of the final amended exemption.

Exemption Scope

The Department is proposing minor changes and clarifications to the scope of the exemption. PTE 2020–02 currently permits Financial Institutions, Investment Professionals, and their Affiliates and Related Entities to receive reasonable compensation as a result of providing fiduciary investment advice, including as a result of investment advice to roll over assets from a Plan to an IRA. Subject to additional conditions, the exemption also provides relief for Financial Institutions, Investment Professionals, Affiliates and Related Entities to engage in certain principal transactions, and to receive a mark-up, mark-down, or other payment. The Department is not proposing changes to these covered transactions.

¹ For purposes of this disclosure, and throughout the exemption, the term fiduciary status is limited to fiduciary status under Title I of ERISA, the Code, or both. While this exemption and the SEC’s Regulation Best Interest both use the term “best interest,” the Department retains interpretive authority with respect to satisfaction of this exemption.

At the same time, the Department notes that more parties may need to rely on an amended PTE 2020–02, because of the Department’s proposed amendment to the definition of “fiduciary investment advice.” If the new rule is adopted, parties that have not been fiduciaries under the five-part test may become fiduciaries in the future. In addition, the Department is proposing to amend other class prohibited transaction exemptions that provide relief for fiduciary investment advice.² Parties that have been relying on those exemptions may choose to comply with the amended PTE 2020–02 instead. The Department requests comment on whether other or additional changes are needed to the scope of the exemption in light of the changes proposed elsewhere in this edition of the **Federal Register**.

Covered Principal Transactions

The Department is proposing minor changes to the definition of Covered Principal Transaction. As proposed, a “Covered Principal Transaction” is a principal transaction that:

(1) For sales to a Plan or an IRA:

(i) Involves a U.S. dollar denominated debt security issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933, a U.S. Treasury Security, a debt security issued or guaranteed by a U.S. federal government agency other than the Department of the Treasury, a debt security issued or guaranteed by a government-sponsored enterprise, a municipal security, a certificate of deposit, an interest in a Unit Investment Trust, or any investment permitted to be sold by an investment advice fiduciary to a Retirement Investor under an individual exemption granted by the Department after the effective date of this exemption that includes the same conditions as this exemption; and

(ii) A debt security may only be recommended in accordance with written policies and procedures adopted by the Financial Institution that are reasonably designed to ensure that the security, at the time of the recommendation, has no greater than moderate credit risk and sufficient liquidity that it could be sold at or near carrying value within a reasonably short period of time; and

(2) For purchases from a Plan or an IRA, involves any securities or investment property.

This is very similar to the current definition in PTE 2020–02, with minor wording changes for clarity. The Department is considering revising the beginning of Section II(d) to read “A ‘Covered Principal Transaction’ is a principal transaction for cash that . . .” Adding the phrase “for cash” would prevent in-kind transactions from being Covered Principal Transactions. The Department seeks comment on this revision and particularly would like to receive information regarding whether eliminating in-kind assets would reduce the complexity and conflicts of interest involved in these transactions.

The Department is also proposing to add a definition of Riskless Principal Transaction to PTE 2020–02. Proposed Section V(l) provides that “Riskless Principal Transaction” means a transaction in which a Financial Institution, after having received an order from a Retirement Investor to buy or sell an asset, purchases or sells the asset for the Financial Institution’s own account to offset the contemporaneous transaction with the Retirement Investor. A Riskless Principal Transaction is not a Covered Principal Transaction. While these are technically executed as principal transactions, the Department is not including them in the definition of Covered Principal Transaction. Thus, there is no limitation on the types of products that may be sold in a Riskless Principal Transaction. Adding the definition provides clarity regarding which transactions qualify as Riskless Principal Transactions. The Department requests comment on this definition. The Department notes that Financial Institutions should take care in determining that a product is eligible for a Covered Principal Transaction or Riskless Principal Transaction. These definitions are intentionally narrow, based on the potentially acute conflicts of interest created by principal transactions. If a Financial Institution later determines that an Investment Professional recommended a principal transaction that was neither a Covered Principal Transaction nor a Riskless Principal Transaction, then that transaction was not eligible for this exemption and may need to be reversed to put the Retirement Investor in the same position they would have been if the transaction had not occurred.

Financial Institutions, Investment Professionals, and Retirement Investors

The Department is not proposing substantive changes to definitions of the parties that can rely on the exemption. PTE 2020–02 is available to Financial Institutions (registered investment

advisers,³ broker-dealers, banks,⁴ and insurance companies) and their Investment Professionals (individual employees, agents, and representatives) that provide fiduciary investment advice to Retirement Investors (Plan participants and beneficiaries, IRA owners, and Plan and IRA fiduciaries).⁵ As it did in 2020, the Department requests comment on this definition of Financial Institution and whether any other type of entity should be included.⁶

The Department is proposing a very minor change to the definition of “Retirement Investor.” Proposed Section V(l) defines Retirement Investor as “(1) A participant or beneficiary of a Plan with authority to direct the investment of assets in his or her account or to take a distribution; (2) The beneficial owner of an IRA acting on behalf of the IRA; or (3) A fiduciary of a Plan or an IRA.” In the proposed amendment, the definition of Retirement Investor is re-designated as Section V(n), and section V(n)(3) reads “A fiduciary acting on behalf of a Plan or an IRA.” The Department intends this

³ The definition of Financial Institution in Section V(e) includes an entity that is “(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) or under the laws of the state in which the adviser maintains its principal office and place of business.” References in the preamble to registered investment advisers include both SEC- and state-registered investment advisers.

⁴ Section V(e)(2) includes “A bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)))” In the preamble to PTE 2020–02, the Department clarified that the Department interprets this definition to extend to credit unions.” 85 FR 82811.

⁵ As defined in Section V(i) of the exemption, the term “Plan” means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A). In Section V(g), the term “Individual Retirement Account” or “IRA” is defined as any account or annuity described in Code section 4975(e)(1)(B) through (F), including an Archer medical savings account, a health savings account, and a Coverdell education savings account. While the Department uses the term “Retirement Investor” throughout this document, the exemption is not limited only to investment advice fiduciaries of employee pension benefit plans and IRAs. Relief would be available for investment advice fiduciaries of employee welfare benefit plans as well.

⁶ 85 FR 40838 (“The Department seeks comment on the definition of Financial Institution in general and whether any other type of entity should be included. The Department also seeks comment as to whether the definition is overly broad, or whether Retirement Investors would benefit from a narrowed list of Financial Institutions. In addition, the Department requests comment on whether the definition of Financial Institution is sufficiently broad to cover firms that render advice with respect to investments in Health Savings Accounts (HSA), and about the extent to which Plan participants receive investment advice in connection with such accounts.”) In finalizing PTE 2020–02, the Department determined to not expand the scope of the exemption.

² Elsewhere in this edition of the **Federal Register**, the Department is proposing to amend PTEs 75–1, 77–4, 80–83, 84–24, and 86–128.

as a mere clarification that advice provided to a Plan or IRA fiduciary must be in the Best Interest of the Plan or IRA, and not the Best Interest of the fiduciary. The Department requests comment on whether additional clarifications are necessary.

Exclusions

PTE 2020–02 Section I(c) provides that the exemption does not apply in certain situations. The Department is proposing changes to expand the availability of this exemption, to facilitate more Financial Institutions and Investment Professionals providing high quality advice to Retirement Investors.

Pooled Employer Plans (PEPs)

PTE 2020–02 Section I(c)(1) currently provides an exclusion from the exemption if the Plan is covered by Title I of ERISA and the Investment Professional, Financial Institution or any Affiliate is (A) the employer of employees covered by the Plan, or (B) a named fiduciary or plan administrator with respect to the Plan that was selected to provide advice to the Plan by a fiduciary who is not independent of the Financial Institution, Investment Professional, and their Affiliates. In 2020, the Department received comments requesting additional guidance and clarification regarding the exemption's application to PEPs, which were authorized by the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act).⁷ In finalizing PTE 2020–02, the Department explained its belief that it was premature to address issues related to PEPs, given their recent origination, unique structure, and likelihood of significant variations in potential business models, as the Pooled Plan Providers (PPPs) were still deciding how to structure their operations.⁸ Based on PEP developments since December 2020, including the Department's final rule establishing registration requirements for PPPs under 29 CFR 2510.3–44, the Department is now proposing to change the exclusions so that PTE 2020–02 clearly would cover investment advice provided by an Investment Professional, Financial Institution, or any Affiliate that is a PPP. The proposal amends the existing exclusion to clearly provide that a PPP

can provide investment advice to a PEP within the framework of the exemption. This would allow PEPs to receive investment advice in the same manner as other ERISA plans. The proposed text would allow Investment Professionals, Financial Institutions, or any Affiliates to be a named fiduciary or plan administrator of the PEP, if that named fiduciary or plan administrator is a PPP that is registered with the Department under 29 CFR 2510.3–44. However, it would not provide relief for a PPP's decision to hire an affiliated or related party as an advice provider.

To ensure PEPs are properly covered, the Department is also proposing certain changes to the definitions in Section V. The proposed amendment would add the defined terms “PEP” and “PPP” by referencing ERISA section 3(43) and 3(44), the statutory provisions defining PEPs and PPPs that were added to ERISA by the SECURE Act. The Department seeks comment on how PEPs and PPPs may use this exemption. For example, will advice be provided directly to the PEP, or will it be provided to the PPP in connection with the PEP? Will the exemption be used to provide advice to employers participating in the PEP?

Robo Advice

The Department is proposing to remove PTE 2020–02 Section I(c)(2), which excludes investment advice generated solely by an interactive website in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the website, without any personal interaction or advice with an Investment Professional (robo-advice). As explained in the preamble to PTE 2020–02, the statutory exemption in ERISA section 408(b)(14), (g), and Code section 4975(d)(17) and 4975(f)(8), includes specific conditions that are tailored to computer-generated investment advice. PTE 2020–02, by contrast, was tailored to investment advice that is provided through a human Investment Professional who is supervised by a Financial Institution. The Department is now proposing to amend PTE 2020–02 to allow Financial Institutions providing investment advice through computer models to rely on the exemption. The Department understands that Financial Institutions may use a combination of computer models and individual Investment Professionals to provide investment advice and may wish to have a single set of policies and procedures that can govern all recommendations, regardless of whether a Retirement Investor speaks

with an Investment Professional. Including computer-generated advice in this exemption would simplify Financial Institutions' compliance, so that a Retirement Investor could request an Investment Professional's assistance with a particular transaction, or an Investment Professional could review the computer model's recommendations, without separate analysis as to whether an Investment Professional has provided fiduciary investment advice.

Like any other advice arrangement, Financial Institutions relying on computer models would have to satisfy the exemption's best interest standard and other protective conditions in order to satisfy PTE 2020–02. For example, a computer model that preferentially recommends that a Retirement Investor purchase products that generate more income to the Financial Institution would not be permitted under this exemption. The Department is not, however, proposing to require Financial Institutions to comply with the conditions of the statutory exemption in ERISA 408(g)⁹ in order to rely on PTE 2020–02. The Department believes that the additional conditions of this exemption, particularly the retrospective review and ineligibility provisions, would provide strong protections that are not a part of the statutory exemption. However, complying with the statutory exemption conditions could form the basis for policies and procedures that effectively mitigate Conflicts of Interest. To enhance their policies and procedures, it would be reasonable for a Financial Institution to incorporate some, but not all, of the statutory exemption conditions when relying on PTE 2020–02, although a Financial Institution could not merely pick and choose among the conditions of both exemptions in an attempt to avoid the meaningful conflict mitigation requirements each exemption provides. In other words, a Financial Institution must determine that its policies and procedures are, in fact, prudently designed to ensure compliance with the Best Interest standard, regardless of whether the policies and procedures include conditions taken from the statutory exemption.

The Department requests comment on amending PTE 2020–02 to provide relief for Financial Institutions that provide investment advice through computer models without the involvement of an

⁷ The SECURE Act was enacted as Division O of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94, 133 Stat. 2534 (Dec. 20, 2019)). The SECURE Act amended ERISA section 3(2) to authorize PEPs and added new ERISA sections 3(43) which establishes requirements for PEPs and 3(44), which establishes requirements for PPPs.

⁸ 85 FR 82798, 82819 (Dec. 18, 2020).

⁹ ERISA section 408(g) and the regulations thereunder provide prohibited transaction relief for certain investment advice arrangements that use fee leveling or use computer models. See 29 CFR 2550.408g–1 and Code section 4975(f)(8).

Investment Professional. The Department also requests responses to the following questions:

- Are Financial Institutions currently relying on the statutory exemption in ERISA section 408(g)?
- Are Financial Institutions that use computer models providing advice in a manner that does not require a prohibited transaction exemption?
- Would expanding PTE 2020–02 to include investment recommendations by computer models allow more conflicted investment advice?
- Are Financial Institutions providing rollover advice via computer models?
 - If so, would those Financial Institutions be able to provide the required Rollover disclosure in Section II(b)(5)?
 - If not, are there other ways the Financial Institution can ensure that the Retirement Investor receives a full explanation of why the recommended product is in their Best Interest?
- Are Financial Institutions using artificial intelligence to provide investment advice? If so, how are those Financial Institutions compensated for advice provided in this manner and do they rely on PTE 2020–02 or on the statutory exemption in ERISA section 408(g)? Would recommendations that relied in whole or part on artificial intelligence require additional or separate conditions?

Investment Discretion

Section I(c)(3) of PTE 2020–02 currently excludes transactions that involve the Investment Professional acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of the regulations issued by the Department and the Department of the Treasury/IRS,¹⁰ which set forth the definition of fiduciary investment advice. In the preamble to PTE 2020–02, the Department explained it was citing the Department's five-part test as the governing authority for status as an investment advice fiduciary.¹¹

Now that the Department is proposing to amend the regulation defining an investment advice fiduciary, the Department is also proposing to simplify the language in the exemption. Specifically, the proposed amendment redesignates Section I(c)(3) as Section I(c)(2), which would exclude from the exemption advice provided in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii))

and Code section 4975(e)(3)(B) and the regulations issued thereunder. While the Department does not intend to change the substance of this exclusion, the Department is proposing to clarify that Financial Institutions and Investment Professionals cannot rely on the exemption if they act in a fiduciary capacity other than as an investment advice fiduciary.

Impartial Conduct Standards

Best Interest

The Best Interest standard in PTE 2020–02 currently requires investment advice to be, at the time it is provided, in the Best Interest of the Retirement Investor. As defined in current Section V(b), Best Interest advice (1) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and (2) does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own.

The proposed amendment would retain the Best Interest standard from PTE 2020–02. To provide additional clarity, the Department is proposing to add an example to the operative text from the 2020–02 preamble specifying that it is impermissible for the Investment Professional to recommend a product that is worse for the Retirement Investor because it is better for the Investment Professional's or the Financial Institution's bottom line. In other words, the requirement for Investment Professionals not to subordinate the Retirement Investor's interests to their own is not satisfied if the Investment Professional merely considers the Retirement Investor's interests along with its own and the Financial Institution's in choosing which product to recommend to a Retirement Investor. The Department notes this standard is consistent with the SEC's standards for both registered investment advisers and broker-dealers.

As the Department stated in the preamble to PTE 2020–02, this Best Interest standard allows Investment Professionals and Financial Institutions to provide investment advice despite having a financial or other interest in the transaction, so long as they do not

place their own interests ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to their own. For example, in choosing between two investments offered and available to the investor from the Financial Institution, it is not permissible for the Investment Professional to advise investing in the one that is worse for the Retirement Investor but better for the Investment Professional's or the Financial Institution's bottom line. It bears emphasis, however, that this standard should not be read as somehow foreclosing the Investment Professional and Financial Institution from being paid on a transactional basis, nor does it foreclose investment advice on proprietary products or investments that generate Third-Party Payments, or advice based on investment menus that are limited to such products, in part or whole. Financial Institutions and Investment Professionals are entitled to receive reasonable compensation fairly disclosed for their work, as long as they do not subordinate the Retirement Investor's interests to their own and have appropriate policies and procedures to safeguard against imprudent or disloyal advice.

Certainly, in many cases, it is in the Retirement Investor's best interest to receive advice from Investment Professionals that are compensated through commissions incurred on a transactional basis, rather than as part of an ongoing fee-based relationship (for example, pursuant to an advisory relationship subject to a recurring charge based on assets under management). In such cases, the fact that the Investment Professional received a commission for their services is not inconsistent with the principles set forth herein. Conversely, a recommendation to enter into a fee-based arrangement may, in certain cases, be inconsistent with the Best Interest standard. For example, "reverse churning," or recommending that a Retirement Investor continue to receive advice and hold assets subject to an ongoing advisory fee, in circumstances where the investor has low trading activity and little need for ongoing advice, would constitute a violation of the Impartial Conduct Standards and ERISA section 406(b)(1) that is not covered by this exemption. In the discussion of the policies and procedures requirement under Section II(c), the Department provides additional guidance on how Financial Institutions that construct their investment menus with reference to proprietary products or Third-Party

¹⁰ 29 CFR 2510.3–21(c)(1)(i) and (ii)(B) or 26 CFR 54.4975–9(c)(1)(i) and (ii)(B).

¹¹ 85 FR 82798, 40842 (Dec. 18, 2020).

payments can comply with the exemption.

Finally, it should be noted that this Best Interest standard also does not impose an unattainable obligation on Investment Professionals and Financial Institutions to somehow identify the single “best” investment for the Retirement Investor out of all the investments in the national or international marketplace, assuming such advice were even possible at the time of the transaction.

Reasonable Compensation and Best Execution

The Department is retaining the reasonable compensation and best execution standards from PTE 2020–02, with minor adjustments to the language. Section II(a)(2)(A) provides that the compensation received, directly or indirectly, by the Financial Institution, Investment Professional, their Affiliates and Related Entities for their fiduciary investment advice services provided to the Retirement Investor must not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2). In addition, Section II(a)(2)(B) provides that the Financial Institution and Investment Professional must seek to obtain the best execution of the recommended investment transaction that is reasonably available under the circumstances as required by the Federal securities laws.

No Misleading Statements

The Department is also maintaining the requirement in Section II(a)(3), which prohibits Financial Institutions and Investment Professionals from making materially misleading statements to Retirement Investors. It is not sufficient for such statements to be technically accurate; therefore, the Department is clarifying that this condition is not satisfied if a Financial Institution or Investment Professional omits information that is needed to make the statement not misleading in light of the circumstances under which it was made. The Financial Institution and Investment Professional must consider whether the information provides data the Retirement Investor likely would need or want to know about the recommended investment and provide that information in a manner the Retirement Investor can understand.

Disclosure

Section II(b) of PTE 2020–02 currently requires Financial Institutions to provide certain disclosures to Retirement Investors before engaging in a transaction pursuant to the exemption.

The Financial Institution must provide a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries under Title I of ERISA and the Code, as applicable, with respect to any investment recommendations provided by the Financial Institution or Investment Professional to the Retirement Investor. The Financial Institution must also provide an accurate written description of the services to be provided to the Retirement Investor and the Financial Institution’s and Investment Professional’s material Conflicts of Interest that is not misleading in all material respects. In addition, under current Section II(c)(3) of PTE 2020–02, before engaging in a rollover recommended pursuant to the exemption, the Financial Institution must provide Retirement Investors with documentation of specific reasons why the rollover recommendation is in the Retirement Investor’s best interest.

As part of this amendment to PTE 2020–02, the Department is proposing additional disclosures described below, which the Department has determined will help ensure that Retirement Investors have sufficient information to make an informed decision about the costs of the transaction and the significance and severity of the Financial Institution’s Conflicts of Interest. The Department requests comment on these disclosures and is particularly interested in receiving information regarding whether additional or alternative information would be helpful to Retirement Investors. Since many Financial Institutions are already complying with PTE 2020–02, the Department is interested in hearing from those Financial Institutions and from investors about the helpfulness of the current disclosures and what information might provide additional protections.

Pre-Transaction Disclosure

Before engaging in a transaction pursuant to this exemption, PTE 2020–02 Section II(b)(1) currently requires the Financial Institution to provide a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries under Title I of ERISA or the Code, or both, as applicable, with respect to any investment recommendations provided by the Financial Institution or Investment Professional to the Retirement Investor. The Department has become concerned that some parties misinterpret this condition and claim to satisfy it through artful phrasing that does not, in fact, tell the Retirement

Investor if the recommendation is made by a fiduciary (for example, by saying they “may” be fiduciaries or that they are fiduciaries to the extent they meet the definition of fiduciary investment advice under the ERISA or the Code). Before executing a recommended transaction, however, a Retirement Investor should know whether the recommendation is coming from a Financial Institution or Investment Professional who is subject to the ERISA/Code fiduciary standard. Similarly, if the Financial Institution and Investment Professional are to comply with the law and meet the exemption’s conditions, they should decide if they are acting as a fiduciary, inasmuch as their legal obligations and exemption conditions turn on fiduciary status under ERISA, the Code, or both.

The proposed amendment would clarify the fiduciary acknowledgment requirement so that the Financial Institution must provide a written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I, the Code, or both when making an investment recommendation. If Financial Institutions and Investment Professionals are unwilling to meet this exemption condition, they must restructure their operations to avoid prohibited transactions.

The Department is proposing to add a requirement in Section II(b)(2) that the Financial Institutions include with the initial disclosure a written statement of the Best Interest standard of care owed by the Investment Professional and Financial Institution to the Retirement Investor. PTE 2020–02 Section II(b)(2) currently requires a written description of the services to be provided and the Financial Institution’s and Investment Professional’s material Conflicts of Interest that is accurate and not misleading in all material respects. The Department is proposing to re-designate this provision as Section II(b)(3), replace “all material respects” with “any material respect,” and add a clarification that this description will include the amount the Retirement Investor will directly pay for such services and the amounts the Financial Institution and Investment Professional receive from other sources, including through Third-Party Payments. If, for example, the Retirement Investor will pay through commissions or transaction-based payments, the written statement must clearly disclose that fact. This description must be written in plain English, taking into consideration a Retirement Investor’s level of financial

experience. As explained previously in the preamble to final PTE 2020–02 published in 2020, the Department anticipates Financial Institutions are able to satisfy this disclosure requirement in part through disclosures required by other regulators.¹² The Department requests comment whether additional specificity is needed, particularly as to the type of Third-Party Payments or other incentives provided to the Financial Institution.

The Department is also proposing a new Section II(b)(4) which would require Financial Institutions to inform Retirement Investors of their right to obtain specific information regarding costs, fees, and compensation that is described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, and nature. The Financial Institution must provide the information in sufficient detail for the Retirement Investor to make an informed judgment about the costs of the transaction and the significance and severity of Conflicts of Interest. This includes the total compensation that the Financial Institution and Investment Professional receive, not just the costs directly paid by the Retirement Investor. This disclosure also must describe how the Retirement Investor can receive the information free of charge. The Department is not proposing to require Financial Institutions to maintain records of every transaction or be able to quickly provide specific information regarding costs or fees generated by specific transactions. However, the Department is proposing to require Financial Institutions to maintain sufficient records to allow them to meaningfully respond to Retirement Investors' requests to demonstrate how the Financial Institution and its

Investment Professionals are compensated in connection with their recommendations.¹³

To assist Financial Institutions and Investment Professionals in complying with this exemption condition, the Department is providing the following model language that will satisfy Section II(b)(1), (2), and (4).

When we make investment recommendations to you regarding your retirement plan account or individual retirement account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money creates some conflicts with your interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours. Under this special rule's provisions, we must:

- Meet a professional standard of care when making investment recommendations (give prudent advice);
- Never put our financial interests ahead of yours when making recommendations (give loyal advice);
- Avoid misleading statements about conflicts of interest, fees, and investments;
- Follow policies and procedures designed to ensure that we give advice that is in your best interest;
- Charge no more than is reasonable for our services; and
- Give you basic information about conflicts of interest.

You can ask us for more information explaining costs, fees, and compensation, so that you may make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest. We will provide you with this information at no cost to you.

Please note that the Department is not proposing to include model language for Section II(b)(3) because many different types of Financial Institutions will rely on this exemption and provide a wide range of services to Plans and Retirement Investors.

Rollover Disclosure

The proposed amendment would clarify the rollover disclosure. While the current requirement is a part of both the disclosure conditions in Section II(b)(3) and the policies and procedures condition in Section II(c)(3) of PTE 2020–02, the proposed amendment would consolidate this into one condition in amended Section II(b)(5). This requirement extends to recommended rollovers from a Plan to

another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (e.g., from a commission-based account to a fee-based account).

Before engaging in a rollover or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Financial Institution, and Investment Professional must consider and document their conclusions as to whether a rollover is in the Retirement Investor's Best Interest and provide that documentation to the Retirement Investor. Relevant factors to consider must include but are not limited to:

- (i) the alternatives to a rollover, including leaving the money in the Plan or account type, as applicable;
- (ii) the comparative fees and expenses;
- (iii) whether an employer or other party pays for some or all administrative expenses; and
- (iv) the different levels of fiduciary protection, services and investments available.

When considering the alternatives to a rollover recommendation, the Financial Institution and Investment Professional should not focus solely on the Retirement Investor's existing investment allocation without considering other investment options in the existing Plan or IRA.¹⁴

Investment Professionals and Financial Institutions should make diligent and prudent efforts to obtain information about the fees, expenses, and investment options offered in the Retirement Investor's Plan account. In general, such information should be readily available to the Retirement Investor as a result of Department regulations mandating disclosure of plan-related information to the plan's participants that is found at 29 CFR 2550.404a–5. If the Retirement Investor refuses to provide such information, even after a full explanation of its significance, and the information is not otherwise readily available, the Financial Institution and Investment Professional should make a reasonable estimate of a Plan's expenses, asset

¹² “While the exemption does not include specific safe harbors, the Department confirms that Financial Institutions may rely, in whole or in part, on other regulatory disclosures to satisfy certain aspects of this disclosure requirement, for example, the disclosures required under Regulation Best Interest and Form CRS, applicable to broker-dealers; Form ADV including Form CRS, applicable to registered investment advisers; and disclosures required under insurance and banking laws when such disclosures cover services to be provided and the Financial Institution's and Investment Professional's material Conflicts of Interest. Avoiding duplication of disclosures is important and the Department reiterates that the disclosure standard under this exemption may be satisfied in whole, or in part, by using other required disclosures to the extent those disclosures include information required to be disclosed by the exemption. Allowing the use of other disclosures to meet the disclosure standard under this exemption should serve to harmonize this exemption's conditions with those of other disclosure regimes.” 85 FR at 82830.

¹³ In addition, Section IV already requires Financial Institutions to “maintain[] for a period of six years records demonstrating compliance with this exemption and make[] such records available, to the extent permitted by law including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury.”

¹⁴ The Department included very similar language in its April 2021 FAQs, Q15. When this policy was challenged in litigation, the court determined that that policy was a procedurally proper interpretive rule, and it was not arbitrary and capricious, because it is “the type of documentation that . . . is precisely of the nature that a prudent investment advisor would undertake. Accordingly, it neither contradicts the 2020 Exemption nor goes beyond it.” *Am. Securities Ass'n v. Dep't of Labor*, No. 8:22-cv-330, 2023 WL 1967573, at *21 (M.D. Fla. Feb. 13, 2023).

values, risk, and returns based on publicly available information. The Financial Institution and Investment Professional should document and explain the assumptions used in the estimate and their limitations. In such cases, the Financial Institution and Investment Professional could rely on alternative data sources, such as the Plan's most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of the Plan that holds the Retirement Investor's account. The Department welcomes comments on reliable benchmarks that could be used for this purpose.

The Department notes it would be permissible under this exemption for a Financial Institution to charge a discrete fee for the rollover analysis and charge separately for advice following the rollover. Like all other service providers and investment advice fiduciaries, the Financial Institution may only charge reasonable compensation for the rollover analysis and must satisfy all other conditions of the exemption.

Web Disclosure

The Department also seeks comment on whether Financial Institutions should be required to provide additional disclosures to Retirement Investors and the investing public. In particular, the Department is interested in receiving comments regarding whether it should require Financial Institutions to maintain a public website containing the pre-transaction disclosure, a description of the Financial Institution's business model, associated Conflicts of Interest (including arrangements that provide Third-Party Payments), and a schedule of typical fees. The website could be formatted as a separate website, a web page on an existing website, or in some other way that is publicly accessible. If the Department were to add a web disclosure requirement, the Department would also require Financial Institutions to provide Retirement Investors with a link to the web disclosure (or a printed web address) as part of the pre-transaction disclosures currently required by Section II(b)(1)–(4).

The Department is interested in receiving data and other information regarding the benefits of such a disclosure. The Department estimates that, if such a disclosure were required, it would require eight hours of labor annually from a computer programmer, on average, resulting in an annual cost of approximately \$20.5 million.¹⁵ The

Department welcomes comments on the accuracy of Department's estimates on the required time to maintain the disclosure, and how many Financial Institutions currently have the technology infrastructure to post a web disclosure. The Department is also interested in receiving any data that commenters may have that can inform an estimate of the extent to which Retirement Investors, investment consultants, and third-party intermediaries would visit and use a web page that includes such disclosures, and the extent to which such disclosures could drive better investor outcomes.

The Department contemplates that, to the extent applicable, the website would list all product manufacturers and other parties with whom the Financial Institution maintains arrangements that provide Third-Party Payments to the Investment Professional, the Financial Institution, or Affiliates with respect to specific investment products or classes of investments recommended to Retirement Investors; a description of the arrangements, including a statement on whether and how these arrangements impact Investment Professionals' compensation, and a statement on any benefits the Financial Institution provides to the product manufacturers or other parties in exchange for the Third-Party Payments.

The website may describe the above arrangements with product manufacturers, Investment Professionals, and others by reference to dollar amounts, percentages, formulas, or other means reasonably calculated to present a materially accurate description of the arrangements. Similarly, the Financial Institution may group disclosures on the website based on reasonably defined categories of investment products or classes, product manufacturers, Investment Professionals, and arrangements, and it may disclose reasonable ranges of values, rather than specific values as appropriate. Regardless of how it is constructed, the website should fairly disclose the scope, magnitude, and nature of the Financial Institution's compensation arrangements and Conflicts of Interest in sufficient detail to permit visitors to the website to make an informed judgment about the significance of the compensation practices and Conflicts of Interest with respect to transactions recommended by

is used for a computer programmer professional. The labor rate is applied in the following calculation: (19,290 entities × 8 hours) × \$133.05 = \$20,532,276.

the Financial Institution and its Investment Professionals.

Good Faith

Section II(b)(6) of the proposal would provide that the Financial Institution will not fail to satisfy the conditions in Section II(b) solely because it, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, or if the disclosure is temporarily inaccessible through no fault of the Financial Institution, provided that the Financial Institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

Under proposed Section II(b)(7) of the amendment, Investment Professionals and Financial Institutions may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know that such information is incomplete or inaccurate. The proposed exemption makes clear in Section II(b)(8) that Financial Institutions will not be required to disclose information pursuant to this Section II(b) if such disclosure is otherwise prohibited by law.

Policies and Procedures

Under PTE 2020–02, Section II(c), a Financial Institution must currently establish, maintain, and enforce written policies and procedures that it prudently designs to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards. The proposed amendment clarifies, by adding examples to the operative text, some actions that Financial Institutions may not take because a reasonable person could conclude that they are likely to encourage Investment Professionals to make recommendations that are not in the Retirement Investors' Best Interest. The Department is not proposing changes to the underlying requirements applicable to these policies and procedures but is proposing to require Financial Institutions to provide their complete policies and procedures to the Department upon request within 10 business days of request.¹⁶

The Financial Institution's policies and procedures must mitigate Conflicts of Interest to such an extent that a reasonable person reviewing the Financial Institution's policies and procedures and its incentive practices as

¹⁵ The burden is estimated as: (19,290 entities × 8 hours) = 154,320 hours. A labor rate of \$133.05

¹⁶ Except where specified, as here, "days" refers to calendar days.

a whole would conclude that they do not create an incentive for the Financial Institution or Investment Professional to place its interests ahead of the Retirement Investor's interest.¹⁷ The policies and procedures must be prudently designed to protect Retirement Investors from recommendations to make excessive trades; to buy investment products, annuities, or riders that are not in the Retirement Investor's Best Interest; or to allocate excessive amounts to illiquid or risky investments. To satisfy Section II(c), Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to encourage Investment Professionals to make recommendations that are not in Retirement Investors' Best Interest. A Financial Institution should not offer incentive vacations, or even paid trips to educational conferences, if the desirability of the destination is based on sales volume and satisfaction of sales quotas.

The Financial Institution must pay close attention to any Conflicts of Interest that may exist within the Financial Institution itself. For example, it is not enough merely to pay Investment Professionals the same percentage of the Financial Institution's compensation for a recommended investment product, as for other products, if the Financial Institution receives more compensation from recommending that product rather than other products. In such cases, the "level" compensation percentage effectively directly transmits the Financial Institution's conflict of interest to the Investment Professional, as the Investment Professional's compensation is increased in direct proportion to the profitability of the investment to the firm. Thus, Section II(c) requires the Financial Institution to look carefully at its own incentives and ensure that all recommendations are focused on the Retirement Investor's Best Interest rather than the Financial Institution's interests.

This is not to say the exemption is limited to certain types of Financial Institutions or investment products. Financial Institutions that offer a restricted menu of proprietary products or products that generate Third-Party

Payments can establish, maintain, and enforce written policies and procedures that satisfy these requirements. For example, the Department would view a Financial Institution that authorizes a limited universe of investment recommendations as satisfying the policies and procedures requirement if it prudently does the following:

- Documents in writing its limitations on the universe of recommended investments, the Conflicts of Interest associated with any contract, agreement, or arrangement providing for its receipt of Third-Party Payments or associated with the sale or promotion of proprietary products.

- Documents any services it will provide to Retirement Investors in exchange for Third-Party Payments, as well as any services or consideration it will furnish to any other party, including the payor, in exchange for the Third-Party Payments.

- Reasonably concludes that the limitations on the universe of recommended investments and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to receive compensation in excess of reasonable compensation for Retirement Investors as set forth in Section II(a)(2).

- Reasonably concludes that these limitations and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to recommend imprudent investments; and documents in writing the bases for its conclusions.

- Informs the Retirement Investor clearly and prominently in writing that the Financial Institution limits the types of products that it and its Investment Professionals recommend to proprietary products and/or products that generate Third-Party Payments.

- In this regard, the notice should not simply state that the Financial Institution or Investment Professional "may" limit investment recommendations based on whether the investments are proprietary products or generate Third-Party Payments, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis.

- Clearly explains its fees, compensation, and associated Conflicts of Interest to the Retirement Investor in plain English.

- Ensures that all recommendations are based on the Investment Professional's considerations of factors or interests such as investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

- At the time of the recommendation, the amount of compensation and other

consideration reasonably anticipated to be paid, directly or indirectly, to the Investment Professional, Financial Institution, or their Affiliates or Related Entities for their services in connection with the recommended transaction is not in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

- The Investment Professional's recommendation reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor; and the Investment Professional's recommendation is not based on the financial or other interests of the Investment Professional or on the Investment Professional's consideration of any factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

The Department intends this as an example of one way a Financial Institution could satisfy the policies and procedures requirement, but not the only way. The Department requests comment on whether additional guidance is needed regarding a Financial Institution or Investment Professional's recommendations of proprietary products to a Retirement Investor, and, if so, the type of guidance that would be most useful.

Retrospective Review

The Department is proposing to retain the retrospective review in PTE 2020–02, Section II(d) with certain modifications. The review must be reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption, including the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. The Department is clarifying that as part of the review, it expects Financial Institutions to determine whether they have complied with each exemption condition. This expectation is based in part on the premise that PTE 2020–02 currently requires the Financial Institution's Senior Executive Officer to certify that the Financial Institution has policies and procedures in place that are prudently designed to achieve compliance with the exemption conditions as part of the retrospective review. In order to make that

¹⁷ The Department provided further guidance on the policies and procedures in Questions 16 and 17 of a set of Frequently Asked Questions available at <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf>.

certification, the retrospective review must be reasonably designed to detect and prevent violations of, and achieve compliance with, all conditions of the exemption itself. Consistent with this expectation, the Department has received self-correction notifications summarizing the Financial Institution's annual retrospective review and identifying its failure to comply with a range of conditions.

The Department is also adding a clarification that, as part of its retrospective review, the Financial Institution must update its policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with Section II(c). This is intended as clarification of the current PTE 2020–02, which requires Financial Institutions “maintain” their policies and procedures and also requires the Senior Executive Officer's certification to include that the Financial Institution has in place a prudent process to modify the policies and procedures. The Department is proposing to add this language to Section II(d)(1) for clarity.

In the Department's view, an annual review will generally be appropriate. However, Financial Institutions may choose to conduct their reviews more frequently and should do so as circumstances dictate. For example, if a Financial Institution knows or should know that non-exempt prohibited transactions or violations of either the Impartial Conduct Standards or policies and procedures conditions have occurred, the Financial Institution cannot wait until the next annual review to correct transactions or revise its policies and procedures.

As the Department described in the preamble to PTE 2020–02 when it was finalized in 2020, an appropriate retrospective review would be aimed at detecting non-compliance across a wide range of transaction types and sizes, large and small, identifying deficiencies in the policies and procedures, and rectifying those deficiencies. For large Financial Institutions that conduct large numbers of transactions each year, sampling may not be the sole means of testing compliance, but it is an important and necessary component of any prudent review process and should be performed in a manner designed to identify potential violations, problems, and deficiencies that need to be addressed.¹⁸

The methodology and results of the retrospective review must be reduced to a written report that is provided to a

Senior Executive Officer. The Department is proposing some edits to the Senior Executive Officer's report. The Department is making minor edits to reflect the clarifications to the retrospective review described above. In addition, the Department is proposing to amend Section II(d)(3) to require the Senior Executive Officer to certify that the Financial Institution has filed (or will file timely, including extensions) Form 5330 to report to the IRS any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B). The certification must also include that the Financial Institution has corrected those transactions and paid any resulting excise taxes owed under Code section 4975. As further described below, the Department is proposing to amend other sections of PTE 2020–02 to ensure Financial Institutions pay the excise taxes owed on non-exempt prohibited transactions. In its decision vacating the 2016 rulemaking, the Fifth Circuit wrote that “ERISA Title II only punishes violations of the ‘prohibited transactions’ provision by means of IRS audits and excise taxes.”¹⁹ Consistent with this reasoning, the Department is proposing to require the Senior Executive Officer to carefully review transactions, correct violations, and pay any required excise taxes.

The review, report, and certification must be completed no later than six months following the end of the period covered by the review. The Financial Institution must retain the report, certification and supporting data for six years, and provide such information to the Department within 10 business days of request, to the extent permitted by law including 12 U.S.C. 484 (regarding limitations on visitatorial powers for national banks).

Self-Correction

The Department is proposing to retain the self-correction in Section II(e) in amended PTE 2020–02. The exemption allows self-correction in certain cases when either the violation did not result in investment losses to the Retirement Investor, or the Financial Institution made the Retirement Investor whole for any resulting losses. In this context, “losses” are not limited to recommendations that leave the Retirement Investor with fewer assets

than originally invested. For example, if the Financial Institution's fees are excessive, the Financial Institution cannot keep the fees just because the Retirement Investor did not lose money in the transaction.

Since finalizing PTE 2020–02, the Department has received several self-correction emails under Section II(e). Most of these emails describe late disclosures (including both fiduciary acknowledgments and rollover analyses) which may be corrected under PTE 2020–02 as long as all of the required information was provided to the Retirement Investor, even if not in writing, so that the Financial Institution is confident that the Retirement Investor had the information needed to make an informed investment decision before a transaction was executed pursuant to the Financial Institution or Investment Professional's recommendation.

The Department has also received questions about the types of transactions that can be corrected under PTE 2020–02, Section II(e). If a recommendation satisfies all conditions of the exemption, but due to a clerical error the wrong asset is purchased or sold, the Financial Institution must correct this error as quickly as possible by ensuring the Retirement Investor's account is in the same position it would have been if the correct transaction had occurred. However, if an Investment Professional has recommended a transaction that was not in the Retirement Investor's Best Interest, the Retirement Investor may be prohibited from returning money to an ERISA account after it has been rolled over into an IRA. Even if the IRA investments have performed well since the rollover, the Retirement Investor may have been harmed by the loss of ERISA Title I's protections. The Department requests comment on whether additional clarifications are needed as to the types of transactions eligible for correction under Section II(e).

Eligibility

The Department is proposing to retain the eligibility provision in Section III, which identifies circumstances under which an Investment Professional or Financial Institution will become ineligible to rely on the exemption for a period of 10 years. The Department continues to maintain that the eligibility provisions ensure that Financial Institutions provide reasonable oversight of Investment Professionals and that both adopt a culture of compliance. The Department is proposing certain changes to Section III, mostly for clarity. The Department requests comment on these proposed

¹⁹ *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 384 (5th Cir. 2018). For additional information regarding correcting prohibited transactions see *Voluntary Fiduciary Correction Program Under the Employee Retirement Income Security Act of 1974*, 71 FR 20262 (Apr. 19, 2006).

¹⁸ 85 FR 82798, 82839 (Dec. 18, 2020).

changes and whether additional clarity is needed.

The Department is proposing to expand ineligibility to include Financial Institutions that are Affiliates, rather than a more limited definition of “Controlled Group.” The Department remains concerned that a Financial Institution facing ineligibility for its actions affecting Retirement Investors could merely change its corporate form and continue to rely on the exemption. The Department understands there has been some confusion about what entities would be considered Financial Institutions in the same Controlled Group and has determined that by including Affiliates as opposed to Financial Institutions in the same Controlled Group, the provision will be better understood by the parties involved. Moreover, the inclusion of Affiliates ensures that Financial Institutions would be diligent in their obligation to monitor the actions of their Affiliates and foster a culture of compliance throughout the organization.

The proposed amendment also would set forth the specific crimes (including foreign crimes) that could cause ineligibility in Section III(a). Under current PTE 2020–02, a Financial Institution or Investment Professional only becomes ineligible upon conviction of “crimes arising out of such person’s provision of investment advice to Retirement Investors.” The Department is proposing to broaden this to include the enumerated crimes, regardless of the conduct under which they arose. The Department is concerned that the limitation of “arising out of . . . provision of investment advice” is too narrow. Like the addition of Affiliates, this will help foster a culture of compliance throughout the organization in recognition of the importance of investment advice to Retirement Investors. The Department requests comment on this change.

Similar to the amended retrospective review provision, the Department is proposing to add ineligibility for a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B) to Section II(a)(2). This proposed amendment would ensure that IRAs and other Title II plans actually report and pay an excise tax that they owe. A single missed excise tax would not make the Financial Institution ineligible for 10 years, but Financial Institutions that

regularly disregard their legal obligation to pay excise taxes on prohibited transactions would need to find alternative relief.

The Department is also making clarifying changes to the timing of the ineligibility designation set forth in Section III(b). While PTE 2020–02 provides for different amounts of time before ineligibility, and then provides a one-year winding down period, the Department is proposing to simplify this process and create uniformity so that all entities would become ineligible six months after the conviction date, the date of the Department’s written determination regarding a foreign conviction, or the date of the Department’s written ineligibility notice regarding other misconduct, as applicable. In the Department’s view, the one-year wind down created a long period in which noncompliance and inappropriate conduct could continue. This six-month period will take the place of the winding down period and provide ample time for Financial Institutions and Investment Professionals to inform Retirement Investors of their ineligibility and/or find alternative means of complying with ERISA. During the six months, the Financial Institution and Investment Professionals are still fiduciaries that are subject to all of the fiduciary requirements and prohibited transaction rules. Thus, Financial Institutions and Investment Professionals must continue to comply with the exemption during those six months, and any transactions that do not meet the terms of the exemption will be subject to excise tax and ERISA penalties.

Furthermore, the Department has clarified that the ineligibility remains in effect until the earliest of: (A) a subsequent judgment reversing a person’s conviction, (B) 10 years after the person became ineligible or is released from imprisonment, if later, or (C) the Department grants an individual exemption permitting reliance on this exemption, notwithstanding the conviction.

The Department is proposing changes to Section III(c), which provides an opportunity to be heard. In a change from PTE 2020–02, Financial Institutions and Investment Professionals that become ineligible due to a conviction under Section III(a)(1)(A) would not have a separate opportunity to be heard by the Department following conviction by a U.S. Federal or state court of competent jurisdiction. A convicted advice provider has been provided due process by the U.S. court, and the criminal conduct underlying the conviction cannot be cured. Financial

Institutions and Investment Professionals are required to act in the Best Interest of the Retirement Investor and in doing so, the Department expects them to act with a high degree of integrity and foster a culture of compliance. The criminal conduct underlying the conviction calls into question the advice provider’s ability to act in the Retirement Investor’s Best Interest, although a convicted Financial Institution or Investment Professional may be able to use other exemptions or apply for an individual exemption. The Department is proposing to provide an opportunity to be heard when the conviction is by a foreign court. Section III(c)(1) would allow Financial Institutions and Investment Professionals to submit a petition informing the Department of the conviction and seeking a determination that continued reliance on the exemption would not be contrary to the purposes of the exemption.

Proposed Section III(c)(2) of the exemption would allow Financial Institutions and Investment Professionals that have engaged in conduct described in Section III(a)(2) to have the opportunity to cure the behavior and to be heard in an evidentiary hearing by the Department. Under this provision, before issuing a written ineligibility notice, the Department will issue a written warning to the Investment Professional or Financial Institution, as applicable, identifying the specific conduct, and provide a six-month period to cure the misconduct. At the end of the six-month period, if the Department determines that the Investment Professional or Financial Institution has not taken appropriate action to prevent recurrence of the disqualifying conduct, it will then provide an opportunity to be heard and present evidence, in person (including by phone or videoconference), or in writing, or a combination thereof. The evidentiary hearing will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences. Following the hearing, the Department’s determination whether to issue the ineligibility notice will be based solely on its discretion. If the Department issues a written ineligibility notice, the notice will articulate the basis for the determination that the Investment Professional or Financial Institution engaged in conduct described in Section III(a)(2).

For all hearings under Section III(c), the Department will consider the following when making its determination:

- the gravity of the offense;

- the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy;

- recency of the conduct at issue;
- any remedial measures the Investment Professional or Financial Institution has taken upon learning of the underlying conduct; and
- other factors the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption.

The Department is also proposing to add the heading “Alternative exemptions” in Section III(d), which describes how a Financial Institution may continue business after becoming ineligible. The Department requests comments on the process described above, including whether it would be helpful to provide greater details about the evidentiary hearing and the written ineligibility notice, and, if so, what details are necessary.

Recordkeeping

The Department is considering amending the recordkeeping provisions in Section IV to allow more parties to review the records necessary to determine whether the exemption is satisfied. The recordkeeping provisions of PTE 2020–02 allow only the Department and the Department of the Treasury to inspect books and records. The Department originally proposed that records should be available for review by additional parties but limited that access in the final exemption in response to comments. Commenters expressed concern that parties might “overwhelm” Financial Institutions with requests for use in litigation.

Since PTE 2020–02 became effective, the Department has worked with Financial Institutions seeking to comply. The Department is of the view both that Financial Institutions could easily share their documentation of compliance and that Retirement Investors would benefit from access to that information. As described above, the Department is proposing additional disclosure requirements, which means some of this information would be provided to Retirement Investors without them needing to request to review records. In addition, the Department believes that most parties will likely not request records, and, when they do, the Department believes it is important that plans, unions and employee organizations, and participants and beneficiaries can access information they need to determine whether the exemption is satisfied and to understand how the Financial Institution and Investment Professional

are acting in the Retirement Investor’s Best Interest.

The Department seeks feedback on whether to replace Section IV with the following:

(a) The Financial Institution maintains the records necessary to enable the persons described in subsection (a)(2) below to determine whether the conditions of this exemption have been met with respect to a transaction for a period of six years from the date of the transaction in a manner that is reasonably accessible for examination. No prohibited transaction will be considered to have occurred solely on the basis of the unavailability of such records if they are lost or destroyed due to circumstances beyond the control of the Financial Institution before the end of the six-year period:

(1) No party, other than the Financial Institution responsible for complying with this section IV, will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the excise tax imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or available for examination as required by this section IV.

(2) Except as provided in subsection (3) or precluded by 12 U.S.C. 484 (regarding limitations on visitorial powers for national banks), and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records are reasonably available at their customary location during normal business hours for examination by:

(A) Any authorized employee of the Department or the IRS or another state or Federal regulator;

(B) Any fiduciary of a Plan that engaged in a transaction pursuant to this exemption;

(C) Any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to this exemption; or

(D) Any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

(3) None of the persons described in subsection (2)(B)–(D) above are authorized to examine records regarding a transaction involving another Retirement Investor, privileged trade secrets or privileged commercial or financial information of the Financial Institution, or information identifying other individuals.

(4) If the Financial Institution refuses to disclose information to a person described in subsection (2)(B)–(D) above on the basis that the information is exempt from disclosure, the Financial Institution must provide a written notice advising the requestor of the reasons for its refusal and that the Department may request that such information be produced to the Department by the end of the thirtieth (30th) day following the Department’s request.

(b) A Financial Institution’s failure to maintain the records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. Such failure does

not affect the relief for other transactions if the Financial Institution maintains required records for such transactions in compliance with this section IV.

The Department requests comment on both the burden to Financial Institutions and the benefits to Retirement Investors of being able to access this information on request.

Executive Order 12866 and 13563 Statement

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, as amended by Executive Order 14094, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$200 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President’s priorities, or the principles set forth in the Executive Order. It has been determined that this proposal is a “significant regulatory action” within the scope of section 3(f)(1) of the Executive Order.

Therefore, the Department has provided an assessment of the proposal’s potential costs, benefits, and transfers, and OMB has reviewed this proposed amendment pursuant to the Executive Order.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and Federal

agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department is soliciting comments regarding the information collection request (ICR) included in the proposed amendments to the ICR. To obtain a copy of the ICR, contact the PRA addressee below or go to RegInfo.gov. The Department has submitted a copy of the rule to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology (e.g., permitting electronically delivered responses).

Commenters may send their views on the Departments' PRA analysis in the same way they send comments in response to the proposed rule as a whole (for example, through the www.regulations.gov website), including as part of a comment responding to the broader proposed rule. Comments are due by January 2, 2024 to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N-5718, Washington, DC 20210, or ebbsa.opr@dol.gov. ICRs also are available at <http://www.RegInfo.gov> (<http://www.reginfo.gov/public/do/PRAMain>).

As discussed above in the preamble, the Department proposes to amend PTE 2020-02 to require the provision of additional disclosures to retirement investors receiving advice and to provide more guidance for financial institutions and investment professionals complying with the Impartial Conduct Standards and implementing the policies and procedures. This proposal is intended to align with other regulators' rules and standards of conduct.

These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.²⁰

1.1 Preliminary Assumptions

In the analysis discussed below, a combination of personnel would

perform the tasks associated with the ICRs at an hourly wage rate of \$63.45 for clerical personnel, \$133.05 for a computer programmer, and \$159.34 for a legal professional, and \$219.23 for a financial advisor.²¹

The Department does not have information on how many retirement investors, including plan beneficiaries and participants and IRA owners, receive disclosures electronically from investment advice fiduciaries. For the purposes of this analysis, the Department assumes that the percent of retirement investors receiving disclosures electronically would be similar to the percent of plan participants receiving disclosures electronically under the Department's 2020 electronic disclosure rules.²² Accordingly, the Department estimates that 94.2 percent of the disclosures sent to retirement investors would be sent electronically, and the remaining 5.8 percent would be sent by mail.²³ The Department requests comment on these assumptions.

The Department assumes any documents sent by mail would be sent by first class mail, incurring a postage cost of \$0.66 for each piece of mail.²⁴ Additionally, the Department assumes that documents sent by mail would incur a material cost of \$0.05 for each page.

1.2 Affected Entities

The Department expects the same 19,290 entities that are affected by the existing PTE 2020-02 would be affected by the proposed amendments to the PTE. The number of entities by type and size are summarized in the table below.²⁵

TABLE 1—AFFECTED ENTITIES BY TYPE AND SIZE

	Small	Large	Total
Broker-Dealer	395	1,499	1,894
Retail	287	1,034	1,321
Non-Retail	108	465	573
Registered Investment Adviser	2,996	12,986	15,982
SEC	220	7,350	7,570
Retail	74	4,570	4,644
Non-Retail	146	2,780	2,926
State	2,776	5,636	8,412
Retail	2,166	4,399	6,566
Non-Retail	610	1,237	1,847

²⁰ For a more detailed discussion of the marginal costs associated with the proposed amendments to PTE 2020-02, refer to the Regulatory Impact Analysis (RIA) in the Notice of Proposed Rulemaking published elsewhere in today's edition of the **Federal Register**.

²¹ Internal DOL calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see <https://www.dol.gov/sites/dolgov/files/EBBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebbsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

²² 67 FR 17263.

²³ The Department estimates approximately 94.2% of retirement investors receive disclosures electronically, which is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2%) and the estimated share of

retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36.0%).

²⁴ U.S. Post Office, *First-Class Mail*, (2023), <https://www.usps.com/ship/first-class-mail.htm>.

²⁵ For more information on how the number of each type and size of entity is estimated, refer to the Affected Entity section of the RIA in the Notice of Proposed Rulemaking published elsewhere in today's edition of the **Federal Register**.

TABLE 1—AFFECTED ENTITIES BY TYPE AND SIZE—Continued

	Small	Large	Total
Insurer	151	32	183
Robo-Adviser	10	190	200
Pension Consultant	930	81	1,011
Investment Company Underwriter	20	0	20
Total	4,502	14,788	19,290

In addition, the proposed amendments may affect banks and credit unions selling non-deposit investment products. There are 4,672 federally insured depository institutions in the United States, consisting of 4,096 commercial banks and 576 savings institutions.²⁶ Additionally, there are 4,686 federally insured credit unions.²⁷ Moreover, in 2017, the U.S. Government Accountability Office estimated that approximately two percent of credit unions have private deposit insurance.²⁸ Based on this estimate, the Department estimates that there are approximately 96 credit unions with private deposit insurance and 4,782 credit unions in total.²⁹

The Department understands that banks most commonly use “networking arrangements” to sell retail non-deposit investment products, including equities, fixed-income securities, exchange-traded funds, and variable annuities.³⁰ Under such arrangements, bank employees are limited to performing only clerical or ministerial functions in connection with brokerage transactions. However, bank employees may forward

customer funds or securities and may describe, in general terms, the types of investment vehicles available from the bank and broker-dealer under the arrangement. Similar restrictions on bank employees’ referrals of insurance products and state-registered investment advisers exist.

Because of these limitations, the Department believes that, in most cases, such referrals would not constitute fiduciary investment advice within the meaning of the proposal. Due to the prevalence of banks using networking arrangements for transactions related to retail non-deposit investment products, the Department believes that most banks would not be affected by PTE 2020–02 with respect to such transactions.

The Department currently estimates that no banks or credit unions would be impacted by the proposed amendments to PTE 2020–02 but requests comments on this assumption. The Department is requesting comment on how frequently these entities use their own employees to perform activities that would otherwise be covered by the prohibited transaction provisions of ERISA and the Code. The Department seeks comment on the frequency with which bank or credit union employees recommend bank products to retirement investors and how they currently ensure such recommendations are prudent to the extent required by ERISA. The Department invites comments on the magnitude of any such costs and solicits data that would facilitate their quantification in the proposal.

1.3 Production and Distribution of Required Disclosures for Investors

1.3.1 Disclosure Requirements Under the Current PTE 2020–02

Section II(b) currently requires financial institutions to provide certain disclosures to retirement investors before engaging in a transaction pursuant to the exemption. These disclosures include:

- a written acknowledgment that the financial institution and its investment professionals are fiduciaries;
- a written description of the services to be provided and any material conflicts of interest of the investment

professional and financial institution; and

- documentation of the financial institution and its investment professional’s conclusions as to whether a rollover is in the retirement investor’s best interest, before engaging in a rollover or offering recommendations on post-rollover investments.

The following estimates reflect the ongoing paperwork burdens of the affected entities. Broker-dealers, registered investment advisers, and insurance companies were required to prepare these disclosures under the existing PTE 2020–02. The estimates below reflect paperwork burden these entities would incur to modify such exemption, but the Department assumes that these entities have already incurred costs related to drafting such disclosures.

The Department estimates that preparing a disclosure indicating fiduciary status would take a legal professional at affected robo-advisors, pension consultants, and investment company underwriters 30 minutes, resulting in an hour burden of 616 hours and a cost burden of \$98,074.³¹

The proposed amendment makes minor edits to the written acknowledgment that the financial institution and its investment professional are fiduciaries. The Department does not have data on how many financial institutions would need to modify their disclosures in response to this amendment; however, the Department expects that the disclosures required under the existing form of PTE 2020–02 likely satisfy this requirement for most financial institutions covered under the existing exemption. For the purposes of this analysis, the Department assumes that 10 percent of financial entities under the existing exemption would need to update their disclosures and that it would take a legal professional at a financial

²⁶ Federal Insurance Deposit Corporation, *Statistics at a Glance—as of March 31, 2023*, <https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf>.

²⁷ National Credit Union Administration, *Quarterly Credit Union Data Summary 2023 Q2*, <https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q2.pdf>.

²⁸ U.S. Government Accountability Office, *Private Deposit Insurance: Credit Unions Largely Complied with Disclosure Rules, But Rules Should be Clarified*, (March 29, 2017), <https://www.gao.gov/products/gao-17-259>.

²⁹ The total number of credit unions is calculated as: 4,686 federally insured credit unions/(100%–2% of credit unions that are privately insured) = 4,782 total credit unions. The number of private credit unions is estimated as: 4,782 total credit unions – 4,686 federally insured credit unions = 96 credit unions with private deposit insurance.

³⁰ For more details about “networking arrangements,” see Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>. Financial institutions that are broker-dealers, investment advisers, or insurance companies that participate in networking arrangements and provide fiduciary investment advice would be included in the counts in their respective sections.

³¹ The burden is estimated as: [(200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) × 30 minutes] + 60 minutes = 616 hours. The burden is estimated as: [(200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) × 30 minutes] + 60 minutes × \$159.34 = \$98,074.

institution, on average, 10 minutes to update existing disclosures. Robo-advisers, pension consultants, and investment company underwriters, who

are not covered under the existing exemption would need to draft the acknowledgement. Updating the acknowledgement is estimated to result

in an hour burden of 301 hours with an equivalent cost of \$47,961.³²

TABLE 2—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	917	\$146,035	0	\$0
Total	917	146,035	0	0

The Department estimates that preparing a disclosure identifying services provided and conflicts of interest would take a legal professional at affected robo-advisers, pension consultants, and investment company underwriters one hour at small financial institutions and five hours at large financial institutions, resulting in an

hour burden of 2,315 hours and an equivalent cost burden of \$368,872.³³ The proposed amendments would also expand on the existing requirement for a written description of the services provided to also require a statement on whether the retirement investor would pay for such services, directly or indirectly, including through third-party

payments. The Department assumes it would take a legal professional at a financial institution under the existing exemption 30 minutes to update existing disclosures to include this information. This results in an hour burden of 9,030 hours and an equivalent cost burden of \$1,438,761 in the first year.³⁴

TABLE 3—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN DESCRIPTION OF SERVICES PROVIDED

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	11,345	\$1,807,633	0	\$0
Total	11,345	1,807,633	0	0

According to Cerulli Associates, in 2022, almost 4.5 million defined contribution (DC) plan accounts with \$779 billion in assets were rolled over to an IRA. Additionally, 0.7 million DC plan accounts with \$66 billion in assets were rolled over to other employer-sponsored plans.³⁵ It is challenging to obtain reliable data on other types of rollovers such as IRA-to-IRA and defined benefit (DB) plan-to-IRA. The Department uses Internal Revenue Service (IRS) data from 2020 on overall rollovers into IRAs, which is 5.7 million taxpayers and \$618 billion.³⁶ Adding in

the figures for plan-to-plan rollovers, the Department estimates the total number of rollovers at 6.4 million accounts with \$684 billion in assets. The Department requests comment on this estimate.

Only rollovers overseen by an ERISA fiduciary would be affected by the proposed amendments to PTE 2020–02. The Department does not have compelling data on the percentage of rollovers that are overseen by an ERISA fiduciary. In 2022, 49 percent of DC plan-to-IRA rollovers, accounting for 63 percent of DC plan rollover assets, were intermediated by an adviser.³⁷ For

purposes of this analysis, the Department assumes that advisers intermediating rollovers are ERISA fiduciaries, which means the estimate is an upper bound. The Department applies the estimate made for DC plan-to-IRA rollovers to all types of rollovers. Accordingly, the Department estimates that 3.1 million rollovers and \$431 billion in rollover assets would be affected by the proposed amendments to PTE 2020–02.³⁸ The Department requests comments on these assumptions.

³² The number of financial entities needing to update their written acknowledgement is estimated as: $(1,894 \text{ broker-dealers} \times 10\%) + (7,570 \text{ SEC-registered investment advisers} \times 10\%) + (8,412 \text{ state-registered investment advisers} \times 10\%) + (183 \text{ insurers} \times 10\%) = 1,806$ financial institutions updating existing disclosures. $[(1,806 \text{ financial institutions} \times 10 \text{ minutes}) \div 60 \text{ minutes}] = 301$ hours. The equivalent cost is estimated as: $301 \text{ hours} \times \$159.34 = \$47,961$.

³³ The burden is estimated as: $[(930 \text{ small pension consultants} + 10 \text{ small robo-adviser} + 20 \text{ small investment company underwriters}) \times 1 \text{ hour}] + [(81 \text{ large pension consultants} + 190 \text{ large robo-advisers}) \times 5 \text{ hours}] = 2,315$ hours. The equivalent cost is estimated as: $[(930 \text{ small pension consultants} + 10 \text{ small robo-adviser} + 20 \text{ small investment company underwriters}) \times 1 \text{ hour}] + [(81 \text{ large pension}$

$\text{consultants} + 190 \text{ large robo-advisers}) \times 5 \text{ hours}] \times \$159.34 = \$368,872$.

³⁴ The number of financial entities needing to update their written description of services is estimated as: $1,894 \text{ broker-dealers} + 15,982 \text{ registered investment advisers} + 183 \text{ insurers} = 18,059$ financial institutions updating existing disclosures. The burden is estimated as follows: $[(18,059 \text{ financial institutions} \times 30 \text{ minutes}) \div 60 \text{ minutes}] = 9,030$ hours. The equivalent cost is estimated as: $[(18,059 \text{ financial institutions} \times 30 \text{ minutes}) \div 60 \text{ minutes}] \times \$159.34 = \$1,438,761$.

³⁵ According to Cerulli, in 2022, there were 4,485,059 DC plan-to-IRA rollovers and 707,104 DC plan-to-DC plan rollovers. (See Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience*, Exhibit 6.02. The Cerulli Report.) These account estimates may

include health savings accounts, Archer medical savings accounts, or Coverdell education savings accounts.

³⁶ Internal Revenue Service, *SOI Tax Stats—Accumulation and Distribution of Individual Retirement Arrangement (IRA)*, Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020 (2023).

³⁷ According to Cerulli, 49 percent of rollovers were mediated by an adviser, while 37 percent were self-directed. The remaining 14 percent were plan-to-plan rollovers. (See Cerulli Associates, *U.S. Retirement-End Investor 2023: Personalizing the 401(k) Investor Experience Fostering Comprehensive Relationships*, Exhibit 6.04. The Cerulli Report.)

³⁸ The number of affected rollovers is estimated as: $(6,367,005 \times 49\%) = 3,119,832$.

The current PTE required rollover documentation from plans to IRAs. As a best practice, the SEC already encourages firms to record the basis for significant investment decisions, such as rollovers, although doing so is not required. In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if

not required. A report commissioned by this commenter found that slightly more than half (52 percent) of respondents will “require best interest rationale documentation for rollover recommendations.”³⁹ The Department estimates that documenting each rollover recommendation will require 30 minutes for a personal financial advisor whose firms currently do not

require rollover documentations and five minutes for financial advisors whose firms already require them to do so. The Department estimates that this will result in an hour burden of 883,953 hours with an equivalent cost of approximately \$193.8 million.⁴⁰ The Department requests comment on the time it would take to document the rollover recommendation.

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE ROLLOVER DOCUMENTATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Adviser	883,953	\$193,788,961	883,953	\$193,788,961
Total	883,953	193,788,961	883,953	193,788,961

1.3.2. New Disclosure Requirements Under the Proposed Amended PTE 2020–02

As amended, PTE 2020–02 would require financial institutions to provide investors with the following additional disclosures:

- (1) a written statement of the best interest standard of care owed; and
- (2) a written statement that the retirement investor has the right to obtain specific information regarding costs, fees, and compensation.

Under the Investment Advisers Act of 1940 and SEC Regulation Best Interest, most SEC-registered investment advisers and broker-dealers with retail investors already provide disclosures that the Department expects would satisfy these requirements.

The proposed amendments would add a requirement for financial institutions to provide a written statement of the Best Interest standard of care owed. Under the Investment Advisers Act, the SEC’s Regulation Best Interest, and Form CRS, most SEC-registered investment advisers and

broker-dealers with retail investors are already required to provide disclosures that the Department expects would satisfy these requirements.

The Department expects that the written statement of the Best Interest standard of care owed would not take a significant amount of time to prepare and would be uniform across clients. The Department assumes it would take a financial institution 30 minutes to prepare the statement, resulting in an hour burden of 10,352 hours and an equivalent cost burden of \$1,649,488 in the first year.⁴¹

TABLE 5—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE BEST INTEREST STANDARD DISCLOSURE

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	10,352	\$1,649,488	0	\$0
Total	10,352	1,649,488	0	0

For the added requirement of a written statement informing the investor of their right to obtain a written description of the financial institution’s policies and procedures and information regarding costs, fees, and compensation, the Department expects that many financial institutions’

disclosures, as required by the existing PTE 2020–02, already substantially comply with this regulation or would require modest adjustments to do so. The Department estimates that, on average, it would take a legal professional at broker-dealers and registered investment advisers, on

average, 30 minutes to modify existing statements and that it would take insurers, robo-advisers, pension consultants, and investment company underwriters, on average, one hour to prepare the statement. This results in an hour burden of 10,352 hours and a cost burden of \$1,649,488 in the first year.⁴²

³⁹ Deloitte, *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package*, (March 6, 2020). This report was released before Regulation Best Interest was effective, so more broker-dealers may now document rollover recommendations. As such, this may represent an overestimate of the cost incurred to comply with this requirement.

⁴⁰ The burden is estimated as follows: (3,119,833 rollovers × 48% × 30 minutes) + (3,119,833 rollovers × 52% × 5 minutes) = 883,953 hours. A labor rate of \$219.23 is used for a personal financial

adviser. The labor rate is applied in the following calculation: {(3,119,833 rollovers × 48% × 30 minutes) + (3,119,833 rollovers × 52% × 5 minutes)} ÷ 60 minutes × \$219.23 = \$193,788,961.

⁴¹ The burden is estimated as follows: [(19,290 financial institutions × 30 minutes) ÷ 60 minutes] = 10,352 hours. A labor rate of \$159.34 is used for a lawyer. The labor rate is applied in the following calculation: [(19,290 financial institutions × 30 minutes) ÷ 60 minutes] × \$159.34 = \$1,649,488.

⁴² The burden is estimated as follows: [(1,894 broker-dealers + 15,982 registered investment

advisers) × 30 minutes] + [(183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) × 1 hour] = 10,352 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,894 broker-dealers + 15,982 registered investment advisers) × 30 minutes] + [(183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) × 1 hour] × \$159.34 = \$1,649,488.

The Department does not have data on how often investors would request a written description of the financial institutions' policies and procedures and information regarding costs, fees, and compensation. The Department assumes that, on average, each financial

institution would receive 10 such requests annually and that most financial institutions already have such information available. The Department requests comment on these assumptions. The Department estimates it would take a clerical worker five

minutes to prepare and send the disclosure, regardless of whether it is sent electronically or by mail. This results in an annual hour burden of 16,075 with an equivalent cost of \$1,019,959.⁴³

TABLE 6—HOURL BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN DESCRIPTION STATEMENT OF THE RIGHT TO OBTAIN A WRITTEN DESCRIPTION OF THE FINANCIAL INSTITUTION'S POLICIES AND PROCEDURES AND PROVISION OF REQUESTED POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	10,352	\$1,649,488	0	\$0
Clerical	16,075	1,019,959	16,075	1,019,959
Total	26,427	2,669,447	16,075	1,019,959

As discussed above, the Department assumes that 5.8 percent, or 11,188, of these disclosures would not be sent electronically. Financial institutions

would incur \$0.66 for postage and \$0.10 for the paper and printing costs of two pages for each of the disclosures that would not be sent electronically, which

the Department estimates to cost \$8,503.⁴⁴

TABLE 7—MATERIAL AND POSTAGE COST ASSOCIATED WITH THE WRITTEN DESCRIPTION STATEMENT OF THE RIGHT TO OBTAIN A WRITTEN DESCRIPTION OF THE FINANCIAL INSTITUTION'S POLICIES AND PROCEDURES AND PROVISION OF REQUESTED POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Pages	Cost	Pages	Cost
Material Cost	2	\$8,503	2	\$8,503
Total	2	8,503	2	8,503

1.3.3. Provision of Disclosures

Similar to the 2020 analysis, the Department assumes most required disclosures will be electronically delivered to plan fiduciaries. As discussed above, the Department assumes that approximately 5.8 percent of participants who roll over their plan

assets to IRAs would not receive required disclosures electronically. The Department estimates that approximately 3.2 million retirement investors⁴⁵ have relationships with financial institutions and are likely to engage in transactions covered under this PTE. Of these 3.2 million retirement investors, it is estimated that 5.8

percent, or 184,643 retirement investors, would receive paper disclosures.⁴⁶ The Department estimates that preparing and sending each disclosure would take a clerical worker, on average, five minutes, resulting in an hour burden of 15,387 hours with an equivalent cost of \$976,301.⁴⁷

⁴³ The burden is estimated as follows: [(19,290 financial institutions × 10 disclosures × 5 minutes) ÷ 60 minutes] = 16,075 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(16,075 financial institutions × 10 disclosures × 5 minutes) ÷ 60 minutes] × \$63.45 = \$1,019,959.

⁴⁴ [(19,290 financial institutions × 10 disclosures × 2 pages × \$0.05) + (19,290 financial institutions × 10 disclosures × \$0.66)] × 5.8% = \$8,503.

⁴⁵ According to Cerulli, in 2022, there were 707,104 DC plan-to-DC plan rollovers. (See Cerulli

Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience*, Exhibit 6.02. The Cerulli Report.) The Department also uses Internal Revenue Service (IRS) data from 2020 on overall rollovers into IRAs, which is 5,659,901 taxpayers. (See *Internal Revenue Service, SOI Tax Stats—Accumulation and Distribution of Individual Retirement Arrangement (IRA)*, Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020. (2023).) The Department estimates the number of affected plans and IRAs to be equal to 50 percent of rollovers from retirement plans to IRAs. The total

number of retirement investors that have relationships with financial institutions and are likely to engage in transacted covered under this PTE is estimated as: (707,104 DC plan-to-DC plan rollovers + 5,659,901 taxpayer with IRA rollovers) × 50 percent = 3,183,503.

⁴⁶ This is estimated as: 3,183,503 rollovers × 5.8% = 184,643 disclosures.

⁴⁷ This burden is estimated as: [(184,643 disclosures × 5 minutes) ÷ 60 minutes] = 15,387 hours. [(184,643 disclosures × 5 minutes) ÷ 60 minutes] × \$63.45 = \$976,301.

TABLE 8—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED PREPARING AND SENDING DISCLOSURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	15,387	\$976,301	15,387	\$976,301
Total	15,387	976,301	15,387	976,301

The Department assumes that the disclosures would require four pages in total, resulting in a material and postage cost of \$158,793.⁴⁸

TABLE 9—MATERIAL AND POSTAGE COST ASSOCIATED WITH SENDING DISCLOSURES

Activity	Year 1		Subsequent years	
	Pages	Cost	Pages	Cost
Material Cost	4	\$158,793	4	\$158,793
Total	4	158,793	4	158,793

1.4 Costs Associated With Disclosures for PEPs

Financial institutions providing investment advice for PEPs must provide to each participating employer an additional disclosure detailing any amounts the financial institution pays to or receives from the PPP or its affiliates in addition to any conflicts of interest that arise in connection with the investment advice it provides to a PEP. According to filings submitted to the Department, the Department estimates that there are 382 PEPs.⁴⁹

The Department does not have data on what percent of PEPs would be affected by the exemption. The Department assumes that on average, one financial institution would need to prepare one disclosure for each PEP. The Department estimates that, on average, it would take legal staff for each entity two hours to draft the disclosure, resulting in an hour burden of 764 hours with an equivalent cost of \$121,736 in the first year.⁵⁰ The Department requests comment on this assumption and how frequently PPPs would provide

investment advice to a PEP within the framework of the exemption. According to filings submitted to the Department, the Department estimates that there are 955 employers in PEPs.⁵¹ The Department assumes that all of these disclosures will be sent electronically. Distributing the disclosures is estimated to take clerical personnel one minute per disclosure. This results in an hour burden of 16 hours, and assuming an hourly wage rate for clerical personnel of \$63.45, the estimated equivalent cost burden is \$1,010.⁵²

TABLE 10—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH PREPARING AND SENDING DISCLOSURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	764	\$121,736	0	\$0
Clerical	16	1,010	16	1,010
Total	780	122,746	16	1,010

1.5 Costs Associated With Annual Report of Retrospective Review

The proposed amendment would require financial institutions to conduct a retrospective review at least annually.

The review would be required to be reasonably designed to detect and prevent violations of, and achieve compliance with, (1) the conditions of this exemption, (2) the Impartial Conduct Standards, and (3) the policies

and procedures governing compliance with the exemption. The Department is clarifying that the Financial Institution must update the policies and procedures as business, regulatory, and legislative changes and events dictate, to

⁴⁸ The material and postage cost is estimated as: (184,643 disclosures × 4 pages × \$0.05) + (184,643 disclosures × \$0.66 postage) = \$158,793.

⁴⁹ Department of Labor, *Form PR*, <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-pr>.

⁵⁰ The burden is estimated as follows: 382 PEPs × 2 hours = 764 hours. A labor rate of \$159.34 is used for a lawyer. The labor rate is applied in the following calculation: 382 PEPs × 2 hours × \$159.34 = \$121,736.

⁵¹ Based on 2021 EFAST filings as of August 22, 2023, the Department estimates that there were 955 employers in 382 PEPs. The Department does not have data on the number of employers since October 2022. To estimate the number of employees, the Department applies the ratio of employers to PEPs in October 2021 (955/382 ~2.5) to the updated number of PEPs. Accordingly, the Department estimates that there are 955 employers in PEPs (382 × 2.5 = 955). The inaugural filing deadline for Form 5500 filings for PEPs with plan years beginning after January 1, 2021 was July 31,

2022. The Department based its estimates on those filings it had received by August 22, 2023.

However, since this is the first year PEPs could file, the Department anticipates that this understates the true number of PEPs affected by this proposed rule.

⁵² The burden is estimated as follows: [(955 employers × 1 minute) ÷ 60 minutes] = 16 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(955 employers × 1 minute) ÷ 60 minutes] × \$63.45 = \$1,010.

ensure they remain prudently designed, effective, and compliant with the exemption. This report would need to be certified by a Senior Executive.

Many of the entities affected by PTE 2020–02 likely already have retrospective review requirements. Broker-dealers are subject to retrospective review requirements under FINRA Rule 3110,⁵³ FINRA Rule 3120,⁵⁴ and FINRA Rule 3130;⁵⁵ SEC-registered investment advisers are already subject to retrospective review requirements under SEC Rule 206(4)–7; and insurance companies in many states are already subject to state insurance law based on the NAIC's Model Regulation.⁵⁶ Accordingly, in this analysis, the Department assumes that these entities will incur minimal costs to meet this requirement.

In 2018, the Investment Adviser Association estimated that 92 percent of SEC-registered investment advisers voluntarily provide an annual compliance program review report to senior management.⁵⁷ The Department assumes that state-registered investment advisers exhibit similar retrospective

review patterns as SEC-registered investment advisers. Accordingly, the Department estimates that eight percent, or 1,279 investment advisers advising retirement plans will incur costs associated with producing a retrospective review report.

The Department assumes that only ten percent of financial institutions will incur the total costs of producing the retrospective review report. This is estimated to take a legal professional five hours for small firms and 10 hours for large firms. This results in an annual hour burden of 3,715 hours and an equivalent cost burden of \$591,948.⁵⁸

Financial Institutions that already produce retrospective review reports voluntarily or in accordance with other regulators' rules likely will spend additional time to fully comply with this exemption condition such as revising their current retrospective review reports. This is estimated to take a financial professional one hour for small firms and two hours for large firms. This results in an annual hour burden of 33,335 hours and an equivalent cost burden of \$5,311,672.⁵⁹

The proposed amendments would add a requirement to review policies and procedures at least annually and to update them as needed to ensure they remain prudently designed, effective, and current. This includes a requirement to update and modify the policies and procedures, as appropriate, after considering the findings in the retrospective review report. For entities currently covered by PTE 2020–02, the Department estimates that it would take a legal professional an additional 30 minutes for all entities covered under the existing and amended exemption. The Department estimates this would result an annual hour burden of 9,645 with an equivalent cost of \$1,536,834.⁶⁰

In addition to conducting the audit and producing a report, financial institutions also will need to review the report and certify the exemption. This is estimated to take the certifying officer two hours for small firms and four hours for large firms. This results in an hour burden of 68,156 and an equivalent cost burden of \$12,992,578.⁶¹

TABLE 11—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RETROSPECTIVE REVIEW

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	46,695	\$7,440,454	46,695	\$7,440,454
Senior Executive Staff	68,156	12,992,578	68,156	12,992,578
Total	114,851	20,433,032	114,851	20,433,032

⁵³ Rule 3110. *Supervision*, FINRA Manual, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/3110>.

⁵⁴ Rule 3120. *Supervisory Control System*, FINRA Manual, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/3120>.

⁵⁵ Rule 3130. *Annual Certification of Compliance and Supervisory Processes*, FINRA Manual, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/3130>.

⁵⁶ NAIC Model Regulation, Section 6.C.(2)(i). (The same requirement is found in the NAIC Suitability in Annuity Transactions Model Regulation (2010), Section 6.F.(1)(f).)

⁵⁷ 2018 *Investment Management Compliance Testing Survey*, Investment Adviser Association (Jun. 14, 2018), https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management-Compliance-Testing-Survey-Results-Webcast_pptx.pdf.

⁵⁸ The burden is estimated as: [(395 small broker-dealers + (2,996 small registered-investment advisers × 8%) + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 10% × 5 hours] + [(1,499 large broker-dealers + (12,986

large registered-investment advisers × 8%) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 10% × 10 hours] = 3,715 hours. The equivalent cost is estimated as: [(395 small broker-dealers + (2,996 small registered-investment advisers × 8%) + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 10% × 5 hours] + [(1,499 large broker-dealers + (12,986 large registered-investment advisers × 8%) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 10% × 10 hours] × \$159.34 = \$591,948.

⁵⁹ The burden is estimated as: [(395 small broker-dealers + (2,996 small registered-investment advisers × 92%) + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 90% × 5 hours] + [(1,499 large broker-dealers + (12,986 large registered-investment advisers × 92%) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 90% × 10 hours] = 33,335 hours.

The equivalent cost is estimated as: [(395 small broker-dealers + (2,996 small registered-investment advisers × 92%) + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 90% × 5 hours] + [(1,499 large broker-dealers + (12,986

large registered-investment advisers × 92%) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 90% × 10 hours] × \$159.34 = \$5,311,672.

⁶⁰ The burden is estimated as follows: [(19,290 × 30 minutes) + 60 minutes] = 9,645 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(19,290 × 30 minutes) + 60 minutes] × \$159.34 = \$1,536,834.

⁶¹ The burden is estimated as: [(395 small broker-dealers + (2,996 small registered-investment advisers + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 2 hours] + [(1,499 large broker-dealers + (12,986 large registered-investment advisers) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 4 hours] = 68,156 hours. The equivalent cost is estimated as: [(395 small broker-dealers + (2,996 small registered-investment advisers + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 2 hours] + [(1,499 large broker-dealers + (12,986 large registered-investment advisers) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 4 hours] × \$190.63 = \$12,992,578.

1.6 Costs Associated With Written Policies and Procedures

Under the original exemption, financial institutions were already required to maintain their policies and procedures. Robo-advisers, pension consultants, and investment company

underwriters, who are not covered under the existing exemption may need to develop policies and procedures. The Department estimates that initially establishing, maintaining, and enforcing written policies and procedures prudently designed to ensure compliance with the Impartial Conduct

Standards will take a legal professional five hours for small entities and 10 hours for large entities. The Department estimates the requirement would have an hour burden of 7,510 hours with an equivalent cost of \$1,196,643 in the first year.⁶²

TABLE 12—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH DEVELOPING POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	7,510	\$1,196,463	0	\$0
Total	7,510	1,196,643	0	0

The proposed amendments would require financial institutions to provide their complete policies and procedures to the Department upon request. Based on the number of cases in the past and current open cases that would merit such a request, the Department estimates that the Department would request 165 policies and procedures in the first year and 50 policies and

procedures in subsequent years. The Department estimates that it will take a clerical worker 15 minutes to prepare and send their complete policies and procedures to the Department resulting in an hourly burden of approximately 41 hours in the first year. Assuming an hourly wage rate for clerical personnel of \$63.45, the estimated cost burden in the first year is \$2,617.⁶³ In subsequent

years, the Department estimates that the requirement would result in an hour burden of approximately 13 hours with an equivalent cost of \$793.⁶⁴ The Department assumes financial institutions would send the documents electronically and thus would not incur costs for postage or materials.

TABLE 13—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH PROVIDING POLICIES AND PROCEDURES TO THE DEPARTMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	41	\$2,617	13	\$793
Total	41	2,617	13	793

1.7 Overall Summary

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Fiduciary Proposed Transaction Exemption.

OMB Control Number: 1210–0163.

Affected Public: Business or other for-profit institution.

Estimated Number of Respondents: 19,290.

Estimated Number of Annual Responses: 6,504,119.

Frequency of Response: Initially, Annually, and when engaging in exempted transaction.

Estimated Total Annual Burden Hours: 1,044,050.

Estimated Total Annual Burden Cost: \$167,296.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)⁶⁵ imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.⁶⁶ Under section 603 of the RFA, agencies must submit an initial regulatory flexibility analysis (IRFA) of

a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This proposed amended exemption, along with related amended exemptions and a proposed rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this proposed amendment on small entities is included in the IRFA

⁶² The burden is estimated as follows: [(930 small pension consultants + 10 small robo-adviser + 20 small investment company underwriters) × 5 hours] + [(81 large pension consultants + 190 large robo-advisers) × 10 hours] = 7,510 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(930 small pension consultants + 10 small robo-adviser

+ 20 small investment company underwriters) × 5 hours] × \$159.34 = \$1,196,643.

⁶³ The burden is estimated as follows: [(165 policies and procedures × 15 minutes) ÷ 60 minutes] = 41 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(165 policies and procedures × 15 minutes) ÷ 60 minutes] × \$63.45 = \$2,617.

⁶⁴ The burden is estimated as follows: [(50 policies and procedures × 15 minutes) ÷ 60 minutes] = 13 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(50 policies and procedures × 15 minutes) ÷ 60 minutes] × \$63.45 = \$793.

⁶⁵ 5 U.S.C. 601 *et seq.*

⁶⁶ 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

for the entire project, which can be found in the related notice of proposed rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995⁶⁷ requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposed amended exemption does not include any Federal mandate that will result in such expenditures.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have “substantial direct effects” on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this proposed class exemption has federalism implications because it has no 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.

General Information

The attention of interested persons is directed to the following: (1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary, or other party in interest or disqualified person with respect to a Plan, from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge his or her duties respecting the Plan solely in the interests of the participants and beneficiaries of the Plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the Plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries; (2) Before the proposed exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), the Department must find that it is administratively feasible, in the interests of Plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of the Plan and IRA owners; (3) If granted, the proposed exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and (4) The proposed exemption, if granted, is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

The Department is proposing the following amendment on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).⁶⁸

⁶⁸ Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees

Section I—Transactions

(a) In General

ERISA Title I (Title I) and the Internal Revenue Code (the Code) prohibit fiduciaries, as defined, that provide investment advice to Plans and individual retirement accounts (IRAs) from receiving compensation that varies based on their investment advice and compensation that is paid from third parties. Title I and the Code also prohibit fiduciaries from engaging in purchases and sales with Plans or IRAs on behalf of their own accounts (principal transactions). This exemption permits Financial Institutions and Investment Professionals who provide fiduciary investment advice to Retirement Investors to receive otherwise prohibited compensation and engage in riskless principal transactions and certain other principal transactions (Covered Principal Transactions) as described below.

The exemption provides relief from the prohibitions of ERISA section 406(a)(1)(A), (D), and 406(b), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E), and (F), if the Financial Institutions and Investment Professionals provide fiduciary investment advice in accordance with the conditions set forth in Section II and are eligible pursuant to Section III, subject to the definitional terms and recordkeeping requirements in Sections IV and V.

(b) Covered Transactions

This exemption permits Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, to engage in the following transactions, including as part of a rollover from a Plan to an IRA as defined in Code section 4975(e)(1)(B) or (C), as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B):

(1) The receipt of reasonable compensation; and

(2) The purchase or sale of an asset in a riskless principal transaction or a Covered Principal Transaction, and the receipt of a mark-up, mark-down, or other payment.

(c) Exclusions

This exemption does not apply if: (1) The Plan is covered by Title I and the Investment Professional, Financial Institution, or any Affiliate providing investment advice is

⁶⁷ Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

(A) the employer of employees covered by the Plan, or

(B) the Plan's named fiduciary or administrator; provided however that a named fiduciary or administrator or their Affiliate may rely on the exemption if it is: (i) selected to provide investment advice by a fiduciary who is Independent of the Financial Institution, Investment Professional, and their Affiliates, or (ii) a Pooled Plan Provider (PPP) registered with the Department under 29 CFR 2510.3-44; or

(2) The transaction involves the Investment Professional or Financial Institution acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B).

Section II—Investment Advice Arrangement

Section II(a) requires Investment Professionals and Financial Institutions to comply with Impartial Conduct Standards, including a best interest standard, when providing fiduciary investment advice to Retirement Investors. In addition, Section II(b) requires Financial Institutions to acknowledge fiduciary status under Title I and/or the Code, and provide investors with a statement of the best interest standard of care, a written description of the services they will provide and their Conflicts of Interest, rollover disclosure (as applicable), Financial Institution, and additional disclosure with respect to Pooled Employer Plans (as applicable). Section II(c) requires Financial Institutions to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards when providing fiduciary investment advice to Retirement Investors regarding compliance with the Impartial Conduct Standards. Section II(d) requires the Financial Institution to conduct a retrospective review of compliance with the Impartial Conduct Standards and the policies and procedures. Section II(e) allows Financial Institutions to correct certain violations of the exemption conditions and continue to rely upon the exemption for relief.

(a) Impartial Conduct Standards

The Financial Institution and Investment Professional comply with the following "Impartial Conduct Standards":

(1) Investment advice is, at the time it is provided, in the Best Interest of the Retirement Investor. As defined in Section V(b), such advice: (A) reflects the care, skill, prudence, and diligence

under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor; and (B) does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own. For example, in choosing between two investments offered and available to the Retirement Investor from the Financial Institution, it is not permissible for the Investment Professional to advise investing in the one that is worse for the Retirement Investor but better or more profitable for the Investment Professional or the Financial Institution.

(2)(A) The compensation received, directly or indirectly, by the Financial Institution, Investment Professional, their Affiliates and Related Entities for their services does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (B) as required by the Federal securities laws, the Financial Institution and Investment Professional seek to obtain the best execution of the investment transaction reasonably available under the circumstances; and

(3) The Financial Institution's and its Investment Professionals' statements (written and oral) to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time statements are made, materially misleading. For purposes of this paragraph, the term "materially misleading" includes omitting information that is needed to prevent the statement from being misleading to the Retirement Investor under the circumstances.

(b) Disclosure

Prior to engaging in a transaction pursuant to this exemption, the Financial Institution provides the disclosures set forth in (1)–(4) to the Retirement Investor:

(1) A written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I, the Code, or both when making an investment recommendation;

(2) A written statement of the Best Interest standard of care owed by the

Investment Professional and Financial Institution to the Retirement Investor;

(3) A written description of the services to be provided and the Financial Institution's and Investment Professional's material Conflicts of Interest that is accurate and not misleading in any material respect. This description will include a statement on whether the Retirement Investor will pay for such services, directly or indirectly, including through Third-Party Payments. If, for example, the Retirement Investor will pay through commissions or transaction-based payments, the written statement must clearly disclose that fact. This statement must be written in plain English, taking into consideration a Retirement Investor's level of financial experience;

(4) A written statement that the Retirement Investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present full and fair disclosure that is materially accurate in scope, magnitude, and nature, with sufficient detail to permit the Retirement Investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest, and that describes how the Retirement Investor can get the information, free of charge;

(5) *Rollover disclosure.* Before engaging in a rollover, or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Financial Institution and Investment Professional must consider and document the basis for their conclusions as to whether a rollover is in the Retirement Investor's Best Interest, and must provide that documentation to the Retirement Investor. Relevant factors to consider must include but are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan or account type, as applicable;

(B) the fees and expenses associated with the Plan and the recommended investment or account;

(C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and

(D) the different levels of services and investments available under the Plan and the recommended investment or account.

(6) The Financial Institution will not fail to satisfy the conditions in Section II(b) solely because it, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, provided that

the Financial Institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

(7) Investment Professionals and Financial Institutions may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate.

(8) The Financial Institution is not required to disclose information pursuant to this Section II(b) if such disclosure is otherwise prohibited by law.

(c) Policies and Procedures

(1) The Financial Institution establishes, maintains, and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards in connection with covered fiduciary advice and transactions.

(2) The Financial Institution's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interests of the Retirement Investor. Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in Retirement Investors' Best Interest.

(3) Financial Institutions must provide their complete policies and procedures to the Department upon request within 10 business days of request.

(d) Retrospective Review

(1) The Financial Institution conducts a retrospective review, at least annually, that is reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, this exemption, including the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The Financial Institution updates the policies and procedures as business, regulatory, and legislative changes and events dictate, and to

ensure they remain prudently designed, effective, and compliant with Section II(c).

(2) The methodology and results of the retrospective review are reduced to a written report that is provided to a Senior Executive Officer.

(3) A Senior Executive Officer of the Financial Institution certifies, annually, that:

(A) The officer has reviewed the report of the retrospective review;

(B) The Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975;

(C) The Financial Institution has written policies and procedures that meet the conditions set forth in Section II(c)(1); and

(D) The Financial Institution has in place a prudent process to modify such policies and procedures as set forth in Section II(d)(1).

(4) The review, report, and certification are completed no later than six months following the end of the period covered by the review.

(5) The Financial Institution retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 10 business days of request, to the extent permitted by law including 12 U.S.C. 484 (regarding limitations on visitorial powers for national banks).

(e) Self-Correction

A non-exempt prohibited transaction will not occur due to a violation of the exemption's conditions with respect to a transaction, provided:

(1) Either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses;

(2) The Financial Institution corrects the violation and notifies the Department of Labor of the violation and the correction via email to IIAWR@dol.gov within 30 days of correction;

(3) The correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and

(4) The Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the

violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2).

Section III—Eligibility

(a) General

Subject to the timing and scope provisions set forth in subsection (b) and the opportunity to be heard as set forth in subsection (c), an Investment Professional or Financial Institution will be ineligible to rely on the exemption with respect to any transaction, if the Financial Institution, its Affiliate, or Investment Professional is described in (1) or (2):

(1) The Investment Professional or Financial Institution has been convicted either:

(A) by a U.S. Federal or state court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A).

For purposes of this section (a)(1), a person shall be deemed to have been convicted of a crime as of the "conviction date," which is the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal.

(2) The Investment Professional or Financial Institution has received a written ineligibility notice issued by the Department for:

(A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or

(D) providing materially misleading information to the Department in connection with the conditions of the exemption.

(b) **Timing and Scope of Ineligibility**

(1) Ineligibility shall begin six months after:

(A) the conviction date defined in Section (a)(1);

(B) the date of the Department's written determination under Section (c)(1)(C) for a petition regarding a foreign conviction; or

(C) the date of the written ineligibility notice described in subsection (a)(2).

(2) A person shall become eligible to rely on this exemption again only upon the earliest of the following:

(A) the date of a subsequent judgment reversing such person's conviction described in (a)(1);

(B) 10 years after the person became ineligible under Section III(b)(1) or 10 years after the person was released from imprisonment as a result of a crime described in (a)(1), if later; or

(C) the date, if any, the Department grants an individual exemption (which may impose additional conditions) to the person permitting its continued reliance on this exemption notwithstanding the conviction.

(c) **Opportunity To Be Heard**

(1) **Foreign Convictions.**

(A) A Financial Institution, its Affiliate, or an Investment Professional that has been convicted by a foreign court of competent jurisdiction as provided in subsection (a)(1)(B)), the Financial Institution or Investment Professional may submit a petition to the Department that informs the Department of the conviction and seeks the Department's determination that the Financial Institution's continued reliance on the exemption would not be contrary to the purposes of the exemption. Petitions must be submitted to the Department within 10 business days after the conviction date by email to IIAWR@dol.gov.

(B) Following receipt of the petition, the Department will provide the Investment Professional or Financial Institution with the opportunity to be heard in person (including by phone or videoconference), in writing, or a combination thereof. The opportunity to

be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences.

(C) Following the hearing, the Department will issue a written determination to the Financial Institution or Investment Professional, as applicable, articulating the basis for its determination whether or not to allow the Financial Institution or Investment Professional to continue relying on PTE 2020–02.

(2) **Written Ineligibility Notice.** Prior to issuing a written ineligibility notice, the Department will issue a written warning to the Investment Professional or Financial Institution, as applicable, identifying specific conduct implicating subsection (a)(2) and providing a six-month opportunity to cure. At the end of the six-month period, if the Department determines that the Investment Professional or Financial Institution has not taken appropriate action to prevent recurrence of the disqualifying conduct, it will provide the Investment Professional or Financial Institution with the opportunity to be heard, in person (including by phone or videoconference), in writing, or a combination, before the Department issues the written ineligibility notice. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences. The written ineligibility notice will articulate the basis for the determination that the Investment Professional or Financial Institution engaged in conduct described in subsection (a)(2).

(3) **Department's Considerations.** For hearings under (c)(1) and (c)(2), the Department will consider: the gravity of the offense; the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy; recency of the conduct at issue; any remedial measures taken; and other factors the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption.

(d) **Alternative Exemptions**

A Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or seek an individual prohibited transaction exemption from the Department. To the extent an applicant seeks retroactive relief in connection with an exemption application, the Department will consider the application in accordance with its

retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of retroactive relief.

Section IV—Recordkeeping

The Financial Institution maintains for a period of six years records demonstrating compliance with this exemption and makes such records available, to the extent permitted by law including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury.

Section V—Definitions

(a) “Affiliate” means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Investment Professional or Financial Institution. (For this purpose, “control” would mean the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the Investment Professional or Financial Institution; and

(3) Any corporation or partnership of which the Investment Professional or Financial Institution is an officer, director, or partner.

(b) Advice is in a Retirement Investor's “Best Interest” if such advice (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and (B) does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own.

(c) A “Conflict of Interest” is an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor.

(d) A “Covered Principal Transaction” is a principal transaction that:

(1) For sales to a Plan or an IRA:

(A) Involves a U.S. dollar denominated debt security issued by a U.S. corporation and offered pursuant to

a registration statement under the Securities Act of 1933, a U.S. Treasury Security, a debt security issued or guaranteed by a U.S. federal government agency other than the U.S. Department of the Treasury, a debt security issued or guaranteed by a government-sponsored enterprise, a municipal security, a certificate of deposit, an interest in a Unit Investment Trust, or any investment permitted to be sold by an investment advice fiduciary to a Retirement Investor under an individual exemption granted by the Department after the effective date of this exemption that includes the same conditions as this exemption; and

(B) A debt security may only be recommended in accordance with written policies and procedures adopted by the Financial Institution that are reasonably designed to ensure that the security, at the time of the recommendation, has no greater than moderate credit risk and sufficient liquidity that it could be sold at or near carrying value within a reasonably short period of time; and

(2) For purchases from a Plan or an IRA, involves any securities or investment property.

(e) “Financial Institution” means an entity that is not suspended, barred or otherwise prohibited (including under Section III of this exemption) from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization), that employs the Investment Professional or otherwise retains such individual as an independent contractor, agent or registered representative, and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) or under the laws of the state in which the adviser maintains its principal office and place of business;

(2) A bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))); or

(3) An insurance company qualified to do business under the laws of a state, that: (A) has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state’s insurance commissioner within

the preceding five years, and (C) is domiciled in a state whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority;

(4) A broker or dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*); or

(5) An entity that is described in the definition of Financial Institution in an individual exemption granted by the Department after the date of this exemption that provides relief for the receipt of compensation in connection with investment advice provided by an investment advice fiduciary under the same conditions as this class exemption.

(f) For purposes of subsection I(c)(1), a fiduciary is “Independent” of the Financial Institution and Investment Professional if:

(1) the fiduciary is not the Financial Institution, Investment Professional, or an Affiliate;

(2) the fiduciary does not have a relationship to or an interest in the Financial Institution, Investment Professional, or any Affiliate that might affect the exercise of the fiduciary’s best judgment in connection with transactions covered by the exemption; and

(3) the fiduciary does not receive and is not projected to receive within the current Federal income tax year, compensation or other consideration for his or her own account from the Financial Institution, Investment Professional, or an Affiliate, in excess of 2% of the fiduciary’s annual revenues based upon its prior income tax year.

(g) “Individual Retirement Account” or “IRA” means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(h) “Investment Professional” means an individual who:

(1) Is a fiduciary of a Plan or an IRA by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the assets of the Plan or IRA involved in the recommended transaction;

(2) Is an employee, independent contractor, agent, or representative of a Financial Institution; and

(3) Satisfies the Federal and state regulatory and licensing requirements of insurance, banking, and securities laws (including self-regulatory organizations) with respect to the covered transaction, as applicable, and is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization).

(i) “Plan” means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(j) A “Pooled Employer Plan” or “PEP” means a pooled employer plan described in ERISA section 3(43).

(k) A “Pooled Plan Provider” or “PPP” means a pooled plan provider described in ERISA section 3(44).

(l) “Riskless Principal Transaction” means a transaction in which a Financial Institution, after having received an order from a Retirement Investor to buy or sell an asset, purchases or sells the asset for the Financial Institution’s own account to offset the contemporaneous transaction with the Retirement Investor. A Riskless Principal Transaction is not a Covered Principal Transaction.

(m) A “Related Entity” is any party that is not an Affiliate, but which either has, or in which the Investment Professional or Financial Institution has, an interest that may affect best judgment as a fiduciary.

(n) “Retirement Investor” means:

(1) A participant or beneficiary of a Plan with authority to direct the investment of assets in their account or to take a distribution;

(2) The beneficial owner of an IRA acting on behalf of the IRA; or

(3) A fiduciary acting on behalf of a Plan or an IRA.

(o) A “Senior Executive Officer” is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution.

(p) “Third-Party Payments” include sales charges when not paid directly to the Financial Institution by the Plan, from a participant or beneficiary’s account, or from an IRA; gross dealer concessions; revenue sharing payments; 12–1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration, or financial benefit provided to the Financial Institution or an Affiliate or Related Entity by a third party as a result of a transaction involving a Plan, participant or beneficiary account, or IRA.

Signed at Washington, DC, this 24th day of October, 2023.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

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DEPARTMENT OF LABOR**Employee Benefits Security Administration****29 CFR Part 2550**

[Application No. D–12060]

ZRIN 1210–ZA33**Proposed Amendment to Prohibited Transaction Exemption 84–24**

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Notice of Proposed Amendment to Prohibited Transaction Exemption 84–24.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to Prohibited Transaction Exemption (PTE) 84–24, an exemption from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The amendment would affect participants and beneficiaries of plans, Individual Retirement Account (IRA) owners, and certain fiduciaries of plans and IRAs.

DATES:

Public Comments. Comments are due on or before January 2, 2024.

Public Hearing. The Department anticipates holding a public hearing approximately 45 days following the date of publication in the **Federal Register**. Specific information regarding the date, location, and submission of requests to testify will be published in a notice in the **Federal Register**.

Applicability Date. The Department proposes to make the final amendment effective 60 days after it is published in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendments should be sent to the Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor through the Federal eRulemaking Portal and identified by Application No. D–12060.

Federal eRulemaking Portal: Visit <http://www.regulations.gov>. Follow the instructions for sending comments.

Docket: For access to the docket to read background documents and comments, including the plain-language summary of the proposal required by the Providing Accountability Through Transparency Act of 2023, or comments, please go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

FOR FURTHER INFORMATION CONTACT: Susan Wilker, (202) 693–8540 (not a toll-free number), Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

SUPPLEMENTARY INFORMATION:**Comment Instructions**

Warning: All comments received will be included in the public record without change and will be made available online at [regulations.gov](https://www.regulations.gov). This includes any personal information provided, unless the comment includes information claimed to be confidential or information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number), or confidential business information that you do not want publicly disclosed. If EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. The www.regulations.gov website is an “anonymous access” system, which means EBSA will not know your identity or contact information unless you provide it. If you send an email directly to EBSA without going through [regulations.gov](https://www.regulations.gov), your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

Background

As described elsewhere in this edition of the **Federal Register**, the Department is proposing to amend the regulation defining when a person renders “investment advice for a fee or other compensation, direct or indirect” with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a “fiduciary” in section 3(21)(A)(ii) of ERISA and in section 4975(e)(3)(B) of the Code. The Department also is proposing amendments to existing PTEs 75–1, 77–4, 80–83, 83–1, 86–128, and 2020–02 elsewhere in this edition of the **Federal Register**.

The Department is proposing to amend PTE 84–24 to address specific issues that Insurers confront in complying with the current conditions of PTE 2020–02 when distributing

annuities through independent agents. The ERISA and Code provisions at issue generally prohibit employee benefit plan and IRA fiduciaries from engaging in self-dealing in connection with transactions involving these plans and IRAs. Currently, PTE 84–24 allows these fiduciaries to receive compensation when plans and IRAs enter into certain insurance and mutual fund transactions that the fiduciaries recommend, as well as certain related transactions. The proposed amendment would provide exemptive relief to fiduciaries who are Independent Producers that recommend annuities from an unaffiliated Insurer to Retirement Investors on a commission or fee basis if certain protective conditions are met.

The Department is proposing this amendment on its own motion pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).¹

Current PTE 84–24

Currently, under PTE 84–24, plans and IRAs may purchase insurance or annuity contracts or investment company securities, and insurance agents or brokers, pension consultants, and principal underwriters may receive compensation as a result of these purchases.² Originally proposed in 1976,³ PTE 84–24 covers several transactions in connection with the purchase of insurance and annuity contracts and the purchase and sale of securities issued by an investment company.

PTE 2020–02

When the Department finalized PTE 2020–02 in December 2020, the Department explained that insurance companies could rely on either PTE 2020–02 or PTE 84–24 regardless of whether they sell their products through captive or independent agents. In the preamble to the final PTE 2020–02, the

¹ Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

² As defined in Section X(d), the term “Individual Retirement Account” or “IRA” means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F), including an Archer medical savings account, a health savings account, and a Coverdell education savings account. While the Department uses the term “Retirement Investor” throughout this document, the exemption is not limited only to investment advice fiduciaries of employee pension benefit plans and IRAs. Relief would be available for investment advice fiduciaries of employee welfare benefit plans with an investment component as well.

³ 41 FR 56760 (Dec. 29, 1976), finalized as PTE 77–9, 42 FR 32395 (June 24, 1977).

Department stated that insurance companies working with independent agents can satisfy the conditions of PTE 2020–02 related to the required policies and procedures either by supervising independent insurance agents or by contracting with insurance intermediaries to do so.⁴ In April 2021, the Department provided further guidance in a set of Frequently Asked Questions (FAQs) regarding compliance with the exemption.⁵ Specifically, Question 18 of the FAQs provided that:

When an independent insurance agent recommends an annuity under the exemption, the agent and the financial institution (*e.g.*, the insurance company) must satisfy the exemption's conditions, including the fiduciary acknowledgement and the Impartial Conduct Standards with respect to that transaction. In such cases, the insurance company must ensure that it has adopted policies and procedures to ensure compliance with the Impartial Conduct Standards and to avoid incentives that place the firm's or agent's interests ahead of the interests of retirement investors. While the independent agent may recommend products issued by a variety of insurance companies, PTE 2020–02 does not require insurance companies to exercise supervisory responsibility with respect to the practices of unrelated and unaffiliated insurance companies. When an insurance company is the supervisory financial institution for purposes of the exemption, its obligation is simply to ensure that the insurer, its affiliates, and related parties meet the exemption's terms with respect to the insurance company's annuity which is the subject of the transaction.

Since issuing PTE 2020–02 and posting the FAQs on its website, the Department has conferred with representatives of insurance companies that distribute annuities through independent agents, regarding their compliance with the conditions of PTE 2020–02. At the meetings, the representatives almost universally asserted that the main compliance challenge they face in complying with PTE 2020–02 is that they cannot effectively exercise fiduciary authority over independent insurance agents who do not work for any one insurance company and are not obligated to recommend only one company's annuities. According to the insurance

company representatives, unlike a broker-dealer that can readily control the products its representatives recommend and the compensation they receive, insurance companies working with independent agents have much less authority over the conduct and compensation of independent agents. These insurance companies also face much greater liability risk if they are required to provide a fiduciary acknowledgement, because they do not have the necessary control over the independent agents to manage the independent agent's product offerings and do not know the full range of products the independent agent is authorized to sell. Thus, despite the Department's compliance guidance provided in the preamble to PTE 2020–02 and FAQ 18, these parties represented to the Department that they prefer relying on existing PTE 84–24.

While acknowledging these concerns, the Department continues to believe that insurance companies can effectively exercise fiduciary oversight with respect to independent agents' recommendations of their own products under PTE 2020–02. PTE 2020–02 is a broad, flexible, and principles-based approach that applies across different financial sectors and business models and provides relief for multiple categories of Financial Institutions and Investment Professionals, including insurance companies selling their products through independent agents, and it would continue to be so if the Department adopts the amendments to PTE 2020–02 that it is proposing today. The Department is proposing to amend PTE 84–24, however, to provide a narrowly tailored, alternative exemption allowing independent insurance agents to receive commissions from insurance companies with respect to annuity recommendations.

As amended, PTE 84–24 would not require the insurance company to provide a fiduciary acknowledgement, and the insurance company would not be treated as a fiduciary merely because it exercised oversight responsibilities over independent insurance agents under the exemption.⁶ Instead, the proposed amendment would require the independent agent that recommends the annuity to make the fiduciary

acknowledgement,⁷ and the insurance company selling its product through the independent agent only would be required to exercise supervisory authority over the independent agent's recommendation of its own products. The proposed amended exemption would be limited to commissions or fees as defined in the amendment, which would have to be fully disclosed to the Retirement Investor.

Overview of the Proposed Amendment to PTE 84–24

The Department is proposing to amend PTE 84–24 so that investment advice fiduciaries would rely on a new section of PTE 84–24 for independent insurance agents (called Independent Producers) selling non-securities annuities or other insurance products not regulated by the Securities and Exchange Commission (SEC) to Retirement Investors. The proposed amendment would exclude investment advice fiduciaries from the current relief in PTE 84–24 while proposing relief under a new section of the exemption with specific conditions for independent insurance agents providing investment advice. The Department's objective in proposing this amendment is to provide a level playing field for all investment advice fiduciaries.

To rely on the investment advice relief in this proposed amendment to PTE 84–24, the Independent Producers would have to sell annuities of two or more unrelated Insurers. Independent Producers that sell or recommend investment products other than annuities, such as mutual funds, stocks and bonds, and certificates of deposit must rely on PTE 2020–02 when receiving fees or other compensation in connection with investment recommendations related to those products. The amended PTE 84–24 would provide relief from the prohibited transaction rules only for the receipt of fully disclosed commissions or fees in connection with annuity recommendations or other insurance products not regulated by the SEC. In other respects, the proposed amendment to PTE 84–24 for investment advice would provide very similar protections to Retirement Investors as PTE 2020–02 and create a level playing field for all investment advice provided to Retirement Investors regardless of the investment products that are recommended.

The Department is proposing to amend PTE 84–24 to exclude

⁴ “Insurance company Financial Institutions can comply with the new exemption by supervising independent insurance agents, or by creating oversight and compliance systems through contracts with insurance intermediaries. The Financial Institution and/or intermediary would address incentives created with respect to independent agents' recommendations of the Financial Institution's insurance or annuity products.” 85 FR 82798, 82835 (Dec. 18, 2020).

⁵ <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf>

⁶ For purposes of this disclosure, and throughout the exemption, the term fiduciary status is limited to fiduciary status under Title I, the Code, or both. While this exemption and the SEC's Regulation Best Interest both use the term “best interest,” the Department retains interpretive authority with respect to satisfaction of this exemption.

⁷ For purposes of this disclosure, and throughout the exemption, the term fiduciary status is limited to fiduciary status under Title I, the Code, or both.

investment advice fiduciaries from the existing relief provided in Section II, which would be redesignated as Section II(a). The proposed amendment would add Section II(b), which would provide investment advice fiduciaries with relief from the restrictions of ERISA sections 406(a)(1)(D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) if:

- the fiduciary is an Independent Producer (as defined in Section X(d)),
- the transactions are described in new Section III(g), and
- the conditions set forth in new Sections VI, VII, and IX are satisfied.

These conditions are similar to the conditions contained in PTE 2020–02 but are tailored to protect Retirement Investors from the specific conflicts that can arise for Independent Producers that are compensated through commissions when providing investment advice to Retirement Investors regarding the purchase of an annuity. The Department also is proposing to add a new eligibility provision in Section VIII for investment advice transactions and amend the current recordkeeping condition in Section V(e) with a new recordkeeping provision in Section IX that is similar to the recordkeeping provision in PTE 2020–02.

Although the Department is proposing a pathway for insurance companies to oversee the conduct of Independent Producers under the proposed amendment to PTE 84–24 without assuming fiduciary status, the Department remains concerned that, without fiduciary status, insurance companies may not take their supervisory obligations as seriously as they should. Accordingly, the proposed amendment does not provide relief for the Insurer, and it strictly limits the scope of relief to the Independent Producer's receipt of fully disclosed commissions. An Insurer must rely on PTE 2020–02 for relief if it is itself an investment advice fiduciary because it provides investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and the regulations issued thereunder. In addition, an Insurer's systematic failures to comply with the proposed exemption's conditions could result in Independent Producers' inability to rely on the amended exemption for relief with respect to recommendations of that Insurer's products. In such a situation, the Independent Producer would still be able to receive compensation in connection with fiduciary investment advice related to the products of other Insurers, as long as those other Insurers

complied with all conditions of amended PTE 84–24.

Effective Date

The Department proposes that the amendment will be effective on the date that is 60 days after the publication of a final amendment in the **Federal Register**. Prior to the effective date, PTE 84–24 would remain available for all insurance agents and insurance companies that currently rely on the exemption. Thus, the Department confirms that the restrictions of ERISA section 406(a)(1)(A), 406(a)(1)(D), and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F), would not apply to the receipt of compensation by an Insurer, Investment Professional, or any Affiliate and Related Entity in connection with investment advice, if the recommendation were made before the effective date or pursuant to a systematic purchase program established before the effective date. Also, no party would be held to the amended conditions for a transaction that occurred before the effective date of the amended exemption.

Description of Changes to Existing PTE 84–24

Section II of existing PTE 84–24 provides exemptive relief for the covered transactions described in Section III(a) through (f). The Department is proposing minor language changes to capitalize defined terms where they are used in the existing sections of PTE 84–24, to update the references to a “master or prototype plan” to instead refer to a “Pre-approved Plan,” consistent with changes in IRS Rev. Proc. 2017–41, and to move the definitions from existing Section VI to new proposed Section X. As amended, Section III(a)–(f) would read:

- The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a Mutual Fund Commission or an Insurance Sales Commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract;
- The receipt of a Mutual Fund Commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company;
- The effecting by an insurance agent or broker, pension consultant or

investment company Principal Underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company;

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company;

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-approved Plan; and

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when such investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-approved Plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2).

The Department also is proposing the following amendments.

Excluding Investment Advice

The Department is proposing to exclude investment advice fiduciaries from relief for the transactions described in Section III(a) through (f) of current PTE 84–24. Investment advice fiduciaries would be required to comply with the conditions in Sections VI–VIII, which are tailored specifically for investment advice. The Department notes that many types of fiduciaries are already excluded from the transactions in Sections III(a)–(d). The relief provided for in these sections would remain available for non-fiduciaries and nondiscretionary trustees,⁸ even if they

⁸ Nondiscretionary trustees were added in 1984, in response to a request from the Investment Company Institute listing typical nondiscretionary or trustee services. In an April 21, 1980 letter, “ICI states nondiscretionary trustees and custodians:

(a) Open and maintain plan accounts and, in the case of defined contribution plans, individual participant accounts, pursuant to the employer's instructions;

(b) Receive contributions from the employer and credit them to individual participant accounts in accordance with the employer's instructions;

(c) Invest contributions and other plan assets in shares of a mutual fund or funds or other products such as insurance or annuity contracts designated by the employer, plan trustee, or participants, and reinvest dividends and other distributions in such investments;

(d) Redeem, transfer, or exchange mutual fund shares or surrender insurance or annuity contracts as instructed by the employer, plan trustee, or participant;

do not need all of the prohibited transaction relief provided. The relief for the transaction described in Section III(e) would be available for any insurance company that is a fiduciary (other than an investment advice fiduciary) or service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-approved Plan. The relief for the transaction described in Section III(f) would be available for any insurance company, principal underwriter, or investment company adviser that is a fiduciary (other than an investment advice fiduciary) or service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-approved Plan; or (2) the provision of nondiscretionary trust services to the plan; or (3) both (1) and (2).⁹

The Department requests comment on whether the relief in proposed Section II(a) for the covered transactions in Section III(a)–(f) will be used by fiduciaries and non-fiduciaries. The Department further asks whether parties are currently relying on Sections III(e) and (f), involving Pre-approved Plans. To the extent Sections III(a) through (f) provide needed relief, the Department also asks whether the conditions in current Sections IV and V are sufficiently protective for the specific covered transactions.

(e) Provide or maintain “designation of beneficiary” forms and make distributions from the trust or custodial account to participants or beneficiaries in accordance with the instructions of the employer, plan trustee, participants, or beneficiaries;

(f) Deliver to participants or their employer all notices, prospectuses, and proxy statements, and vote proxies in accordance with the participants’ instructions.

(g) Maintain records of all contributions, investments, distributions, and other transactions and report them to the employer and participants;

(h) Make necessary filings with the Internal Revenue Service and other government agencies;

(i) Keep custody of the plan’s assets;

(j) Reply to and prepare correspondence, either directly or through the mutual fund distributor or adviser, regarding the investment account and the operation and interpretation of a master or prototype plan sponsored by the complex to which the nondiscretionary trustee or custodian belongs.

In some situations, the trustee or custodian is empowered to amend the master or prototype plan; in others, this power resides in the sponsor of the master or prototype plan. ICI further describes the duties of the nondiscretionary trustees as “ministerial” and indicates that such trustees possess no decisional authority with respect to a plan’s funding medium or subsequent purchases or sales.”

⁹ The Department is not proposing to amend Section III(f) to remove the phrase “investment company adviser,” but notes that those providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) would be excluded under Section II(a).

Commissions

The Department is proposing to replace the term “sales commission,” which is not defined in Section VI of existing PTE 84–24, with the more specific terms Mutual Fund Commission and Insurance Sales Commission. “Insurance Sales Commission” would be defined as a sales commission paid by the Insurance Company or an Affiliate to the Independent Producer¹⁰ for the service of recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees. “Mutual Fund Commission” would be defined as a commission or sales load paid by either the Plan or the investment company for the service of effecting or executing the purchase of investment company securities, but does not include 12b–1 fees, revenue sharing payments, administrative fees, management fees, or marketing fees.

The Department is proposing to use these terms to clarify the types of compensation that can be received under the exemption. The Department is limiting the exemption to sales commissions on insurance or annuity contracts and investment company securities, as opposed to any related or alternative forms of compensation. This is consistent with the Department’s historical understanding and intent. The exemption was originally granted in 1977, and the conditions were crafted with simple commission payments in mind. In the interim, the exemption was not amended or formally interpreted to broadly permit additional types of compensation. The proposed definitions would provide certainty regarding the payments permitted by the exemption.¹¹

¹⁰ The Insurance Sales Commission may be paid directly to an intermediary such as an intermediary marketing organization (IMO) or field market organization) FMO, which then compensates the individual Independent Producer who has provided investment advice.

¹¹ The Department has previously expressed this view on the scope of relief under PTE 84–24 in amending the exemption in 2016. “The Department does not believe this exemption was properly interpreted over the years to provide relief for payments such as administrative services fees, which are not akin to a commission. No determination has been made that the conditions of the exemption are protective in the context of such payments. Without further information on these fees, or suggested additional conditions addressed at these types of payments, the Department declines to take such an expansive approach to relief from the prohibited transaction rules under the terms of this exemption.” 81 FR 21147, 21166 (Apr. 8, 2016).

The Department requests comment on whether these defined terms appropriately capture the type of compensation that an Independent Producer may receive.

Disclosures to IRA Owners

Section V(b)(1) of PTE 84–24 currently requires insurance agents, brokers, or consultants to provide disclosures to an “independent fiduciary” before executing a transaction involving the purchase of an annuity with plan assets. That fiduciary must acknowledge receipt of the disclosure in writing and approve the transaction. The Department is proposing to clarify that for transactions involving IRAs, these disclosures may be provided to the IRA owner instead of an unrelated fiduciary. The Department requests comment on how frequently this provision is currently used, how frequently it would be used with the additional proposed changes to PTE 84–24 described below, how it is practically implemented today, and how the revised provision would be operationalized.

Discretionary Managers

The Department proposes to clarify the exclusion for discretionary managers in current Section V(a)(3), which provides that the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter may not be a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the plan’s assets on a discretionary basis. The Department is proposing to amend this provision to exclude fiduciaries with discretionary authority, regardless of whether that authority has been conferred orally or in writing. As amended, proposed Section V(a)(3) would provide that the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter may not be a fiduciary who is authorized (formally or informally) to manage, acquire or dispose of the plan’s assets on a discretionary basis. The Department intends for this change to be a mere clarification, but requests comment as to whether fiduciaries with oral authority to manage plan assets have been relying on PTE 84–24, because the current condition requires the fiduciary to be “expressly authorized in writing.”

Recordkeeping

The Department is proposing to add a new Section IX to PTE 84–24 that would require fiduciaries engaging in all transactions covered by the exemption to maintain records necessary for the

following to determine that the conditions of this exemption have been met:

- (1) any authorized employee of the Department or the Internal Revenue Service or another state or federal regulator,
- (2) any fiduciary of a Plan that engaged in a transaction pursuant to this exemption,
- (3) any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to this exemption, or
- (4) any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

This requirement would replace the more limited existing recordkeeping requirement in current Section V(e).

This proposed amendment to the recordkeeping requirement is consistent with the recordkeeping provision the Department has included in other existing class exemptions (including the proposed amendment to the recordkeeping provisions of PTE 2020–02). It is intended to protect the rights of plan participants, beneficiaries, and IRA owners by ensuring that they and the Department are provided with sufficient information to determine whether the exemption conditions have been satisfied.

Fiduciary Investment Advice Exemption

The relief for fiduciary investment advice in proposed Section II(b) for the covered transactions described in proposed Section III(g) is generally similar to the relief provided in PTE 2020–02. However, while PTE 2020–02 is available for almost any fiduciary investment advice provider, the amended PTE 84–24 would be available only for investment advice that is provided to a Retirement Investor by an Independent Producer who works with multiple insurance companies to sell non-securities annuities or other insurance products not regulated by the SEC. The Department requests comment on whether to exclude these other insurance products not regulated by the SEC and limit Section III(g) to only non-securities annuities.

Independent Producers relying on proposed Section III(g) may reasonably rely on factual representations from the Insurer, and the Insurer may reasonably rely on factual representations from the Independent Producer regarding compliance with the exemption conditions, as long as they do not know

that such factual representations are incomplete or inaccurate. For example, the Independent Producer can rely on the Insurer's representations that it is maintaining the required documentation.

Proposed Section VI provides conditions for transactions described in proposed Section III(g) and would require the advice to be provided by an Independent Producer that is authorized to sell annuities from two or more unrelated Insurers. The term “Independent Producer” would be defined in Section X as a person or entity that is licensed under the laws of a state to sell, solicit or negotiate insurance contracts, including annuities, and that sells products of multiple unaffiliated insurance companies to Retirement Investors but is not an employee of an insurance company (including a statutory employee under Code section 3121). The term “Retirement Investor” would be defined in proposed Section X(o) to have the same meaning as it has in PTE 2020–02, and the term “Insurer” would be defined in proposed Section X(f) similarly to the definition of the term “Financial Institution” in PTE 2020–02, except it would be limited to insurance companies.

Thus, proposed Section VI would limit the transactions described in proposed Section III(g) to the narrow category of transactions in which an independent, insurance-only agent provides investment advice to a Retirement Investor regarding a non-securities annuity or insurance contract. For all other investment advice transactions, including those by Independent Producers that do not satisfy the conditions of the amended PTE 84–24 and those involving captive or career insurance agents, the advice provider would have to rely on PTE 2020–02 to receive exemptive relief for investment advice transactions. The Department has determined that when non-independent agents recommend insurance products, the insurance company whose product is recommended should be willing and able to acknowledge its fiduciary status under ERISA and the Code when investment advice is provided to a Retirement Investor for a fee, because it has sufficient control over the agent and the products the agent recommends.

Even though amended PTE 84–24 would not require Insurers to be fiduciaries, they would be subject to certain conditions when their products are recommended. Consistent with the NAIC Suitability in Annuity Transactions Model Regulation (the

NAIC Model Regulation),¹² and as discussed in the policies and procedures section below, the proposed exemption would require the Insurer whose product is being sold to provide meaningful supervision over the Independent Producer making the recommendation and sale to the Retirement Investor. As stated in proposed Section VI(b), the Insurer would not become an investment advice fiduciary under ERISA and/or the Code merely by complying with the applicable exemption conditions and providing the required supervision. However, the Department cautions that Insurers selling insurance and annuity products through Independent Producers could become an investment advice fiduciary under ERISA and/or the Code through other actions they take. If the Insurers are fiduciaries, they could not rely on amended PTE 84–24 and would need to rely on a different prohibited transaction exemption, such as PTE 2020–02, for relief from ERISA section 406(b) and Code section 4975.

To facilitate compliance with the exemption, Independent Producers and Insurers may rely on factual representations from each other, as long as they are reasonable in doing so. For example, an Independent Producer may generally rely on an Insurer's written report generated as part of its retrospective review required by Section VII(d), unless the Independent Producer knows (or should know) that the report is inaccurate or incomplete.

Exclusions

Section VI(c) proposes to exclude certain specific investment advice transactions. Under proposed Section VI(c)(1), the relief would not be available if the Plan is covered by Title I of ERISA and the Independent Producer, Insurer, or any Affiliate is the employer of employees covered by the Plan, or the Plan's named fiduciary or administrator. For example, an Independent Producer that sponsors a plan for its employees and provides the investment advice to the plan can only receive direct expenses and not reasonable compensation for the advice. However, there is an exception when the advice provider is selected by an independent fiduciary. Proposed Section VI(c)(2) would exclude transactions that involve the Independent Producer acting in a fiduciary capacity other than as an investment advice fiduciary. Unlike in PTE 2020–02, the Department is not proposing a specific provision for

¹² Available at <https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf>.

pooled employer plans, because the Department does not expect that pooled employer plans would need to rely on the limited relief in this exemption. The Department requests comment on whether pooled employer plans as described in ERISA section 3(43) would rely on the investment advice relief in amended PTE 84–24.

Impartial Conduct Standards of Amended PTE 84–24

Section VII(a) of the proposed amendment would condition relief for investment advice transactions described in proposed Section III(g) on the Independent Producer that is providing investment advice to Retirement Investors complying with the Impartial Conduct Standards that are the same as those in PTE 2020–02—*i.e.*, acting in the Retirement Investor's Best Interest, receiving no more than reasonable compensation, and making no misleading statements—with some modifications to reflect the specifics of the independent agent channel. These standards are discussed below.

Best Interest

The Best Interest standard would require the Independent Producer to provide investment advice that is in the Retirement Investor's Best Interest at the time it is provided. Proposed Section VII would rely on the same Best Interest standard from PTE 2020–02. As defined in proposed Section X(b), Best Interest advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and does not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party. For example, in choosing between annuity products offered by Insurers whose products the Independent Producer is authorized to sell, the Independent Producer may not recommend a product that is worse for the Retirement Investor but better or more profitable for the Independent Producer or Insurer.

Reasonable Compensation

Like PTE 2020–02, the proposed exemption requires an Independent

Producer's compensation to not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2). To tailor this condition to the specifics of insurance sales, Section VII(a)(2) would require that the Independent Producer can only receive an Insurance Sales Commission as compensation in connection with the transaction.

No Misleading Statements

Proposed Section VII(a)(3) provides the same prohibition on misleading statements that is part of PTE 2020–02. This provision requires an Independent Producer's statements to the Retirement Investor about the recommended transaction and other relevant matters to not be materially misleading at the time the statements are made. For purposes of this condition, the term “materially misleading” includes omitting information that is needed to make the statement not misleading in light of the circumstances under which it was made. To the extent the Independent Producer provides materials, including marketing materials that are prepared and provided by the Insurer, this condition also would require such materials not to be materially misleading to the Independent Producer's knowledge.

Disclosure

Section VII(b) of the proposed amendment would require Independent Producers to provide disclosures to Retirement Investors before engaging in a transaction pursuant to this exemption. Similar to PTE 2020–02, proposed Section VII(b)(1) would require a fiduciary acknowledgement, but unlike PTE 2020–02, only the Independent Producer and not the Insurer must acknowledge that it is a fiduciary providing investment advice to the Retirement Investor. Also similar to the proposed amendment to PTE 2020–02, the Department is proposing additional disclosures in PTE 84–24 Section VII(b) to help ensure that Retirement Investors have sufficient information to make an informed decision about the costs of the transaction and the significance and severity of the Independent Producer's conflicts of interest. The Department requests comment on these disclosures, particularly regarding whether additional or alternative information would be helpful to Retirement Investors receiving advice from Independent Producers. The Department is also interested in receiving comments regarding whether it should require Insurers or Independent Producers to maintain a

public website containing the pre-transaction disclosure, a description of the Insurer's or Independent Producer's business model, associated Conflicts of Interest (including arrangements that provide third party payments), and a schedule of typical fees. The Department is interested in receiving data and other information regarding the benefits of such a web disclosure. The Department is also interested in receiving any data that commenters may have that can inform an estimate of the extent to which Retirement Investors, investment consultants, and third party intermediaries would visit and use a web page that includes such disclosures.

Pre-Transaction Disclosure

Similar to PTE 2020–02, proposed Section VII(b)(1) would require a fiduciary acknowledgement, but unlike PTE 2020–02, only the Independent Producer and not the Insurer must acknowledge that it is a fiduciary providing investment advice to the Retirement Investor.¹³ Section VII(b)(2) would require the Independent Producer to provide the Retirement Investor with a written statement of the Best Interest standard of care that the Independent Producer owes to the Retirement Investor. Under Section VII(b)(3), the Independent Producer must provide a written description of the services to be provided and the Independent Producer's material Conflicts of Interest that is accurate and not misleading in any material respects. The description will include the products the Independent Producer is licensed and authorized to sell and inform the Retirement Investor in writing of any limits on the range of insurance products recommended. The Independent Producer must identify the specific Insurers and specific investment products available for recommendation.

Under proposed Section VII(b)(4), the Independent Producer would also be required to provide a written statement of the amount of the Insurance Sales Commission it will be paid in connection with the purchase by the Retirement Investor of the recommended annuity. The statement must disclose the amount of the expected Insurance Sales Commission, in both dollars and as a percentage of gross annual premium payments. If applicable, the statement must also disclose the amount the Independent

¹³ The Department cautions that an Insurer cannot insulate itself from fiduciary status merely by not making this acknowledgment. As noted above, an Insurer may become a fiduciary based on its actions.

Producer will be paid for the first year and each succeeding year.¹⁴

Under proposed Section VII(b)(5), the Independent Producer would also be required to provide a written statement informing the Retirement Investor of the right to obtain specific information regarding costs, fees, and compensation, and how to obtain it, free of charge. The statement must be written in plain English, taking into consideration the Retirement Investor's level of financial experience, and it must be accurate and not misleading. The cost, fee, and compensation information may be described in dollar amounts, percentages, formulas, or other means reasonably designed to be materially accurate in scope, magnitude, and nature of the compensation. The information must be detailed enough for the Retirement Investor to make an informed judgment about the transaction costs and the significance and severity of the Conflicts of Interest. For example, the Retirement Investor may ask how the Independent Producer would be compensated for recommending and selling other products they are authorized to sell and whether the Independent Producer is likely to receive more as a result of its recommendation than it would have received if it had recommended other annuities.

The proposed requirement to disclose the amount of expected Insurance Sales Commission, expressed both in dollars and as a percentage of gross annual premium payments, if applicable, for the first year and for each of the succeeding years is consistent with the existing disclosure requirements in PTE 84–24 Section V(b)(1). The proposed requirement to disclose the range of compensation is intended to ensure that the Retirement Investor understands the magnitude of the Independent Producer's material Conflicts of Interest. Without a single Insurer overseeing each recommendation, Independent Producers must carefully analyze and disclose the various incentives available

from different Insurers that could affect the recommendation. For this reason, proposed Section VII(b)(4) requires the Independent Producer to make specific disclosures before the sale of a recommended annuity. The Independent Producer must consider and document its conclusions that the recommended annuity is in the Retirement Investor's Best Interest and provide that documentation to the Retirement Investor and the Insurer.

To assist Independent Producers in complying with this proposed exemption's disclosure conditions, the Department is providing the following proposed model language that will satisfy proposed Section VII(b)(1), (2), and (5).

When we make investment recommendations to you regarding your retirement plan account or individual retirement account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money creates some conflicts with your interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours. Under this special rule's provisions, we must:

- Meet a professional standard of care when making investment recommendations (give prudent advice);
- Never put our financial interests ahead of yours when making recommendations (give loyal advice);
- Avoid misleading statements about conflicts of interest, fees, and investments;
- Follow policies and procedures designed to ensure that we give advice that is in your best interest;
- Charge no more than is reasonable for our services; and
- Give you basic information about conflicts of interest.

You can ask us for more information explaining costs, fees, and compensation, so that you may make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest. We will provide you with this information at no cost to you.

Please note that the Department is not proposing to include model language for Section VII(b)(3) or (4) that would describe services to be provided, the conflicts of interest, or the commissions paid because those will vary for each Independent Producer.

Best Interest Documentation and Rollover Disclosure

Under proposed Section II(b)(6), before the sale of a recommended non-security annuity, the Independent Producer would consider and document its conclusions as to whether the recommended non-security annuity is in the Best Interest of the Retirement

Investor. The Independent Producer must provide this documentation to both the Retirement Investor and to the Insurer whose products are being sold. The Department requests comment on whether this proposed condition should be expanded to other insurance products not regulated by the SEC.

Proposed Section VII(b)(7) would further require Independent Producers to provide a rollover disclosure that is similar to the disclosure required in the proposed amendment to PTE 2020–02 Section II(b)(5). Before engaging in a rollover or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Independent Producer must consider and document its conclusions as to whether a rollover is in the Retirement Investor's Best Interest and provide that documentation to the Retirement Investor. Relevant factors to consider must include but are not limited to:

- the alternatives to a rollover, including leaving the money in the Plan, if applicable,
- the comparative fees and expenses,
- whether an employer or other party pays for some or all administrative expenses, and
- the different levels of fiduciary protection, services, and investments available.

To assist the Insurer in satisfying its supervisory obligations, the Independent Producer must also provide the documentation to the Insurer.

Good Faith

Proposed Section VII(b)(6) provides that Independent Producers and the Insurer may rely in good faith on information and assurances from other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate. Proposed Section II(b)(7) confirms that the Independent Producer would not be required to disclose information that otherwise is prohibited by law.

Policies and Procedures

The exemption depends on oversight by a responsible Insurer to ensure that appropriate policies and procedures are in place. While the exemption would not require the Insurer to act in a fiduciary capacity or to acknowledge fiduciary status, the Insurer would be expected to adopt and implement protective policies and procedures, and to carefully police recommendations of its own investment products. These requirements are consistent with supervisory requirements for insurance

¹⁴ Some insurers offer fee-based annuities which are generally designed for sale in fee-based distribution models. These annuities do not pay a sales commission and typically have no withdrawal charges or lower charges than under commissioned products. Compensation for sales of fee-based annuities is usually based on a percentage of the annuity's account value or some other methodology. Fee-based annuities are eligible for the relief provided by the proposed amendment if all the conditions of the exemption are met. If an Independent Producer recommends a fee-based annuity, the written statement must disclose the specific method for determining the amount of compensation for the first year and succeeding years, expressed both in dollars and as percentage of the account value (or other relevant value) to the extent possible.

companies under state insurance law, and do not require the Insurers to police Independent Producers' recommendations of competitors' products.

Proposed Section VII(c) would require Insurers to establish, maintain, and enforce written policies and procedures. These conditions are similar to those in PTE 2020–02 Section II(c), including that compliance with these obligations are the Insurer's responsibility and not the Independent Producer's. Under proposed Section VII(c)(1), the Insurer must establish, maintain, and enforce written policies and procedures for the Insurer to review each of the Independent Producer's recommendations before an annuity is issued to a Retirement Investor. The policies and procedures must be prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. This requirement is similar to that in PTE 2020–02 and is consistent with the language in NAIC Model Regulation Section 6.C.(2)(d), which provides that “[t]he insurer shall establish and maintain procedures for the review of each recommendation prior to issuance of an annuity that are designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer's financial situation, insurance needs and financial objectives.” Under the proposal, the Insurer's prudent review of the Independent Producer's specific recommendations must be made without regard to the Insurer's own interests or those of its affiliates and related entities.

The Department notes that the NAIC Model Regulation contemplates that insurance companies will maintain a system of oversight with respect to insurance agents. Insurers could implement procedures to review annuity sales to Retirement Investors to ensure that they are made in compliance with the Impartial Conduct Standards similar to how they currently are required to review annuity sales to ensure compliance with the state-law suitability requirements.¹⁵ Section I of

the NAIC Model Regulation provides that the purpose of the regulation is to “require producers, as defined in this regulation, to act in the best interest of the consumer when making a recommendation of an annuity and to require insurers to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.”¹⁶ Accordingly, the Department believes that a system of oversight by Insurers over Independent Producers is consistent with the obligations imposed by NAIC's Model Regulation, and is achievable under this proposed amendment to PTE 84–24.

In terms of the specific oversight requirements, the Department confirms that under the proposed amendment, an Insurer would only be required to supervise an Independent Producer's recommendations of the annuities it offers to Retirement Investors. The Insurer would not be required to review annuities offered by another institution. The Department also clarifies that the exemption would not require the Insurer to consider or compare the specific annuities that an Independent Producer sells or the compensation relating to those annuities, unless they are annuities the Insurer offers. This approach is also consistent with the approach of NAIC Model Regulation Section 6.C.(4).¹⁷

Under proposed Section VII(c)(2), the Insurer's policies and procedures must mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and the Insurer's incentive practices as a whole would conclude that they do

review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria”). Section 6.C.(2)(e) provides that “[t]he insurer shall establish and maintain reasonable procedures to detect recommendations that are not in compliance with subsections A, B, D and E. This may include, but is not limited to, confirmation of the consumer's consumer profile information, systematic customer surveys, producer and consumer interviews, confirmation letters, producer statements or attestations and programs of internal monitoring. Nothing in this subparagraph prevents an insurer from complying with this subparagraph by applying sampling procedures, or by confirming the consumer profile information or other required information under this section after issuance or delivery of the annuity.”

¹⁶ *Id.*, Section 1.A.

¹⁷ NAIC Model Regulation Section 6.C.(4) provides that an insurer is not required to include in its system of supervision: (a) A producer's recommendations to consumers of products other than the annuities offered by the insurer; or (b) Consideration of or comparison to options available to the producer or compensation relating to those options other than annuities or other products offered by the insurer.

not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate, ahead of the Retirement Investor's interests. The Insurer's procedures must identify and eliminate quotas, appraisals, bonuses, contests, special awards, differential compensation, riders and or other similar features that are intended, or that a reasonable person would conclude are likely, to incentivize Independent Producers to provide recommendations that do not meet the Impartial Conduct Standards. This is the same condition that applies to Financial Institutions under Section II(c)(2) of PTE 2020–02. It is also consistent with, although more protective than, the narrower NAIC Model Regulation section 6.C.(2)(h), which prohibits an insurer from establishing sales contests, sales quotas, bonuses, and non-cash compensation that are based on sales of specific annuities within a limited period of time.

Under proposed Section VII(c)(2), an Insurer could not offer incentive vacations, trips, or even educational conferences, if qualification for the vacation, trip or conference is based on sales volume or satisfaction of sales quotas. The Best Interest standard discussed above and defined in proposed Section X(b) clearly prohibits these types of incentives on the grounds they create undue conflicts of interest. Moreover, the Department believes that educational opportunities should be offered equally to all agents and not connected to sales volume, because training is a necessary component of providing Best Interest advice. This emphasis on Independent Producer training is consistent with NAIC Model Regulation section 6.C.(2)(c), which requires insurers to provide its producers with product-specific training and training materials that explain all material features of its annuity products.

Under proposed Section VII(c)(3), the Insurer's policies and procedures must include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors. It must also include a prudent process for taking action to protect Retirement Investors from Independent Producers who have failed or are likely to fail to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill. This is consistent with, but more protective than, NAIC Model Regulation section 7.B.(11), which requires an insurer to verify the producer has completed the annuity training course required under NAIC

¹⁵ NAIC Model Regulation Section 6.C.(2)(d) provides that “[t]he insurer shall establish and maintain procedures for the review of each recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer's financial situation, insurance needs and financial objectives. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical

Model Regulation section 7 before allowing the producer to sell an annuity product for that insurer.

As part of a prudent evaluation of an Independent Producer's background, the Insurer must carefully review customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards, and it must review that determination at least annually as part of the retrospective review. The Department notes that Insurers may rely in part on an automated system to apply general standards and review formal discipline records, as long as careful, individual review is applied when the general review raises concerns. However, the Department expects that an Insurer would not work with an Independent Producer that either has been barred by any regulator from selling insurance or annuity contracts, or that is ineligible to rely on either PTE 2020–02 or the amended PTE 84–24 under proposed Section VIII. The Department requests comments on these requirements and is specifically interested in the systems Insurers currently use to determine whether Independent Producers are compliant with state insurance obligations. The Department is also interested in comments about how Insurers have operationalized the supervisory requirements in the NAIC Model Regulation.

Under proposed Section VII(c)(4), Insurers must provide their complete policies and procedures to the Department within 10 days upon request. The Department believes that ensuring its access to policies and procedures will facilitate the quicker resolution of disputes and allow the Department, if it desires, to survey the policies and procedures for exemption compliance and effectiveness.

Retrospective Review

Proposed Section VII(d) would require Insurers to conduct a retrospective review, at least annually. The retrospective review must be reasonably designed to detect and prevent violations of, and achieve compliance with the Impartial Conduct Standards, the terms of this exemption, and the policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, any noncompliance discovered in

connection with the review, and corrective actions taken or recommended, if any.

The retrospective review requirement is similar to that in Section II(d) of PTE 2020–02. However, unlike PTE 2020–02, Insurers under proposed Section VII(d) of PTE 84–24 must include in their review a prudent determination whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. This review does not need to be as extensive as the initial decision to contract with an Independent Producer. An Insurer may consider any change in discipline records that are found in widely-available databases and rollover documentations that have been provided under Section VII(c)(5). Additionally, the Insurer must update the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with Section VII(c).

Consistent with both PTE 2020–02 and the NAIC Model Regulation Section 6.C.(2)(i),¹⁸ proposed Section VII(d)(2) would require the Insurer to provide a Senior Executive Officer with an annual written report which details the review. Under Section VII(d)(3), the Department would further require the Insurer to provide the Independent Producer with the underlying methodology and results of the retrospective review. The Department understands that Insurers will conduct reviews for many different Independent Producers and confirms that Independent Producers only have the right to information about their own sales. There is no obligation to inform any Independent Producers of an unrelated Independent Producer's failure.

Proposed Section VII(d)(4) would require a Senior Executive Officer of the Insurer to annually certify that:

- The officer has reviewed the retrospective review report,
- The Insurer has filed (or will file timely, including extensions) Form 5330, reporting any non-exempt prohibited transaction discovered by the Insurer in connection with investment advice covered under Code section 4975(e)(3)(B),
- The Insurer has advised the Independent Producer of the violation

¹⁸ NAIC Model Reg Section 6.(C)(i) provides that: "The insurer shall annually provide a written report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any."

and any resulting excise taxes owed under Code section 4975, and

- The Insurer has notified the Department of Labor of the violation via email to PTE_84-24@dol.gov.

- The Insurer has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and

- The Insurer has in place a prudent process to modify such policies and procedures as business, regulatory, and legislative changes and events dictate, as well as a prudent process to test the effectiveness of such policies and procedures on a periodic basis, to ensure its continuing compliance with the exemption's conditions.

Under proposed Section VII(d)(5), the review, report, and certification must be completed no later than 6 months following the end of the period covered by the review, and proposed Section VII(d)(6) would require the Insurer to retain the report, certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department, within 10 business days of request, to the extent permitted by law.

Self-Correction

While the Insurer is responsible for the retrospective review, proposed Section VII(e) would allow the Independent Producer to make the corrections needed to avoid a non-exempt prohibited transaction in certain circumstances. Self-correction would be allowed in cases when either (1) the Independent Producer has refunded any charge to the Retirement Investor or (2) the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. This is somewhat different from the self-correction provision in PTE 2020–02, which is focused on investment losses. With a fixed annuity, the consumer is guaranteed not to lose any account value but can incur a charge (and hence a loss) if the contract is surrendered during the surrender charge period. The usual remedy for a mis-sold annuity is rescission, which requires the insurer to cancel the contract and waive surrender charges. Under the proposed amendment, the Independent Producer must notify the Department of the violation and the refund or rescission via email to PTE_84-24@dol.gov within 30 days of correction. The correction must occur no later than 90 days after the Independent Producer learned, or

reasonably should have learned, of the violation. Lastly, the Independent Producer must notify the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction must specifically be set forth in the written retrospective review report.

Eligibility

Section VIII of the proposed amendment identifies circumstances under which an Independent Producer or Insurer would become ineligible to rely on the exemption for 10 years, and also circumstances when an entity would not be permitted to serve as an Insurer under this exemption for 10 years. These eligibility provisions are similar to the provisions of Section III of PTE 2020–02, and are intended to promote compliance. Section VIII(a) describes how Independent Producers can become ineligible. The proposed amendment sets forth the specific crimes (including foreign crimes) that could cause ineligibility in Section III(a)(1). Independent Producers would also become ineligible if they are issued a written ineligibility notice from the Department stating that they: (A) engaged in a systematic pattern or practice of violating the conditions of this exemption; (B) intentionally violated, or knowingly participated in violations of, the conditions of this exemption; (C) engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay excise taxes involving investment advice; or (D) provided materially misleading information to the Department in connection with the its conduct under the exemption. Independent Producers would become ineligible six months after the conviction date, the date of the Department's written determination regarding a foreign conviction, or the date of the Department's written ineligibility notice, as applicable. During the six-month period, the Independent Producers are still fiduciaries, subject to all of the fiduciary requirements and prohibited transaction rules. Thus, Independent Producers must continue to comply with the exemption during those six months, and any transactions that do not meet the terms of the exemption will be subject to excise tax and ERISA penalties. The ineligibility remains in effect until the earliest of: a subsequent judgement reversing a person's conviction, 10 years after the person became ineligible or is released from imprisonment, if later, or the Department grants an individual

exemption permitting reliance on this exemption, notwithstanding the conviction.

Section VIII(b) delineates similarly eligibility provisions for Insurers. An entity will be ineligible to serve as an Insurer with respect to the exemption if it has a conviction for a crime listed under Section VIII(b)(1) or has been determined to be ineligible under Section VIII(b)(2). Furthermore, because Insurers that fail to satisfy the conditions of this exemption would not necessarily engage in a non-exempt prohibited transaction, their eligibility to rely on this exemption would not be linked to engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B). The Department notes that, as a fiduciary, before recommending an insurance product the Independent Producer is responsible for ensuring that the relevant insurance company is an Insurer permitted to sell its products through Independent Producers and Section VIII. The Independent Producer may reasonably rely on an Insurer's representations to it regarding the Insurer's continued eligibility under the exemption.

Insurers would become ineligible six months after the conviction date, the date of the Department's written determination regarding a foreign conviction, or the date of the Department's written ineligibility notice, as applicable. Unlike Independent Producers, Insurers might not be fiduciaries; therefore, they might not be subject to all fiduciary requirements during the six-month period. As fiduciaries, the Independent Producers should be aware of whether they are selling products of any Insurers that will become ineligible within six months. The ineligibility remains in effect until the earliest of: a subsequent judgement reversing a person's conviction, 10 years after the person became ineligible or is released from imprisonment, if later, or the Department grants an individual exemption permitting reliance on this exemption, notwithstanding the conviction.

Proposed Section VIII(c) would provide Independent Producers and Insurers with the opportunity to be heard. Like PTE 2020–02, there would be no separate evidentiary hearing following conviction by a U.S. federal or state court of competent jurisdiction, but Section XVIII(c)(1) would allow

Insurers and Independent Producers to submit a petition informing the Department of the conviction and seeking a determination that continued reliance on the exemption would not be contrary to the purposes of the exemption.

Proposed Section VIII(c)(2) would allow Independent Producers and Insurers to request an evidentiary hearing before becoming ineligible and losing access to the exemption. Before issuing a written ineligibility notice, the Department will issue a written warning to the Independent Producer or Insurer, as applicable, identifying specific conduct implicating proposed Section VIII(a)(2) or (b)(2), as applicable. The Insurer or Independent Producer then has a six-month opportunity to correct their conduct. At the end of the six-month period, if the Department determines that the Independent Producer or Insurer has not taken appropriate action to prevent recurrence of the disqualifying conduct, it will give the Independent Producer or Insurer the opportunity to be heard in person (including by phone or videoconference), in writing, or a combination thereof, before the Department issues the written ineligibility notice. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences.

Following a hearing for either foreign convictions or other misconduct, the Department's determination will be based solely on its discretion. The Department will consider the following when making its determination:

- the gravity of the offense;
- the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy;
- recency of the conduct at issue;
- any remedial measures the Independent Producer or Insurer has taken upon learning of the underlying conduct; and
- other factors the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption.

If the Department issues a written ineligibility notice, the notice will articulate the basis for the Department's determination that the Independent Producer or Insurer engaged in conduct described in Section VIII(a)(2).

If an Insurer or Independent Producer is ineligible to rely on amended PTE 84–24, proposed Section VIII(d) provides that the Insurer or Independent Producer may rely on a statutory or

separate administrative prohibited transaction exemption if one is available or seek an individual prohibited transaction exemption from the Department. The Department notes that PTE 2020–02 will generally be available for insurance companies that are ineligible to serve as Insurers under PTE 84–24. However, the Department may, as part of its eligibility determination process, determine that an entity is not eligible for either PTE 2020–02 or PTE 84–24. The written warning, opportunity to be heard, and written ineligibility notice would each clearly state the exemption or exemptions for which ineligibility was being considered.

If an Insurer cannot sell its products under PTE 84–24, the Department would consider an application for an individual exemption for that Insurer, and any resulting exemption would likely require the Insurer to be a fiduciary and acknowledge fiduciary status. If an applicant seeks retroactive relief in connection with an exemption application, the Department will consider the application in accordance with its retroactive exemption policy.¹⁹ The Department may require additional prospective compliance conditions as a condition of retroactive relief. The Department requests comments on the process described above, including whether it would be helpful to provide greater details about the evidentiary hearing and the written ineligibility notice, and, if so, what details are necessary.

Recordkeeping

As discussed above, the Department is proposing to add a new Section IX to PTE 84–24, which would require the party engaging in a transaction covered by the exemption to maintain records necessary to enable certain persons (described in proposed Section IX(a)(2)) to determine whether the conditions of this exemption have been met. This provision would apply to all of the conditions of PTE 84–24, replacing the more limited existing recordkeeping requirement in current Section V(e). This proposed recordkeeping requirement is consistent with PTE 2020–02 and is intended to protect the rights of plan participants and beneficiaries and IRA owners by ensuring that they and the Department have sufficient information to confirm that that exemption conditions have been satisfied.

Executive Order 12866 and 13563 Statement

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, as amended by Executive Order 14094, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$200 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in the Executive Order. It has been determined that this proposal is a “significant regulatory action” within the scope of section 3(f)(1) of the Executive Order.

Therefore, the Department has provided an assessment of the proposal’s potential costs, benefits, and transfers, and OMB has reviewed this proposed amendment pursuant to the Executive Order.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and Federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). This helps ensure that the public understands the Department’s collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is

minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department is soliciting comments regarding the information collection request (ICR) included in the proposed amendments to the ICR. To obtain a copy of the ICR, contact the PRA addressee below or go to *RegInfo.gov*. The Department has submitted a copy of the rule to the OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronically delivered responses).

Commenters may send their views on the Departments’ PRA analysis in the same way they send comments in response to the proposed rule as a whole (for example, through the *www.regulations.gov* website), including as part of a comment responding to the broader proposed rule. Comments are due by January 2, 2024 to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210, or *ebsa.opr@dol.gov*. ICRs also are available at *http://www.RegInfo.gov* (*http://www.reginfo.gov/public/do/PRAMain*).

As discussed in detail above, PTE 84–24, as amended, would exclude investment advice fiduciaries from the existing relief provided in Section II, which would be redesignated as Section II(a) and add new Sections VI–VIII, which would provide relief for investment advice limited to the narrow category of transactions in which an

¹⁹ Set forth in 29 CFR 2570.35(d).

independent, insurance-only agent, or Independent Producer, provides investment advice to a Retirement Investor regarding an annuity or insurance contract. Additionally, as amended, the exemption requires the Independent Producers engaging in these transactions to adhere to certain Impartial Conduct Standards, including acting in the best interest of the plans and IRAs when providing advice.

Financial institutions and investment professionals that engage in all other investment advice transactions, including those involving captive or career insurance agents would rely on PTE 2020–02 to receive exemptive relief for investment advice transactions. The amendment would revise the recordkeeping requirements for all entities relying on PTE 84–24. Additionally, for Independent Producers, the exemption would require entities to make certain new disclosures, conduct an annual retrospective review, and comply with policy and procedure requirements.

These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.²⁰

1.1 Preliminary Assumptions

In the analysis discussed below, a combination of personnel would perform the tasks associated with the ICRs at an hourly wage rate of \$158.94 for an Independent Producer, \$63.45 for clerical personnel, and \$159.34 for a legal professional, and \$128.11 for a senior executive.²¹

The Department does not have information on how many Retirement Investors, including plan beneficiaries and participants and IRA owners, receive disclosures electronically from investment advice fiduciaries. For the purposes of this analysis, the Department assumes that the percent of Retirement Investors receiving disclosures electronically would be similar to the percent of plan participants receiving disclosures electronically under the Department's 2020 electronic disclosure rules.²²

²⁰ For a more detailed discussion of the marginal costs associated with the proposed amendments to PTE 84–24, refer to the Notice of Proposed Rulemaking published elsewhere in today's edition of the *Federal Register*.

²¹ Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

²² 67 FR 17263 (Apr. 9, 2002).

Accordingly, the Department estimates that 94.2 percent of the disclosures sent to Retirement Investors would be sent electronically, and the remaining 5.8 percent would be sent by mail.²³ The Department requests comment on these assumptions.

The Department assumes any documents sent by mail would be sent by First Class Mail, incurring a postage cost of \$0.66 for each piece of mail.²⁴ Additionally, the Department assumes that documents sent by mail would incur a material cost of \$0.05 for each page.

1.2 Costs Associated With Satisfying Conditions for Transactions Described in Section III(a)–(f)

Insurance agents and brokers, pension consultants, insurance companies, and investment company principal underwriters are expected to continue to take advantage of the exemption for transactions described in Section III(a)–(f). The Department estimates that 2,986 insurance agents and brokers, pension consultants, and insurance companies will continue to take advantage of the exemption for transactions described in Section III(a)–(f). This estimate is based on the following assumptions:

- According to the Insurance Information Institute, in 2022, there were 3,328 captive agents, which are insurance agents who work for only one insurance company.²⁵ The Insurance Information Institute also found that life and annuity insurers accounted for 47.4 percent of all net premiums for the insurance industry in 2022.²⁶ Thus, the Department estimates there are 1,577 insurance agents and brokers relying on the existing provisions.²⁷
- The Department expects that pension consultants would continue to

²³ The Department estimates approximately 94.2% of Retirement Investors receive disclosures electronically, which is the sum of the estimated share of Retirement Investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2%) and the estimated share of Retirement Investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36.0%).

²⁴ United States Post Service, *First-Class Mail*, (2023), <https://www.usps.com/ship/first-class-mail.htm>.

²⁵ Insurance Information Institute, *A Firm Foundation: How Insurance Supports the Economy—Captives by State, 2021–2022*, <https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/a-50-state-commitment/captives-by-state> (last visited August 25, 2023).

²⁶ Insurance Information Institute, *Facts + Statistics: Industry Overview—Insurance Industry at a Glance*, <https://www.iii.org/fact-statistic/facts-statistics-industry-overview>.

²⁷ The number of captive insurance agents is estimated as: (3,328 captive agents × 47.4%) = 1,577 captive insurance agents serving the annuity market.

rely on the existing PTE 84–24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.²⁸

- In the Department's 2016 Regulatory Impact Analysis, it estimated that 398 insurance companies wrote annuities.²⁹ The Department requests information on how the number of insurance companies underwriting annuities has changed since then.

In addition, investment company principals may rely on the exemption. In the Department's experience, investment company principal underwriters almost never use PTE 84–24. Therefore, the Department assumes that 20 investment company principal underwriters will engage in one transaction annually under PTE 84–24, 10 of which are assumed to service plans and 10 are assumed to service IRAs.

The Department requests comments on how many entities currently rely on PTE 84–24 for transactions that do not involve investment advice and would continue to rely on the exemption as amended.

Further, the Department estimates that there are approximately 765,124 ERISA covered pension plans³⁰ and approximately 67.8 million IRAs.³¹ The Department estimates that 7.5 percent of plans are new accounts or new financial advice relationships³² and that 3 percent of plans will use the exemption for covered transactions.³³ Based on these assumptions, the Department estimates that 1,722 plans would be

²⁸ Internal Department of Labor calculations based on the number of unique service providers listed as pension consultants on the 2021 Form 5500 Schedule C.

²⁹ This estimate is based on 2014 data from SNL Financial on life insurance companies that reported receiving either individual or group annuity considerations. (See Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.)

³⁰ Employee Benefits Security Administration, United States Department of Labor, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports*, Table A1 (2023; forthcoming).

³¹ Cerulli Associates, *2023 Retirement-End Investor*, Exhibit 5.12. The Cerulli Report, (2023).

³² EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

³³ In 2020, 7 percent of traditional IRAs were held by insurance companies. (See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement*, 2020, 27(1) ICI Research Perspective (2021), <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>.) This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.

affected by the proposed amendments to PTE 84–24.³⁴

The proposed amendments to 84–24 would also affect new IRA accounts. The Department does not have data on the number of new IRA accounts that are opened each year. However, in 2022, of the 67.8 million IRA owners, 1.4 million, or approximately 2.1 percent, opened an IRA for the first time.³⁵ Inferring from this statistic, the Department estimates that 2.1 percent of IRA accounts are new each year. The Department acknowledges that some IRA owners may have multiple IRAs, and as such, this statistic may underestimate the percentage of new IRAs opened.³⁶ Additionally, the Department estimates that about 3 percent of these new IRAs, or approximately 52,000 IRAs, would use PTE 84–24 for covered transactions.³⁷

The proposed amendment would exclude entities currently relying on the exemption, under the existing provisions for investment advice. As such, the Department acknowledges that the estimates discussed above may

overestimate the entities able to rely on the exemption for relief for the transactions described in Section III(a)–(f). The Department requests comment or data on whether the relief in proposed Section II(a) for the covered transactions in Section III(a)–(f) would still be utilized after investment advice is excluded.

1.2.1. Written Authorization From the Independent Plan Fiduciary

Based on the estimates discussed above, the Department estimates that authorizing fiduciaries for 1,722 plans and authorizing fiduciaries for 52,449 IRA holders would be required to send an advance written authorization to the 2,996 financial institutions for IRAs³⁸ for exemptive relief for the transactions described in Section III(a)–(f).

In the plan universe, it is assumed that a legal professional would spend five hours per plan reviewing the disclosures and preparing an authorization form. In the IRA universe, it is assumed that a legal professional working on behalf of the financial institution for IRAs will spend three

hours drafting an authorization form for IRA holders to sign. This results in an hour burden of 17,598 hours with an equivalent cost of \$2.8 million.³⁹

The Department expects that plans will send the written authorization through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the authorization. The Department expects that 94.2 percent of written authorization for IRAs will be sent electronically at no additional burden. The remaining 5.8 percent of authorizations will be mailed. For paper authorizations, the Department assumes that clerical staff will spend two minutes preparing and sending the authorization resulting in an hour burden of approximately 101 hours with an equivalent cost of \$6,434.⁴⁰

In total, as presented in the table below, the written authorization requirement, under the new conditions of relief, is expected to result in an annual total hour burden of 17,699 hours with an equivalent cost of \$2,810,499.

TABLE 1—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN AUTHORIZATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	17,598	\$2,804,065	17,598	\$2,804,065
Clerical	101	6,434	101	6,434
Total	17,699	2,810,499	17,699	2,810,499

The Department assumes 5.8 percent of authorizations for IRAs would be distributed by mail and that the

authorization will include two pages. Accordingly, the Department estimates

an annual cost burden of approximately \$2,312.⁴¹

TABLE 2—MATERIAL AND POSTAGE COST ASSOCIATED WITH THE WRITTEN AUTHORIZATION

Activity	Year 1		Subsequent years	
	Pages	Cost	Pages	Cost
Material and Postage Cost	2	\$2,312	2	\$2,312

³⁴ 765,124 plans × 7.5 percent of plans are new × 3 percent of plans with relationships with insurance agents or pension consultants = 1,722 plans.

³⁵ Cerulli Associates, *U.S. Retirement End-Investor 2023: Fostering Comprehensive Relationships*, The Cerulli Report.

³⁶ The Department lacks data on the number of IRA owners that own multiple IRAs. To provide scope of magnitude, one source reported that in 2019, 19 percent of IRA owners contributed to both a traditional IRA and Roth IRA. (See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>.) This statistic does not account for individuals who own

multiple IRAs of each type or those who did not contribute in 2019, but it provides a lower bound.

³⁷ In 2020, 7 percent of traditional IRAs were held by insurance companies. (See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>.) This number has been adjusted downward to 3 percent to reflect the removal of transactions not covered by this exemption. The number of IRAs affected is estimated as: (83,252,750 IRAs × 2.1% IRAs assumed to be new IRAs × 3% of IRAs held by insurance companies) = 52,449 IRAs.

³⁸ This includes 2,986 insurance agents and brokers, pension consultants, and insurance companies and 10 investment company underwriters servicing IRAs.

³⁹ The burden is estimated as: (1,722 plans × 5 hours) + (2,996 financial institutions × 3 hours) = 17,598 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,722 plans × 5 hours) + (2,996 financial institutions × 3 hours)] × \$159.34 per hour = \$2,804,065.

⁴⁰ The burden is estimated as: ((52,449 IRAs × 5.8 percent paper × 2 minutes per plan) + 60 minutes) = 101 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: ((52,449 IRAs × 5.8 percent paper × 2 minutes per plan) + 60 minutes) × \$63.45 per hour = \$6,434.

⁴¹ The material cost is estimated as: (52,449 IRA authorizations × 5.8 percent paper) × [\$0.66 + (\$0.05 × 2)] = \$2,312.

TABLE 2—MATERIAL AND POSTAGE COST ASSOCIATED WITH THE WRITTEN AUTHORIZATION—Continued

Activity	Year 1		Subsequent years	
	Pages	Cost	Pages	Cost
Total	2	2,312	2	2,312

1.2.2. Disclosure

Based on the estimates discussed above, the Department estimates that approximately 3,006 financial institutions⁴² would continue to utilize the exemption for exemptive relief for the transactions described in Section III(a)–(f) for each plan and IRA. In total, the Department estimates that 2,996 entities would prepare disclosures for plans and 2,996 entities would prepare disclosures for IRAs. The Department assumes that an in-house attorney will spend one hour of legal staff time drafting the disclosure for plans and one hour of legal staff time drafting the

disclosure for IRAs. This results in an hour burden of 5,992 hours with an equivalent cost of \$954,765.⁴³

The Department expects that the disclosures for plans would be distributed through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the disclosures. The Department expects that 94.2 percent of disclosures for IRAs will be sent electronically at no additional burden. The remaining 5.8 percent of authorizations will be mailed. For paper copies, a clerical staff member is assumed to require two minutes to prepare and mail the required

information to the plan fiduciary. This information will be sent to the 52,449 IRAs plus the 10 investment company principal underwriters for IRAs entering into an agreement with an insurance agent, pension consultant, or mutual fund principal underwriter, and based on the above, the Department estimates that this requirement results in an hour burden of 84 hours with an equivalent cost of \$6,435.⁴⁴

In total, as presented in the table below, providing the pre-authorization materials is expected to impose an annual total hour burden of 6,093 hours with an equivalent cost of \$961,200.

TABLE 3—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE DISCLOSURE

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	5,992	\$954,765	5,992	\$954,765
Clerical	101	6,435	101	6,435
Total	6,093	961,200	6,093	961,200

The Department assumes that this information will include seven pages with 94.2 percent of disclosures distributed electronically through

traditional electronic methods at no additional burden, and the remaining 5.8 percent of disclosures will be mailed. Accordingly, the Department

estimates an annual cost burden of approximately \$2,313.⁴⁵

TABLE 4—MATERIAL AND POSTAGE COST ASSOCIATED WITH THE DISCLOSURE

	Year 1		Subsequent years	
	Pages	Equivalent burden cost	Pages	Equivalent burden cost
Material and Postage Cost	7	\$2,313	7	\$2,313
Total	7	2,313	7	2,313

1.3 Costs Associated With Satisfying Conditions for Transactions Described in Section III(g)

The amendment would provide investment advice fiduciaries with relief for Independent Producers for

transactions in which the Independent Producer receives an insurance sales commission as a result of the provision of investment advice, regarding the purchase of an annuity contract of a financial institution that is not an

Affiliate. The Department expects that the financial institutions covered by this proposal would be insurance companies that directly write annuities. The proposed amendments outline conditions pertaining to disclosure,

⁴² This includes 2,986 insurance agents and brokers, pension consultants, and insurance companies and 20 investment company underwriters servicing plans and IRAs.

⁴³ The burden is estimated as: [2,996 financial institutions × (1 hour for plans + 1 hour for IRAs)] = 5,992 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor

rate is applied in the following calculation: [2,996 financial institutions × (1 hour for plans + 1 hour for IRAs)] × \$159.34 per hour = \$954,765.

⁴⁴ The burden is estimated as: {[52,449 IRAs + 10 investment company principal underwriters for IRAs] × 5.8 percent paper × 2 minutes} ÷ 60 minutes = 101 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the

following calculation: {[52,449 IRAs + 10 investment company principal underwriters for IRAs] × 5.8 percent paper × 2 minutes} ÷ 60 minutes × \$63.45 = \$6,435.

⁴⁵ The material cost is estimated as: [(52,449 IRA authorizations + 10 investment company principal underwriters for IRAs) × 5.8 percent paper] × [\$0.66 + (\$0.05 × 7)] = \$2,313.

policies and procedures, and retrospective reviews that need to be satisfied to rely on the exemption. These conditions are tailored to protect Retirement Investors from the specific conflicts that arise for Independent Producers when providing investment advice to Retirement Investors regarding the purchase of an annuity.

The Independent Insurance Agents and Brokers of America estimated that there were 40,000 Independent Producers in 2022.⁴⁶ The Department does not have data on what percent of Independent Producers service the retirement market. For the purposes of this analysis, the Department assumes that 10 percent, or 4,000, of these Independent Producers service the retirement market. The Department requests comment on this assumption.

Insurance companies are primarily regulated by states and no single regulator records a nationwide count of insurance companies. Although state regulators track insurance companies, the total number of insurance companies cannot be calculated by aggregating individual state totals, because individual insurance companies often operate in multiple states. In the Department's 2016 Regulatory Impact Analysis, it estimated that 398 insurance companies wrote annuities.⁴⁷ The Department requests information on how the number of insurance companies underwriting annuities has changed since then.

Some of these insurance companies may not sell any annuity contracts in the IRA or plans. Because of these data limitations, the Department includes all 398 insurance companies in its cost estimate, though this likely represents an upper bound.

Insurance companies sell insurance products through (1) captive insurance agents that work for an insurance company as employees or as independent contractors who exclusively sell the insurance company's products and (2) independent agents who sell multiple

insurance companies' products. In recent years, the market has seen a shift away from captive distribution toward independent distribution.⁴⁸

The Department does not have data on the number of insurance companies using captive agents or Independent Producers. Based on data on the sales of individual annuities by distribution channel, the Department estimates that approximately 46 percent of insurance companies underwriting annuities sell annuities through captive distribution channels, while 54 percent sell annuities through independent distribution channels.⁴⁹ For the purposes of this analysis, the Department estimates that 215 insurance companies distribute annuities through independent channels and would rely on PTE 84–24 for transactions involving investment advice.⁵⁰

The Department estimates that 70 of the 398 insurance companies are large entities.⁵¹ For the purposes of this analysis, the Department assumes the percent of small insurance companies using each distribution channel is the same as for all insurance companies. That is, the Department assumes that 46 percent of insurance companies (183 insurance companies) sell annuities

through captive distribution channels, of which 151 are estimated to be small insurance companies and the remaining 32 large insurance companies.⁵² Additionally, 54 percent (215 insurance companies) sell annuities through independent distribution channels, of which 177 are estimated to be small insurance companies and the remaining 38 are large.⁵³ The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel. The Department requests comment on how many insurance companies sell annuities through captive and independent distribution channels. The Department also requests comment on whether, or how many, insurance companies may rely on both methods of distribution.

1.3.1 Disclosures

As discussed above, the Department assumes that 4,000 Independent Producers service the retirement market, selling the products of 215 insurance companies. For more generalized disclosures, the Department assumes that insurance companies would prepare and provide disclosures to Independent Producers selling their products. However, some of the disclosures are tailored specifically to the Independent Producer. The Department assumes that these disclosures would need to be prepared by the Independent Producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures; however, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services.

1.3.1.1. Written Acknowledgement That the Independent Producer Is a Fiduciary by the Independent Producer

The Department is including a model statement in the preamble to PTE 84–24 that details what should be included in a fiduciary acknowledgment for

⁴⁶ Annemarie McPherson Spears, *7 Findings From the 2022 Agency Universe Study*, (October 13, 2022), <https://www.iamagazine.com/news/7-findings-from-the-2022-agency-universe-study/?hstc=79369803.5fd6a87d75ca95f942e9dc33fed281b9.1691447156981.1691447156981.1691447156981.1691447156981&hsfp=2180945085>.

⁴⁷ This estimate is based on 2014 data from SNL Financial on life insurance companies reported receiving either individual or group annuity considerations. (See Conflict of Interest Final Rule, *Regulatory Impact Analysis for Final Rule and Exemptions*, U.S. Department of Labor (April 2016), www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf).

⁴⁸ Ramnath Balasubramanian, Rajiv Dattani, Asheet Mehta, & Andrew Reich, *Unbundling Value: How Leading Insurers Identify Competitive Advantage*, McKinsey & Company, (June 2022), <https://www.mckinsey.com/industries/financial-services/our-insights/unbundling-value-how-leading-insurers-identify-competitive-advantage>; Sheryl Moore, *The Annuity Model Is Broken*, Wink Intel, (June 2022), <https://www.winkintel.com/2022/06/the-annuity-model-is-broken-reprint/>.

⁴⁹ According to the Insurance Information Institute, in 2022, 20 percent of individual annuities were sold through independent broker-dealers, 18 percent through independent agents, 15 percent through career agents, 24 percent through banks, 17 percent through full-service national broker-dealers, 3 percent through direct-response, and 2 percent through other methods. For the purposes of this analysis, the Department considers those sales made by career agents and full-service national broker-dealers to be “captive,” and those made by independent broker-dealers and independent agents to be “independent.” The Department assumes that 46 percent of sales by banks are captive, while 54 percent of sales by banks are independent. As such, the Department assumes that 46 percent of sales are sold through captive channels $\{[15\% + 17\% + (46\% \times 24\%)] / (100\% - 6\%)\}$, while 54 percent of sales are sold through independent channels $\{[20\% + 18\% + (54\% \times 24\%)] / (100\% - 6\%)\}$.

⁵⁰ The number of insurance companies using captive distribution channels is estimated as $(398 \times 46\%) = 183$ insurance companies. The number of insurance companies using independent distribution channels is estimated as $(398 - 183) = 215$ insurance companies.

⁵¹ LIMRA estimates that, in 2016, 70 insurers had more than \$38.5 million in sales, which is the Small Business Administration's threshold for a large entity within the insurance industry. (See LIMRA, *U.S. Individual Annuity Yearbook: 2016 Data*, LIMRA Secure Retirement Institute (2017)).

⁵² The number of large insurance companies using a captive distribution channel is estimated as: $(70 \text{ large insurance companies} \times 46\%) = 32$ insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: $(183 \text{ insurance companies} - 32 \text{ large insurance companies}) = 151$ small insurance companies.

⁵³ The number of large insurance companies using an independent distribution channel is estimated as: $(70 \text{ large insurance companies} \times 54\%) = 38$ insurance companies. The number of small insurance companies using an independent distribution channel is estimated as: $(215 \text{ insurance companies} - 38 \text{ large insurance companies}) = 177$ small insurance companies.

financial institutions.⁵⁴ The Department assumes that the time associated with preparing the disclosures would be minimal. Further, these disclosures are expected to be uniform in nature. Accordingly, the Department estimates that these disclosures would not take a significant amount of time to prepare.

Due to the nature of Independent Producers, the Department assumes that

most financial institutions would make draft disclosures available to Independent Producers pertaining to their fiduciary status. However, the Department expects that a small percentage of Independent Producers may draft their own disclosures. The Department assumes that an in-house attorney for all 215 financial institutions

as well as 5 percent of Independent Producers, or 200 Independent Producers, would spend 10 minutes of legal staff time to produce a written acknowledgement in the first year. This results in an estimated hour burden of approximately 69 with an equivalent cost of \$11,021 in the first year.⁵⁵

TABLE 5—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	69	\$11,021	0	\$0
Total	69	11,021	0	0

1.3.1.2 Written Statement of the Best Interest Standard of Care Owed by the Independent Producer

As discussed above, the Department assumes that 4,000 Independent Producers service the retirement market, selling the products of 215 financial

institutions. Due to the nature of Independent Producers, the Department assumes that most financial institutions would make draft disclosures available to Independent Producers, pertaining to the annuities they offer. The Department assumes that an in-house attorney for all 215 financial institutions as well as 5

percent of Independent Producers, or 200 Independent Producers, would spend 30 minutes of legal staff time to prepare the statement in the first year. This results in an hour burden of 208 hours with an equivalent cost of \$33,063 in the first year.⁵⁶

TABLE 6—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN STATEMENT OF THE BEST INTEREST STANDARD OF CARE OWED

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	208	\$33,063	0	\$0
Total	208	33,063	0	0

1.3.1.2. Written Description of the Services Provided and the Products the Independent Producer Is Licensed and Authorized To Sell

As discussed above, the Department assumes that 4,000 Independent Producers service the retirement market, selling the products of 215 insurance companies. For disclosures tailored more specifically to an individual Independent Producer, the Department assumes that the disclosure would need to be prepared by the Independent Producer. The Department recognizes

that many Independent Producers may not have the internal resources to prepare such disclosure. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation would be covered by commission retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this

cost back to the Independent Producer. The Department requests comment on this assumption.

Accordingly, the Department assumes that all 4,000 Independent Producers in this analysis would need to prepare the disclosure. The Department assumes that, for each of these Independent Producers, an attorney would spend 30 minutes of legal staff time drafting the written description. This results in an hour burden of 2,000 hours with an equivalent cost of \$318,680 in the first year.⁵⁷

⁵⁴ 85 FR 82798, 82827 (Dec. 18, 2020). The model statement was also included in Frequently Asked Questions in April 2021, New Fiduciary Advice Exemption: PTE 2020-02 *Improving Investment Advice for Workers & Retirees* Frequently Asked Questions, Q13, (April 2021), <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf>.

⁵⁵ The burden is estimated as: $\{[(215 \text{ financial institutions} + 200 \text{ Independent Producers}) \times (10 \text{ minutes})] \div 60 \text{ minutes}\} = 69 \text{ hours}$. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: $\{[(215 \text{ financial institutions} + 200 \text{ Independent Producers}) \times (10 \text{ minutes})] \div 60 \text{ minutes}\} \times \$159.34 = \$11,021$.

minutes)] $\div 60 \text{ minutes}\} = 69 \text{ hours}$. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: $\{[(215 \text{ financial institutions} + 200 \text{ Independent Producers}) \times (10 \text{ minutes})] \div 60 \text{ minutes}\} \times \$159.34 = \$11,021$.

⁵⁶ The burden is estimated as: $\{[(215 \text{ financial institutions} + 200 \text{ Independent Producers}) \times (30 \text{ minutes})] \div 60 \text{ minutes}\} = 208 \text{ hours}$. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the

following calculation: $\{[(215 \text{ financial institutions} + 200 \text{ Independent Producers}) \times (30 \text{ minutes})] \div 60 \text{ minutes}\} \times \$159.34 = \$33,063$.

⁵⁷ The burden is estimated as: $(4,000 \text{ Independent Producers} \times 0.5 \text{ hours}) = 2,000 \text{ hours}$. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: $(4,000 \text{ Independent Producers} \times 0.5 \text{ hours}) \times \$159.34 = \$318,680$.

TABLE 7—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN DESCRIPTION OF SERVICE PROVIDED

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	2,000	\$318,680	0	\$0
Total	2,000	318,680	0	0

1.3.1.4. A Written Statement of the Independent Producer's Material Conflicts of Interest and the Amount of the Insurance Commission that Would Be Paid to the Independent Producer in Connection With the Purchase by a Retirement Investor of the Recommended Annuity

As discussed above, for disclosures tailored more specifically to an individual Independent Producer, the Department assumes that the disclosure would need to be prepared by the Independent Producer. The Department recognizes that many Independent

Producers may not have the internal resources to prepare such disclosure, however they may already have a similar statement to satisfy other legal requirements. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation would be covered by the commission retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this

cost back to the Independent Producer. The Department requests comment on this assumption.

Accordingly, the Department assumes that all 4,000 Independent Producers in this analysis would need to prepare the disclosure. The Department assumes that, for each of these entities, an attorney would spend one hour of legal staff time drafting the written description. This results in an hour burden of 4,000 hours with an equivalent cost of \$637,360 in the first year.⁵⁸

TABLE 8—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN STATEMENT OF THE INDEPENDENT PRODUCER'S MATERIAL CONFLICTS OF INTEREST

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	4,000	\$637,360	0	\$0
Total	4,000	637,360	0	0

1.3.1.5 Before Recommending an Annuity, Engaging in a Rollover, or Making a Recommendation to a Plan Participant as to the Post-Rollover Investment of Assets Currently Held in a Plan, the Independent Producer Must Document Its Conclusions as to Whether a Rollover Is in the Investor's Best Interest

The proposed amendment would require an Independent Producer to provide a disclosure to investors that documents their consideration as to whether a recommended annuity or rollover is in the Retirement Investor's best interest. Due to the nature of this

disclosure, the Department assumes that the content of the disclosure would need to be prepared by the Independent Producer. The Department recognizes that some may rely on intermediaries in the distribution channel, and some may seek external legal support to assist with drafting the disclosures. However, the Department expects that most Independent Producers would prepare the disclosure themselves. The Department requests comment on this assumption.

For the purposes of this analysis, the Department uses its estimate for the number of new IRA accounts held by insurance companies as a proxy for the

number of Retirement Investors that have relationships with Independent Producers that would engage in transactions covered under the exemption. As such, the Department estimates that 52,449 Retirement Investors would receive documentation on whether the recommended annuity is in their best interest each year.⁵⁹

The Department assumes that, for each of these Retirement Investors, an Independent Producer would spend one hour of a financial manager's time drafting the documentation. This results in an estimated hour burden of 52,449 hours with an equivalent cost of \$8.3 million annually.⁶⁰

⁵⁸ The burden is estimated as: (4,000 Independent Producers × 1 hour) = 4,000 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (4,000 hours × \$159.34) = \$637,360.

⁵⁹ In 2020, 7 percent of traditional IRAs were held by insurance companies. (See Investment Company

Institute, *The Role of IRAs in US Households' Saving for Retirement*, 2020, 27(1) ICI Research Perspective (2021). <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>.) This number has been adjusted downward to 3 percent to reflect the removal of transactions not covered by this exemption. The number of IRAs affected is estimated as: (83,252,750 IRAs × 2.1% IRAs

assumed to be new IRAs × 3% of IRAs held by insurance companies) = 52,449 IRAs.

⁶⁰ The burden is estimated as: (52,449 rollovers × 1 hour) = 52,449 hours. A labor rate of approximately \$158.94 is used for an Independent Producer. The labor rate is applied in the following calculation: (52,449 rollovers × 1 hour) × \$158.94 = \$8,336,244.

TABLE 9—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE ROLLOVER DOCUMENTATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Insurance Sales Agent	52,449	\$8,336,244	52,449	\$8,336,244
Total	52,449	8,336,244	52,449	8,336,244

1.3.1.6 Mailing Cost for Disclosures Sent From Independent Producers to Retirement Investors

As discussed at the beginning of the cost section, The Department assumes

that 5.8 percent of disclosures would be mailed. Accordingly, of the estimated 52,449 affected Retirement Investors, 3,042 Retirement Investors are estimated to receive paper disclosures.⁶¹ For paper copies, a clerical staff member is

assumed to require five minutes to prepare and mail the required information to the Retirement Investor. This requirement results in an estimated hour burden of 254 hours with an equivalent cost of \$16,085.⁶²

TABLE 10—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH PREPARING THE DISCLOSURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	254	\$16,085	254	\$16,085
Total	254	16,085	254	16,085

The Department assumes that this information would include seven pages,

resulting in an annual cost burden for material and paper costs of \$3,072.⁶³

TABLE 11—MATERIAL COST ASSOCIATED WITH THE DISCLOSURES

Activity	Year 1		Subsequent years	
	Pages	Equivalent burden cost	Pages	Equivalent burden cost
Cost	7	\$3,072	7	\$3,072
Total	7	3,072	7	3,072

Additionally, Independent Producers would be required to send the documentation to the insurance company. The Department expects that such documentation would be sent electronically and result in a de minimis burden. The Department requests comment on this assumption.

1.3.2 Policies and Procedures

1.3.2.1 Financial Institutions Must Establish, Maintain, and Enforce Written Policies and Procedures for the Review of Each Recommendation Before an Annuity Is Issued to a Retirement Investor, and the Financial Institution Review Its Policies and Procedures at Least Annually

As discussed above, the Department estimates that 215 financial institutions would need to meet this requirement, of which 177 are estimated to be small and 38 are estimated to be large.⁶⁴ The Department assumes that, for each large

insurance company, an in-house attorney would spend 10 hours of legal staff time drafting the written description, and for each small insurance company, an in-house attorney would spend 5 hours of legal staff time. This results in an hour burden of 1,265 hours with an equivalent cost of \$201,565 in the first year.⁶⁵

In the following years, the Department assumes for each insurance company, an in-house attorney would spend two hours of legal staff time reviewing the policies and procedures. This results in an hour burden of 430 hours with an

⁶¹ This is estimated as: (52,449 Retirement Investors × 5.8%) = 3,042 paper disclosures.

⁶² This is estimated as: [(3,042 paper disclosures × 5 minutes) ÷ 60 minutes] = 254 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(3,042 paper disclosures × 5 minutes) ÷ 60 minutes] × \$63.45 = \$16,085.

⁶³ This is estimated as: 3,042 rollovers resulting in a paper disclosure × [\$0.66 postage + (\$0.05 per page × 7 pages)] = \$3,072.

⁶⁴ The number of large insurance companies using an independent distribution channel is estimated as: (70 large insurance companies × 54%) = 38 insurance companies. The number of small insurance companies using an independent distribution channel is estimated as: (215 insurance

companies – 38 large insurance companies) = 177 small insurance companies.

⁶⁵ This is estimated as: [(177 small insurance companies × 5 hours) + (38 large insurance companies × 10 hours)] = 1,265 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(177 small insurance companies × 5 hours) + (38 large insurance companies × 10 hours)] × \$159.34 = \$201,565.

equivalent cost of \$68,516 in subsequent years.⁶⁶

The proposed amendments would also require financial institutions to provide their complete policies and procedures to the Department upon request. As discussed above for PTE 2020–02, the Department estimates that it would request 165 policies and procedures in the first year and 50 in subsequent years. Assuming that the number of requests for the entities covered under PTE 2020–02 is equivalent to the number of requests for the entities covered under PTE 84–24, the Department assumes that it will

request two policies and procedures from insurers in the first year and one request in subsequent years, on average.⁶⁷ This results in an estimated cost of approximately \$32 in the first year⁶⁸ and \$16 in subsequent years.⁶⁹

Insurers would also be required to review each of the Independent Producer's recommendations before an annuity is issued to a Retirement Investor to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. This requirement is consistent with the language in NAIC's 2010 Model Regulation 275, Suitability in Annuity

Transactions,⁷⁰ and the 2020 revisions to Model Regulation 275, which expanded the suitability standard to a best interest standard.⁷¹ Most states have adopted some form of the Model Regulation 275.⁷² As such, the Department expects that reviewing recommendations before an annuity is issued is common industry practice. Accordingly, the Department expects that financial institutions would incur a de minimis burden to comply with the proposed amendments, when already complying with Model Regulation 275. The Department requests comment on this assumption.

TABLE 12—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	1,265	\$201,565	430	\$68,516
Clerical	1	32	1	16
Total	1,266	201,597	430	68,532

1.3.3. Retrospective Review

The proposed amendment would require financial institutions to conduct a retrospective review at least annually. The review would be required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review would be required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. Financial institutions would also be required to provide the Independent Producer with

the underlying methodology and results of the retrospective review.

1.3.3.1. The Insurance Company Must Conduct a Retrospective Review, at Least Annually, for Each Independent Producer That Sells the Insurance Company's Annuity Contracts

The Department estimates that 215 financial institutions would need to meet this requirement. For this requirement the information collection is documenting the findings of the retrospective review. The Departments lacks data on, for a given insurance company, how many Independent Producers, on average, sell their annuities. For the purposes of this analysis, the Department assumes that, on average, each Independent Producer sells the products of three financial

institutions. From each of these financial institutions, they may sell multiple products. As such, the Department assumes that each year, insurance companies would need to prepare a total of 12,000 retrospective reviews,⁷³ or on average, each insurance company would need to prepare approximately 56 retrospective reviews.⁷⁴ The Department requests comment on this estimate. The Department assumes that, for each Independent Producer selling an insurance company's products, an in-house attorney at the insurance company would spend one hour of legal staff time, on average, drafting the retrospective review. This results in an estimated hour burden of 12,000 hours with an equivalent cost of \$1.9 million.⁷⁵

⁶⁶ This is estimated as: (215 insurance companies × 2 hours) = 430 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (215 insurance companies × 2 hours) × \$159.34 = \$68,516.

⁶⁷ The number of requests in the first year is estimated as 215 insurance companies × (165 requests in PTE 2020–02/19,290 financial institutions in PTE 2020–02) = 2 requests. The number of requests in subsequent years is estimated as: 215 insurance companies × (50 requests in PTE 2020–02/19,290 financial institutions in PTE 2020–02) = 1 request.

⁶⁸ The burden is estimated as: [(2 × 15 minutes) ÷ 60 minutes] = 0.5 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is

applied in the following calculation: [(2 × 15 minutes) ÷ 60 minutes] × \$63.45 = \$31.73.

⁶⁹ The burden is estimated as: [(1 × 15 minutes) ÷ 60 minutes] = 0.25 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(1 × 15 minutes) ÷ 60 minutes] × \$63.45 = \$15.86.

⁷⁰ NAIC Model Suitability Regulations, § 6(F)(1)(d) (2010), <https://naic.soutrnglobal.net/Portal/Public/en-GB/RecordView/Index/25201>.

⁷¹ NAIC Model Suitability Regulations, § 6(C)(1)(d) (2020), <https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf>.

⁷² As of October of 2021, only three states had not adopted some form of Model Regulation 275. (See

A.D. Banker & Company, *Annuity Best Interest State Map and FAQs*, (October 2021), <https://blog.adbanker.com/annuity-best-interest-state-map-and-faqs>).

⁷³ This is estimated as: (4,000 Independent Producers × 3 insurance companies covered) = 12,000 retrospective reviews.

⁷⁴ This is estimated as: (12,000/215) = 55.81 retrospective reviews, on average

⁷⁵ This is estimated as: (12,000 retrospective reviews × 1 hour) = 12,000 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (12,000 retrospective reviews × 1 hour) × \$159.34 = \$1,912,080.

TABLE 13—HOURL BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RETROSPECTIVE REVIEW

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden Hours	Equivalent burden cost
Legal	12,000	\$1,912,080	12,000	\$1,912,080
Total	12,000	1,912,080	12,000	1,912,080

1.3.3.2. Certification by the Senior Executive Officer of the Insurance Company

The Department assumes it would take a Senior Executive Officer 15 minutes to certify the report. This

results in an annual hour burden of 3,000 hours with an equivalent cost of \$384,330.⁷⁶

TABLE 14—HOURL BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE CERTIFICATION BY THE SENIOR EXECUTIVE OFFICER

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Senior Executive Officer	3,000	\$384,330	3,000	\$384,330
Total	3,000	384,330	3,000	384,330

1.3.3.3. The Insurance Company Provides to the Independent Producer the Methodology and Results of the Retrospective Review

The Department assumes that the insurance company would provide the methodology and results electronically.

The Department requests comment on this assumption. The Department estimates that it would take clerical staff five minutes to prepare and send each of the estimated 12,000 retrospective reviews. This results in an annual hour burden of 1,000 hours with an

equivalent cost of \$63,450.⁷⁷ The Department expects that the results would be provided electronically, thus the Department does not expect there to be any material costs with providing Independent Producers with the retrospective review.

TABLE 15—HOURL BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE PROVISION OF THE RESULTS OF THE RETROSPECTIVE REVIEW

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	1,000	\$63,450	1,000	\$63,450
Total	1,000	63,450	1,000	63,450

1.3.4. Recordkeeping Requirement

The proposed amendment would change the current recordkeeping requirements to incorporate a new provision that is similar to the recordkeeping provision in PTE 2020–02. This requirement would replace the more limited existing recordkeeping requirement in current version of PTE 84–24, which requires sufficient records

to demonstrate that the conditions of the exemption have been met. The Department does not have data on how many pension consultants, insurance companies, and investment company principal underwriters would continue to rely on PTE 84–24 as amended without also complying with the amended PTE 2020–02. In this analysis, the Department assumes that all of the pension consultants and investment

company principal underwriters continuing to rely on the amended PTE 84–24 would also rely on the amended PTE 2020–02. Thus, to avoid double counting the compliance cost, this analysis does not include the cost associated with the proposed recordkeeping requirement for these entities.

⁷⁶ This is estimated as: [(12,000 retrospective reviews × 15 minutes) ÷ 60 minutes] = 3,000 hours. A labor rate of \$128.11 is used for a Senior Executive Officer. The labor rate is applied in the following calculation: [(12,000 retrospective

reviews × 15 minutes) ÷ 60 minutes] × \$128.11 = \$384,330.

⁷⁷ This is estimated as: [(12,000 retrospective reviews × 5 minutes) ÷ 60 minutes] = 1,000 hours.

A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(12,000 retrospective reviews × 5 minutes) ÷ 60 minutes] × \$63.45 = \$63,450.

For this analysis, the Department considers the cost for insurance companies and Independent Producers complying with the proposed recordkeeping requirements. The

Department estimates that the additional time needed to maintain records for the financial institutions to be consistent with the exemption would take an Independent Producer 2 hours,

resulting in an hour burden of 8,430 hours and an equivalent cost of \$1.3 million.⁷⁸

TABLE 16—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RECORDKEEPING REQUIREMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	8,430	\$1,340,036	8,430	\$1,340,036
Total	8,430	1,340,036	8,430	1,340,036

For the purposes of this analysis, the Department assumes that, on average, an Independent Producer would receive 10 requests per year and that preparing and sending each request would take a legal professional, on average, 30 minutes.

Based on these assumptions, the Department estimates that the proposed amendments would result in an annual hour burden of 20,000 hours with an equivalent cost of approximately \$3.2 million.⁷⁹ The Department requests

comment on how often financial institutions would receive requests for records and how long the preparation of such records would take.

TABLE 17—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RECORDKEEPING REQUIREMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Independent Producer	20,000	\$3,178,800	20,000	\$3,178,800
Total	20,000	3,178,800	20,000	3,178,800

1.4. Overall Summary

These paperwork burden estimates are summarized as follows:

Type of Review: Revision of an Existing Collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters.

OMB Control Number: 1210–0158.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 7,221.

Estimated Number of Annual Responses: 119,376.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 123,726 hours.

Estimated Total Annual Burden Cost: \$8,457.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)⁸⁰ imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.⁸¹ Under section 603 of the RFA, agencies must submit an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This proposed amended exemption, along with related amended exemptions and a proposed rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities.

The impact of this proposed amendment on small entities is included in the IRFA for the entire project, which can be found in the related notice of proposed rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995⁸² requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposed amended exemption does not include any Federal mandate that will result in such expenditures.

⁷⁸ This is estimated as: (4,000 Independent Producers + 215 insurance companies) × 2 hours = 8,430 hours. A labor rate of \$158.94 is used for an Independent Producer and a rate of \$159.34 for an insurance company legal professional. The labor rate is applied in the following calculation: [(4,000 Independent Producers × 2 hours × \$158.94) + (215

insurance companies × 2 hours × \$159.34)] = \$1,340,036.

⁷⁹ The burden is estimated as: [(4,000 Independent Producers × 10 requests) × 30 minutes] ÷ 60 minutes = 20,000 hours. A labor rate of \$158.94 is used for an Independent Producer. The

labor rate is applied in the following calculation: [(4,000 Independent Producers × 10 requests) × 30 minutes] ÷ 60 minutes = 20,000 hours. A labor rate of \$158.94 is used for an Independent Producer. The

⁸⁰ 5 U.S.C. 601 *et seq.*

⁸¹ 5 U.S.C. 601(2), 603(a); see also 5 U.S.C. 551.

⁸² Public Law 104–4, 109 Stat. 48 (Jan. 4, 1995).

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires federal agencies to adhere to specific criteria in formulating and implementing policies that have “substantial direct effects” on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, ERISA section 514 provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this proposed class exemption has federalism implications because it has no 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.

General Information

The attention of interested persons is directed to the following: (1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary, or other party in interest or disqualified person with respect to a Plan, from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge his or her duties respecting the Plan solely in the interests of the participants and beneficiaries of the Plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the Plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their

beneficiaries; (2) Before the proposed exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), the Department must find that it is administratively feasible, in the interests of Plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of the Plan and IRA owners; (3) If granted, the proposed exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and (4) The proposed exemption, if granted, is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

The Department is proposing the following amendment on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).⁸³

Proposed Amendment to PTE 84–24

Section I—Retroactive Application

The restrictions of sections 406(a)(1)(A) through (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in section III of this exemption in connection with purchases made before November 1, 1977, if the conditions set forth in section IV are met.

Section II—Prospective Application

(a) Except for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder, the restrictions of section 406(a)(1)(A) through (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in section III(a)–(f) of this exemption in connection with purchases made after October 31, 1977, if the conditions set forth in sections IV, V and IX are met.

(b) Effective on the date that is 60 days after the publication of a final amendment in the **Federal Register**, the restrictions of ERISA sections

406(a)(1)(D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder will not apply if the fiduciaries are Independent Producers, the transactions meet the requirements described in Section III(g), the conditions set forth in Sections VI, VII and IX are satisfied, and the Independent Producer and Insurer are not ineligible under Section VIII.

Section III—Transactions

(a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a Mutual Fund Commission or an Insurance Sales Commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract.

(b) The receipt of a Mutual Fund Commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company.

(c) The effecting by an insurance agent or broker, pension consultant or investment company Principal Underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company.

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company.

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-approved Plan.

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when such investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-approved plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2).

(g) The receipt, directly or indirectly, by an Independent Producer of an Insurance Sales Commission as a result

⁸³ Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), regarding the purchase of a non-security annuity contract or other insurance product not regulated by the Securities and Exchange Commission (SEC) of an Insurer that is not an Affiliate, including as part of a rollover from a Plan to an IRA as defined in Code section 4975(e)(1)(B) or (C).

Section IV—Conditions With Respect to Transactions Described in Section III(a)–(f)

The following conditions apply solely to a transaction described in Section III(a)–(f):

(a) The transaction is effected by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter in the ordinary course of its business as such a person.

(b) The transaction is on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be.

(c) The combined total of all fees, commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter:

(1) For the provision of services to the plan; and

(2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of "reasonable compensation" within the contemplation of section 408(b)(2) and 408(c)(2) of the Act and sections 4975(d)(2) and 4975(d)(10) of the Code. If such total is in excess of "reasonable compensation," the "amount involved" for purposes of the civil penalties of section 502(i) of the Act and the excise taxes imposed by section 4975(a) and (b) of the Code is the amount of compensation in excess of "reasonable compensation."

Section V—Conditions for Transactions Described in Section III(a) Through (d)

The following conditions apply solely to a transaction described in subsections (a), (b), (c) or (d) of section III:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter is not

(1) a trustee of the plan (other than a Nondiscretionary Trustee who does not render investment advice with respect to any assets of the plan),

(2) a plan administrator (within the meaning of section 3(16)(A) of the Act and section 414(g) of the Code),

(3) a fiduciary who is authorized to manage, acquire, or dispose of the plan's assets on a discretionary basis, or

(4) for transactions described in sections III (a) through (d) entered into after December 31, 1978, an employer any of whose employees are covered by the plan.

Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is affiliated with a trustee or an investment manager (within the meaning of section VI(b)) with respect to a plan may engage in a transaction described in section III(a) through (d) of this exemption on behalf of the plan if such trustee or investment manager has no discretionary authority or control over the plan assets involved in the transaction other than as a Nondiscretionary Trustee.

(b)(1) With respect to a transaction involving the purchase with plan assets of an insurance or annuity contract or the receipt of an Insurance Sales Commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary or IRA owner with respect to the plan prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an affiliate of the insurance company whose contract is being recommended, or if the ability of such agent, broker or consultant to recommend insurance or annuity contracts is limited by any agreement with such insurance company, the nature of such affiliation, limitation, or relationship;

(B) The Insurance Sales Commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the recommended contract; and

(C) For purchases made after June 30, 1979, a description of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination or sale of such contract.

(2) Following the receipt of the information required to be disclosed in subsection (b)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner acknowledges in writing receipt of such information and approves the

transaction on behalf of the plan. Such fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction. Such fiduciary may not receive, directly or indirectly (e.g., through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(c)(1) With respect to a transaction involving the purchase with plan assets of securities issued by an investment company or the receipt of a Mutual Fund Commission thereon by an investment company Principal Underwriter, the investment company Principal Underwriter provides to an Independent fiduciary or IRA owner with respect to the plan, prior to the execution of the transaction, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the person recommending securities issued by an investment company is the Principal Underwriter of the investment company whose securities are being recommended, the nature of such relationship and of any limitation it places upon the Principal Underwriter's ability to recommend investment company securities;

(B) The Mutual Fund Commission, expressed as a percentage of the dollar amount of the plan's gross payment and of the amount actually invested, that will be received by the Principal Underwriter in connection with the purchase of the recommended securities issued by the investment company; and

(C) For purchases made after December 31, 1978, a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination or sale of such securities.

(2) Following the receipt of the information required to be disclosed in subsection (c)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner approves the transaction on behalf of the plan. Unless facts or circumstances would indicate the contrary, such approval may be presumed if the fiduciary or IRA owner permits the transaction to proceed after receipt of the written disclosure. Such fiduciary may be an employer of employees covered by the plan, but may not be a Principal Underwriter involved in the

transaction. Such fiduciary may not receive, directly or indirectly (*e.g.*, through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(d) With respect to additional purchases of insurance or annuity contracts or securities issued by an investment company, the written disclosure required under subsections (b) and (c) of this section V need not be repeated, unless—

(1) More than three years have passed since such disclosure was made with respect to the same kind of contract or security, or

(2) The contract or security being recommended for purchase or the commission with respect thereto is materially different from that for which the approval described in subsections (b) and (c) of this section was obtained.

Section VI—Conditions for Transactions Described in Section III(g)

The following conditions apply solely to a transaction described in subsection (g) of section III:

(a) The Independent Producer is authorized to sell annuities from two or more unrelated Insurers.

(b) The Independent Producer and the Insurer satisfy the applicable conditions in Sections VII and IX and are not ineligible under Section VIII. The Insurer will not necessarily become a fiduciary under ERISA or the Code merely by complying with the exemption's conditions.

(c) Exclusions.

The relief in Section III(g) is not available if:

(1) The Plan is covered by Title I of ERISA and the Independent Producer, Insurer, or any Affiliate is:

(A) the employer of employees covered by the Plan, or

(B) the Plan's named fiduciary or administrator; provided however that a named fiduciary or administrator or their Affiliate may rely on the exemption if it is selected to provide investment advice by a fiduciary who:

(i) is not the Insurer, Independent Producer, or an Affiliate;

(ii) does not have a relationship to or an interest in the Insurer, Independent Producer, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by the exemption;

(iii) does not receive and is not projected to receive within the current federal income tax year, compensation or other consideration for their own account from the Insurer, Independent Producer, or an Affiliate in excess of

two (2) percent of the fiduciary's annual revenues based upon its prior income tax year; or

(iv) is not the IRA owner or beneficiary; or

(2) The Independent Producer transaction involves the Independent Producer and Insurer acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B).

Section VII—Investment Advice Arrangement

Section VII(a) requires Independent Producers to comply with Impartial Conduct Standards, including a Best Interest standard, when providing fiduciary investment advice to Retirement Investors. Section VII(b) requires Independent Producers to provide to Retirement Investors a written acknowledgement that the Independent Producer is a fiduciary under Title I of ERISA and/or the Code, a written statement of the Best Interest standard of care, a written description of the services they will provide and the products they are licensed and authorized to sell, and a written statement of their material Conflicts of Interest and the amount of the Insurance Commission that will be paid to them in connection with the purchase of the recommended annuity by a Retirement Investor. In addition, before the sale of a recommended annuity, Independent Producers must consider and document their conclusions as to whether the recommended annuity is in the Best Interest of the Retirement Investor. Independent Producers recommending a rollover must also provide additional disclosure as set forth in subsection (b), below. Section VII(c) requires Insurers to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Section VII(d) requires the Insurer to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the terms of this exemption. Section VII(e) allows Independent Producers to correct certain violations of the exemption conditions and maintain relief under the exemption. In complying with this Section VII, the Independent Producer may reasonably rely on factual representations from the Insurer, and Insurers may rely on factual representations from the Independent Producer, as long as they do not have knowledge that such factual

representations are incomplete or inaccurate.

(a) Impartial Conduct Standards

(1) The Independent Producer's investment advice is, at the time it is provided, in the Retirement Investor's Best Interest. As defined in Section X(b), advice is in the Retirement Investor's Best Interest if it (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and (B) does not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the Retirement Investor's interests, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party. For example, in choosing between annuity products offered by Insurers, whose products the Independent Producer is authorized to sell, it is not permissible for the Independent Producer to recommend a product that is worse for the Retirement Investor, but better or more profitable for the Independent Producer or the Insurer;

(2) The Independent Producer receives no compensation in connection with the transaction other than the Insurance Sales Commission, and the Insurance Sales Commission does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

(3) The Independent Producer's statements to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time the statements are made, materially misleading. For purposes of this subsection, the term "materially misleading" includes omitting information that is needed to make the statement not misleading in light of the circumstances under which it was made.

(b) Disclosure

Prior to engaging in a transaction described in Section III(g), the Independent Producer provides the disclosures set forth in paragraphs (1)–(5) to the Retirement Investor:

(1) A written acknowledgment that the Independent Producer is a fiduciary under Title I and the Code, as applicable, with respect to any investment recommendation provided

by the Independent Producer to the Retirement Investor;

(2) A written statement of the Best Interest standard of care owed by the Independent Producer to the Retirement Investor;

(3) A written description of the services to be provided and the Independent Producer's material Conflicts of Interest that is accurate and not misleading in any material respects. The description will include the products the Independent Producer is licensed and authorized to sell. The description must inform the Retirement Investor in writing of any limits on the range of insurance products recommended. The Independent Producer must identify the specific Insurers and specific insurance products available for recommendation.

(4) A written statement of the amount of the Insurance Commission that will be paid to the Independent Producer in connection with the purchase by a Retirement Investor of the recommended annuity. The statement must disclose the amount of expected Insurance Sales Commission, expressed both in dollars and as a percentage of gross annual premium payments, if applicable, for the first year and for each of the succeeding years.

(5) A written statement that the Retirement Investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, nature with in sufficient detail to permit the Retirement Investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest, and describe how the Retirement Investor can get the information, free of charge.

(6) Before the sale of a recommended annuity, the Independent Producer considers and documents its conclusions as to whether the recommended annuity is in the Best Interest of the Retirement Investor and provides that documentation to both the Retirement Investor and to the Insurer;

(7) *Rollover disclosure.* Before engaging in a rollover or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Independent Producer must consider and document its conclusions as to whether a rollover is in the Retirement Investor's Best Interest and provide that documentation to both the Retirement Investor and to Insurer. Relevant factors to consider must include to the extent

applicable, but in any event are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan, if applicable;

(B) the comparative fees and expenses;

(C) whether an employer or other party pays for some or all administrative expenses; and

(D) the different levels of fiduciary protection, services, and investments available.

(6) Independent Producers and Insurers may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know (or have a reason to know) that such information is incomplete or inaccurate.

(8) The Independent Producer is not required to disclose information pursuant to this Section VII(b) if such disclosure is otherwise prohibited by law.

(c) Policies and Procedures

(1) The Insurer establishes, maintains, and enforces written policies and procedures for the review of each recommendation before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation that are prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The Insurer's prudent review of the Independent Producer's specific recommendations must be made without regard to the Insurer's own interests. An Insurer is not required to supervise an Independent Producer's recommendations to Retirement Investors of products other than annuities offered by the Insurer.

(2) The Insurer's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. The Insurer's procedures identify and eliminate quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in the Retirement Investor's Best Interest, or that subordinate the interests of the Retirement Investor to the Independent Producer's own

interests, or those of the Insurer, or to make recommendations based on the Independent Producer's considerations of factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

(3) The Insurer's policies and procedures include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have failed or are likely to fail to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill. A prudent process includes careful review of customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards, and must review that determination at least annually as part of the retrospective review set forth in subsection (d) below.

(4) Insurers must provide their complete policies and procedures to the Department within 10 business days of request.

(d) Retrospective Review

(1) The Insurer conducts a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of the exemption, including the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any. The retrospective review must also include a review of Independent Producers' rollover recommendations and the required rollover disclosure. As part of this review, the Insurer must prudently determine whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer updates the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with Section VII(c).

(2) The Insurer annually provides a written report to a Senior Executive Officer which details the review.

(3) The Insurer provides to the Independent Producer the methodology and results of the retrospective review;

(4) A Senior Executive Officer of the Insurer certifies, annually, that:

(A) The officer has reviewed the report of the retrospective review report;

(B) The Insurer has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transaction discovered by the Insurer in connection with investment advice covered under Code section 4975(e)(3)(B), advised the Independent Producer of the violation and any resulting excise taxes owed under Code section 4975, and notified the Department of Labor of the violation via email to PTE_84-24@dol.gov.

(C) The Insurer has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and

(D) The Insurer has in place a prudent process to modify such policies and procedures as set forth in Section II(d)(1).

(5) The review, report, and certification are completed no later than six months following the end of the period covered by the review.

(6) The Insurer retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 10 business days of request, to the extent permitted by law.

(e) Self-Correction

A non-exempt prohibited transaction will not occur due to a violation of the exemption's conditions with respect to a transaction, provided:

(1) Either the Independent Producer has refunded any charge to the Retirement Investor or the Insurer has rescinded a mis-sold annuity, canceling the contract and waiving the surrender charges;

(2) The Independent Producer notifies the Department of Labor of the violation and the refund or rescission via email to PTE_84-24@dol.gov within 30 days of correction;

(3) The correction occurs no later than 90 days after the Independent Producer learned of the violation or reasonably should have learned of the violation; and

(4) The Independent Producer notifies the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under Section VII(d)(2).

Section VIII—Eligibility

(a) Independent Producer

Subject to the timing and scope provisions set forth in subsection (3), and the opportunity to be heard as set forth in subsection (c), an Independent Producer will be ineligible to rely on the relief for transactions described in Section III(g), if within 10 years preceding the transaction, the Independent Producer is described in (1) or (2):

(1) The Independent Producer has been convicted either:

(A) by a U.S. federal or state court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A).

For purposes of this section (a)(1), a person shall be deemed to have been convicted of a crime as of the "conviction date," which is the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. federal or state trial court), regardless of whether that judgment remains under appeal.

(2) The Independent Producer has received a written ineligibility notice issued by the Department for:

(A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally violating, or knowingly participating in violations of,

the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or

(D) providing materially misleading information to the Department in connection with the conditions of the exemption.

(3) Ineligibility shall begin six months after:

(A) the conviction date defined in Section (a)(1);

(B) the date of the Department's written determination under Section (c)(1)(C) on a petition regarding a foreign conviction; or

(C) the date of the written ineligibility notice described in subsection (a)(2).

(4) An Independent Producer shall become eligible to rely on this exemption again only upon the earliest of the following:

(A) the date of a subsequent judgment reversing such person's conviction;

(B) 10 years after the person became ineligible under Section VIII(a)(3) or 10 years after the person was released from imprisonment as a result of a crime described in (a)(1) if later; or

(C) the date, if any, the Department grants an individual exemption which may impose additional conditions) to the person permitting its continued reliance on this exemption, notwithstanding the conviction.

(b) Insurers

Subject to the timing and scope provisions set forth in subsection (3), and the opportunity to be heard as set forth in subsection (c), an entity will be ineligible to serve as an Insurer if, within the 10 years preceding the transaction:

(1) The Insurer or the Affiliate has been convicted:

(A) by a U.S. federal or state court of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or

attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A).

For purposes of this Section (b)(1), a person shall be deemed to have been convicted of a crime as of the “conviction date,” which is the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. federal or state trial court), regardless of whether that judgment remains under appeal.

(2) The Insurer or an Affiliate has received a written ineligibility notice issued by the Department for:

(A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally violating, or knowingly participating in violation of, the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or

(C) providing materially misleading information to the Department in connection with the conditions of the exemption.

(3) Ineligibility shall begin six months after:

(A) the conviction date as defined in Section (b)(1);

(B) the Department’s written determination under Section (c)(1)(C) for a petition regarding a foreign conviction; or

(C) the date of the written ineligibility notice described in subsection (b)(2) above.

(4) An entity shall become eligible to act as an Insurer under this exemption again only upon the earliest of the following:

(A) the date of a subsequent judgment reversing such person’s conviction;

(B) 10 years after the person became ineligible under Section VIII(b)(3) or 10 years after the person was released from imprisonment as a result of a crime described in (b)(1), if later; or

(C) the date, if any, the Department grants an individual exemption (which may impose additional conditions) to the person permitting its continued reliance on this exemption, notwithstanding the conviction.

(c) Opportunity To Be Heard

(1) *Foreign Convictions.*

(A) An Insurer, its Affiliate, or an Independent Producer that has been convicted by a foreign court of competent jurisdiction as provided in subsection (a)(1)(B) or (b)(1)(B), as applicable, may submit a petition to the Department that informs the Department of the conviction and seeks the Department’s determination that continued reliance on the exemption would not be contrary to the purposes of the exemption. Petitions must be submitted to the Department within 10 business days after the conviction date by email at IIAWR@dol.gov.

(B) Following receipt of the petition, the Department will provide the Insurer or Independent Producer with the opportunity to be heard, in person (including by phone or videoconference), in writing, or a combination thereof. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences.

(C) Following the hearing, the Department will issue a written determination to the Insurer or Independent Producer, as applicable, articulating the basis for its determination whether or not to allow the Insurer or Independent Producer to continue relying on PTE 84–24.

(2) *Written Ineligibility Notice.* Prior to issuing a written ineligibility notice, the Department will issue a written warning to the Independent Producer or Insurer, as applicable, identifying specific conduct implicating subsection (a)(2) or (b)(2), as applicable, and providing a six-month opportunity to cure. At the end of the six-month period, if the Department determines that the Independent Producer or Insurer has not taken appropriate action to prevent recurrence of the disqualifying conduct, it will provide the Independent Producer or Insurer with the opportunity to be heard, in person (including by phone or videoconference), or in writing, or a combination thereof, before the Department issues the written ineligibility notice. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences. The written ineligibility notice will state the basis for the determination that the Independent Producer or Insurer engaged in conduct described in subsection (a)(2) or (b)(2), as applicable, and has not taken appropriate action to prevent recurrence of the disqualifying conduct.

(3) *Department’s Considerations.* For hearings under (c)(1) and (c)(2), the

Department will consider: the gravity of the offense; the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy; recency of the conduct at issue; any remedial measures taken; and other factors the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption.

(d) Alternative Exemptions

An Insurer or Independent Producer that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or seek an individual prohibited transaction exemption from the Department. To the extent an applicant seeks retroactive relief in connection with an exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of retroactive relief.

Section IX—Recordkeeping

(a) The insurance agent or broker (or the insurance company whose contract is being described if designated by the agent or broker), pension consultant or investment company Principal Underwriter, Independent Producer or Insurer must maintain the records necessary to enable the persons described in subsection (a)(2) below to determine whether the conditions of this exemption have been met with respect to a transaction for a period of six years from the date of the transaction in a manner that is reasonably accessible for examination. No prohibited transaction will be considered to have occurred solely on the basis of the unavailability of such records if they are lost or destroyed due to circumstances beyond the control of the responsible party before the end of the six-year period.

(1) No party, other than the party responsible for complying with this section IX, will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the excise tax imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or available for examination as required by this section IX.

(2) Except as provided in subsection (3), and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records are reasonably available at their customary location during normal business hours for examination by:

(A) Any authorized employee of the Department or the Internal Revenue Service or another state or federal regulator;

(B) Any fiduciary of a Plan that engaged in a transaction pursuant to this exemption;

(C) Any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to this exemption; or

(D) Any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

(3) None of the persons described in subsection (2)(B)–(D) above are authorized to examine records regarding a transaction involving another Retirement Investor, privileged trade secrets or privileged commercial or financial information of the Insurer, or information identifying other individuals.

(4) If a party refuses to disclose information to a person described in subsection (2)(B)–(D) above on the basis that the information is exempt from disclosure, the party must provide a written notice advising the requestor of the reasons for its refusal and that the Department may request that such information be produced to the Department by the end of the thirtieth (30th) day following the request.

(b) A party's failure to maintain the records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. Such failure does not affect the relief for other transactions if the responsible party maintains required records for such transactions in compliance with this section IV.

Section X—Definitions

For purposes of this exemption, the terms “insurance agent or broker,” “pension consultant,” “insurance company,” “investment company,” and “Principal Underwriter” mean such persons and any Affiliates thereof. In addition, for purposes of this exemption:

(a) “Affiliate” of a person means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person (For this purpose, “control” would mean the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the person; and

(3) Any corporation or partnership of which the person is an officer, director, or partner.

(b) Advice is in a Retirement Investor's “Best Interest” if such advice (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and (B) does not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party.

(c) A “Conflict of Interest” is an interest that might incline an Independent Producer—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor.

(d) “Independent Producer” means a person or entity that is licensed under the laws of a state to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies but is not an employee of an insurance company (including a statutory employee under Code section 3121).

(e) “Individual Retirement Account” or “IRA” means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(f) “Insurer” means an insurance company qualified to do business under the laws of a state, that: (A) has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding five years, (C) is domiciled in a state whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority; (D) is not disqualified or barred from making investment recommendations by any

insurance, banking, or securities law or regulatory authority (including any self-regulatory organization), that retains the Independent Producer as an independent contractor, agent or registered representative.

(g) “Insurance Sales Commission” means a sales commission paid by the Insurance Company or an Affiliate to the Independent Producer for the service of recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees, but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees.

(h) The term “Mutual Fund Commission” means a commission or sales load paid by either the Plan or the investment company for the service of effecting or executing the purchase of investment company securities, but does not include a 12b–1 fee, revenue sharing payment, administrative fee, or marketing fee.

(i) The term “Nondiscretionary Trust Services” means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1).

(j) The term “Nondiscretionary Trustee” of a plan means a trustee whose powers and duties with respect to the plan are limited to the provision of Nondiscretionary Trust Services. For purposes of this exemption, a person who is otherwise a Nondiscretionary Trustee will not fail to be a Nondiscretionary Trustee solely by reason of his having been delegated, by the sponsor of a Pre-approved Plan, the power to amend such plan.

(k) “Plan” means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(l) The term “Pre-approved Plan” means a plan which is approved by the Internal Revenue Service pursuant to the procedure described in Rev. Proc. 2017–44, 2017–29 I.R.B. 92, or its successors.

(m) A “Principal Underwriter” means a principal underwriter as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29)).

(n) A “Related Entity” is any party that is not an Affiliate, but in which the Independent Producer has an interest that may affect the exercise of its best judgment as a fiduciary.

(o) “Retirement Investor” means:

(1) A participant or beneficiary of a Plan with authority to direct the investment of assets in their account or to take a distribution;

(2) The beneficial owner of an IRA acting on behalf of the IRA; or

(3) A fiduciary acting on behalf of a Plan or an IRA.

(p) A “Senior Executive Officer” is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Insurer.

Signed at Washington, DC, this 24th day of October, 2023.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2023–23781 Filed 11–2–23; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12094]

ZRIN 1210–ZA34

Proposed Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128

AGENCY: Employee Benefits Security Administration (EBSA), U.S. Department of Labor.

ACTION: Notice of Proposed Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of proposed amendments to Prohibited Transaction Exemptions (PTEs) 75–1, 77–4, 80–83, 83–1, and 86–128, exemptions from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The amendments would affect participants and beneficiaries of plans, IRA owners, and certain fiduciaries of plans and IRAs.

DATES: *Public Comments.* Comments are due on or before January 2, 2024.

Public Hearing. The Department anticipates holding a public hearing approximately 45 days following the date of publication in the **Federal Register**. Specific information regarding the date, location, and submission of requests to testify will be published in a notice in the **Federal Register**.

Applicability Date. The Department proposes to make the final amendment effective 60 days after it is published in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendments should be sent to the Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor through the Federal eRulemaking Portal and identified by Application No. D–12094: *Federal eRulemaking Portal:* <https://www.regulations.gov>. at Follow the instructions for submitting comments.

Docket: For access to the docket to read background documents, including the plain-language summary of the proposal of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023, or comments, go to the Federal eRulemaking Portal at <https://www.regulations.gov>.

See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

FOR FURTHER INFORMATION CONTACT: Susan Wilker, telephone (202) 693–8540, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Comment Instructions

Warning: All comments received will be included in the public record without change and will be made available online at <https://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number), or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the <https://www.regulations.gov> website is an “anonymous access” system, which means EBSA will not know your identity or contact information unless you provide it. If you send an email directly to EBSA without going through <https://www.regulations.gov>, your email

address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

Background

As described elsewhere in this edition of the **Federal Register**, the Department is proposing to amend the regulation defining when a person renders “investment advice for a fee or other compensation, direct or indirect” with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a “fiduciary” in section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and in section 4975(e)(3)(B) of the Internal Revenue Code (Code). The Department is also proposing, elsewhere in this edition of the **Federal Register**, to amend prohibited transaction exemption (PTE) 2020–02 to provide additional clarity for advice fiduciaries and additional protections for plans and investors and PTE 84–24 to address specific issues that financial institutions face complying with the conditions of PTE 2020–02 when distributing annuities through independent agents.

The Department is hereby proposing amendments to existing PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 that currently provide relief for investment advice fiduciaries to receive compensation when plans and IRAs enter into certain transactions recommended by the fiduciaries as well as certain related transactions. The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing in connection with transactions involving these plans and IRAs. The proposed amendments would remove fiduciary investment advice, as defined under ERISA and in a proposed regulation issued by the Department that is found elsewhere in this issue of the **Federal Register**, from the covered transactions in each exemption and make certain other administrative changes. The Department is proposing these amendments on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).¹

¹ Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

Current PTEs 75–1, 77–4, 80–83, 83–1, and 86–128

PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 currently provide investment advice fiduciaries with relief for the following transactions:

PTE 75–1² provides an exemption for broker-dealers, reporting dealers, and banks to engage in certain classes of transactions with employee benefit plans and IRAs. The exemption has five parts:³

- Part I provides relief for agency transactions and services;⁴
- Part II(1) permits the purchase or sale of a security between an employee benefit plan or IRA and a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State. The exemption provided in Part II(1) does not extend to the fiduciary self-dealing and conflicts of interest prohibitions of ERISA and the Code;
- Part II(2) contains a special exemption for mutual fund purchases (the mutual fund exemption) between fiduciaries and plans or IRAs. Although it does provide relief for fiduciary self-dealing and conflicts of interest, the mutual fund exemption is only available if the fiduciary who decides on behalf of the plan or IRA to enter into the transaction is not a principal underwriter for, or affiliated with, the mutual fund;
- Part III permits a fiduciary to cause a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary itself when the fiduciary is also a member of the syndicate;
- Part IV permits a plan or IRA to purchase securities in a principal transaction from a fiduciary that is a market maker with respect to such securities; and
- Part V permits the extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities;

² Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 40 FR 50845 (Oct. 31, 1975), as amended at 71 FR 5883 (Feb. 3, 2006).

³ 71 FR 5883 (Feb. 3, 2006).

⁴ Part I(a) expired on May 1, 1978. It ultimately was replaced by PTE 86–128 (51 FR 41686 (Nov. 18, 1986)).

PTE 77–4⁵ provides relief for a plan's or IRA's purchase or sale of open-end investment company shares where the investment adviser for the open-end investment company is also a fiduciary to the plan or IRA;

PTE 80–83⁶ provides relief for a fiduciary causing a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary or an affiliate;

PTE 83–1⁷ provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates; and

PTE 86–128⁸ provides an exemption for certain types of fiduciaries to use their authority to cause a plan or IRA to pay a fee to the fiduciary, or its affiliate, for effecting or executing securities transactions as agent for the plan. The exemption further provides relief for these types of fiduciaries to act as agent in an “agency cross transaction” for both a plan or IRA and one or more other parties to the transaction, and for such fiduciaries or their affiliates to receive fees from the other party(ies) in connection with the agency cross transaction. An agency cross transaction is defined in the exemption as a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

Other Advice Exemptions**PTE 2020–02**

PTE 2020–02⁹ permits investment advice fiduciaries to receive compensation as a result of their advice, including as a result of advice to roll over assets from an employee benefit plan to an IRA, and to engage in certain principal transactions and was designed to promote investment advice that is in

the best interest of retirement investors (e.g., plan participants and beneficiaries, and IRA owners). The exemption's conditions emphasize mitigating conflicts of interest and ensuring that retirement investors receive advice that is prudent and loyal. An important objective of the exemption is to require fiduciary investment advice providers to adhere to stringent standards that are designed to ensure that their investment recommendations reflect the best interest of plan and IRA investors. Accordingly, financial institutions and investment professionals relying on PTE 2020–02 must: (i) acknowledge their fiduciary status in writing; (ii) disclose their services and material conflicts of interest; and adhere to impartial conduct standards; (iii) adopt policies and procedures prudently designed to ensure compliance with the impartial conduct standards and mitigate conflicts of interest that could otherwise cause violations of those standards; (iii) document and disclose the specific reasons that any rollover recommendations are in the retirement investor's best interest; (iv) and conduct an annual retrospective compliance review.

The Department is proposing an amendment to PTE 2020–02 that is published separately in this edition of the **Federal Register**. The proposed amendment to PTE 2020–02 would build on these existing conditions to provide more protections for retirement investors receiving advice and more certainty for financial institutions and investment professionals complying with the exemption's conditions. In this regard, among other things, the Department is proposing additional disclosures to ensure that retirement investors have sufficient information to make informed decisions about the costs of the investment advice transaction and about the significance and severity of the investment advice fiduciary conflicts of interest. The proposed amendment also would provide more guidance for financial institutions and investment professionals complying with the impartial conduct standards and implementing the policies and procedures requirement. As discussed in detail in the preamble to the amendment, these additional conditions would provide important protections to retirement investors by enhancing the existing protections of PTE 2020–02.

⁵ Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans, 42 FR 18732 (Apr. 8, 1977).

⁶ Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties in Interest, 45 FR 73189 (Nov. 4, 1980), as amended at 67 FR 9483 (March 1, 2002).

⁷ Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, 48 FR 895 (Jan. 7, 1984), as amended at 67 FR 9483 (March 1, 2002).

⁸ Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers, 51 FR 41686 (November 18, 1986), as amended at 67 FR 64137 (October 17, 2002).

⁹ Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees 85 FR 82798 (Dec. 18, 2020).

PTE 84–24

PTE 84–24¹⁰ provides exemptive relief for certain prohibited transactions that occur when plans or IRAs purchase insurance and annuity contracts and shares in an investment company registered under the Investment Company Act of 1940 (a mutual fund). The exemption permits insurance agents, insurance brokers and pension consultants that are parties in interest or fiduciaries with respect to plans and IRAs to effect the purchase of the insurance or annuity contracts for the plans or IRAs and receive a commission on the sale. The exemption also is available for the prohibited transaction that occurs when the insurance company selling the insurance or annuity contract is a party in interest or disqualified person with respect to the plan or IRA. Likewise, with respect to mutual fund transactions, PTE 84–24 permits mutual fund principal underwriters that are parties in interest or fiduciaries to effect the sale of mutual fund shares to plans or IRAs and receive a commission on the transaction.

The Department is proposing an amendment to PTE 84–24 that is published separately in this edition of the **Federal Register** that would provide an alternative exemption for independent insurance agents to receive insurance commissions in connection with recommendations of annuity products if certain conditions are met that are similar to the conditions contained in PTE 2020–02. These conditions are tailored to protect retirement investors from the specific conflicts of interest that arise when independent insurance agents are compensated through insurance commissions. Additionally, the amendment would exclude investment advice fiduciaries from the existing relief provided in the current Section II of PTE 84–24, add a new eligibility provision for investment advice transactions, and amend the current recordkeeping condition to be similar to the recordkeeping provision in PTE 2020–02.

Description of Proposed Amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128

Providing for a single standard of care (which is currently found in PTE 2020–02) that would apply universally to all fiduciary investment advice, regardless of the specific type of product or advice provider, will provide greater protection for retirement investors and create a level playing field among investment

advice providers. Therefore, to ensure a universal standard of care for the provision of investment advice that is based on the conditions of PTE 2020–02, the Department is proposing to amend PTEs 75–1 Parts III & IV, 77–4, 80–83, 83–1, and 86–128 to include the following statement: “*Exception.* No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.”

As a result of this amendment, investment advice fiduciaries would instead rely on the amended PTE 2020–02 for exemptive relief for covered investment advice transactions. By providing exemptive relief for fiduciary investment advice transactions under one exemption, PTE 2020–02, retirement investors would receive consistent protections when receiving investment advice from investment professionals such that a level playing regulatory playing field would apply regardless of the investment product the advisor recommends. The Department requests comment on this proposed change.

In addition to removing exemptive relief for investment advice transactions, the Department also is proposing certain administrative amendments to these exemptions, which are discussed below.

Amendments to PTE 75–1

The Department is proposing to revoke parts of PTE 75–1, which was granted shortly after ERISA’s passage to provide certainty to the securities industry over the nature and extent to which ordinary and customary transactions between broker-dealers and plans or IRAs would be subject to ERISA’s prohibited transaction rules.

PTE 75–1 Part I

PTE 75–1, Part I, paragraphs (b) and (c) provide exemptive relief for certain non-fiduciary services provided by broker-dealers in securities transactions. Code section 4975(d)(2), ERISA section 408(b)(2) and regulations thereunder, have clarified the scope of relief for service providers to plans and IRAs.¹¹ The Department believes that the relief provided in Parts I(b) and I(c) of PTE 75–1 duplicates the relief available under the statutory exemptions at Code

section 4975(d)(2) and ERISA section 408(b)(2). Therefore, the Department is proposing to revoke paragraphs (b) and (c) of Part I, and requests comments on this proposed revocation.

PTE 75–1, Part II

PTE 75–1, Part II(2), contains a special exemption for mutual fund purchases (the mutual fund exemption) between fiduciaries and plans or IRAs subject to minimal safeguards for retirement investors. The conditions of the exemption require a fiduciary to customarily purchase and sell securities for its own account in the ordinary course of its business, the transaction to occur on terms at least as favorable to the plan as an arm’s length transaction with an unrelated party, and records to be maintained.

The Department is proposing to revoke PTE 75–1, Part II(2), because it has determined that it is not protective of retirement investors and has been broadly interpreted beyond the Department’s intention when it was issued.¹² The transactions that have been covered by PTE 75–1 Part II(2) are largely now covered by newer, more protective exemptions, and fiduciaries providing investment advice on the purchase or sale of a mutual fund security can rely on PTE 2020–02. Moreover, fiduciaries providing investment management on the purchase or sale of a mutual fund security can receive non-commission compensation under PTE 77–4. The Department requests comment on this proposed revocation, and also on how the remaining parts of PTE 75–1 Part II will be used.

The Department is further proposing to revise the recordkeeping provisions of Section (e) of PTE 75–1, Part II. Section (e) currently provides that records demonstrating compliance with the exemption must be maintained by the plan or IRA involved in the transaction. The proposed amendment would place the responsibility for maintaining such records on the broker-dealer, reporting dealer, or bank engaging in the transaction with such plan or IRA. The proposed amendment also would provide that parties relying on the exemption do not have to disclose trade secrets or other confidential information to members of the public (*i.e.*, plan fiduciaries, contributing employers or employee organizations whose members are covered by the plan, participants and beneficiaries and IRA owners), but that in the event a party refuses to disclose information on this basis, it must

¹⁰ 49 FR 13208 (April 3, 1983), as amended at 71 FR 5887 (Feb. 3, 2006).

¹¹ See 29 CFR 2550.408b–2; 42 FR 32390 (June 24, 1977); Reasonable Contract or Arrangement under Section 408(b)(2)—Fee Disclosure, Final Rule, 77 FR 5632 (Feb. 3, 2012).

¹² 81 FR 21181, 21199 (Apr. 8, 2016).

provide a written notice to the requester advising it of the reasons for the refusal and that the Department may request such information on the requester's behalf.

The Department requests comment regarding whether fiduciaries providing discretionary investment management services on the purchase or sale of a mutual fund security in a principal transaction need the relief that is provided by PTE 75–1, Part II(2), and, if so, what conditions would be appropriate.

Part 75–1, Part V

PTE 75–1, Part V permits a broker-dealer to extend credit to a plan or IRA in connection with the purchase or sale of securities. It originally did not permit the receipt of compensation for an extension of credit by broker-dealers that are fiduciaries with respect to the assets involved in the transaction. In 2016, the Department amended this exemption to allow investment advice fiduciaries to receive compensation when they extend credit to plans and IRAs to avoid a failed securities transaction. As a condition of the amendment, the failure of the purchase or sale of the securities could not have been caused by the fiduciary or an affiliate. The Department also added a definition of the term “IRA” as any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.¹³ The amendment also revised the recordkeeping provisions of PTE 75–1, Part V, to require the broker-dealer engaging in the covered transaction, as opposed to the plan or IRA, to maintain the records. The Department is proposing to make these amendments to PTE 75–1 Part V as it did in 2016.

PTE 86–128

The Department is proposing certain administrative changes to PTE 86–128, which are not directly related to the provision of fiduciary investment advice. As it did in 2016, the Department is proposing to delete Section IV(a), which provides an

exclusion from the conditions of the exemption for certain plans not covering employees, including IRAs, to increase the safeguards available to these retirement investors. Therefore, investment advice fiduciaries to IRAs would have to rely on another exemption, such as PTE 2020–02. Fiduciaries that exercise full discretionary authority or control with respect to IRAs could continue to rely on PTE 86–128, as long as they comply with all of the exemption's conditions.

The Department is also proposing certain technical changes to the exemption, including deleting subsection IV(b)(1), and redesignating remaining sections as needed. The language currently in Section IV(b)(1) excludes investment advice providers; however, investment advice providers would be excluded from the exemption as a whole; therefore, the exclusion does not need to be repeated in Section IV. As a result of the deletion of Section IV(a) and IV(b)(1), the Department is redesignating subsections IV(b)(2) and (3) as subsections IV(a)(1) and (2), respectively, and Section IV(c) as Section IV(b).

The Department is proposing to revise the new Section IV(b) to read: “Recapture of profits. Sections III(a) and III(i) of this exemption do not apply in cases where the person engaging in a covered transaction returns or credits to the plan all profits earned by that person in connection with the securities transactions associated with the covered transaction.” Discretionary trustees were first permitted to rely on PTE 86–128 without meeting the “recapture of profits” provision pursuant to an amendment made in 2002 (2002 Amendment). To effect this change, the 2002 Amendment revised Section III(a), which had provided that “[t]he person engaging in the covered transaction [may not be] a trustee (other than a nondiscretionary trustee), or an administrator of the plan, or an employer any of whose employees are covered by the plan.” Under the amendment, the reference to “trustee (other than a nondiscretionary trustee)” was deleted from Section III(a), and discretionary trustees had to satisfy certain additional conditions set forth in Section III(h) and (i) to rely on the exemption. Section III(h) provides that discretionary trustees may engage in the covered transactions only with plans or IRAs with total net assets of at least \$50 million,¹⁴ and Section III(i) requires discretionary trustees to provide

additional disclosures. The Department understands that after the 2002 Amendment, practitioners had questions regarding whether discretionary trustees were permitted to rely on the “recapture of profits” provision, which allows persons identified in Section III(a) to engage in the covered transactions if they return or credit to the plan or IRA all profits, as an alternative to complying with Sections III(h) and (i). By deleting the reference to discretionary trustees from Section III(a), the Department believes that the 2002 Amendment inadvertently may have prevented trustees of plans or IRAs from using the recapture of profits approach, and instead, has limited the exemption to trustees that satisfy Section III(h) and (i). This result was not intended, therefore, the Department is proposing to modify the exemption to permit all trustees, regardless of associated plan or IRA size, to utilize the recapture of profits exception as they originally were permitted to do in PTE 86–128.

In order to achieve this result, the Department has proposed an amendment to section IV(c) providing that Sections III(a) and III(i) do not apply in any case where the person engaging in the covered transaction returns or credits to the plan or IRA all profits earned by that person in connection with the securities transaction associated with the covered transaction. In addition, the Department proposes to reinsert a reference to trustees (other than nondiscretionary trustees) in Section III(a) along with the existing references to plan administrators and employers. Finally, the Department is proposing to add a sentence to the end of Section III(a) stating: “Notwithstanding the foregoing, this condition does not apply to a trustee that satisfies Section III(h) and (i).” The purpose of these proposed amendments is to clarify that trustees may engage in covered transactions subject to the recapture of profits limitations in Section V(b) of the exemption.

The Department is not proposing to amend PTE 86–128 to include mutual fund principal transactions that are currently covered in PTE 75–1 Part II(2). The Department previously made such a change in 2016 to allow both investment advice and investment discretion mutual fund principal fund transactions to rely on an amended PTE 86–128. However, the Department now believes other exemptions, including PTE 2020–02, provide sufficient relief for these types of transactions and enhanced protection for retirement investors.

¹³ The Department has previously determined, after consulting with the Internal Revenue Service (the IRS), that plans described in 4975(e)(1) of the Code are included within the scope of relief provided by PTE 75–1 because it was issued jointly by the Department and the IRS. See PTE 2002–13, 67 FR 9483 (Mar. 1, 2002) (preamble discussion). For simplicity and consistency with the other new exemptions and amendments to other existing exemptions published elsewhere in this issue of the *Federal Register*, the Department has adopted this specific definition of IRA.

¹⁴ Special rules apply under Section III(h) for pooled funds and groups of plans maintained by a single employer or controlled group of employers.

Lastly, the Department is proposing to add a new Section VII to PTE 86–128 that would require the fiduciary engaging in a transaction covered by the exemption to maintain records necessary to enable certain persons (described in proposed Section VII(b)) to determine whether the conditions of this exemption have been met. The proposed recordkeeping requirement is consistent with the recordkeeping provisions contained in other existing class exemptions as well as the recordkeeping provisions of proposed amendments to PTEs 84–24 and 2020–02, which are published separately in this issue of the **Federal Register**.

Executive Order 12866 and 13563 Statement

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, as amended by Executive Order 14094, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive order defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$200 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in the Executive order. It has been determined that this proposal is “significant regulatory action” within the scope of section 3(f)(1) of the Executive order. Therefore, the Department has provided an assessment of the proposal’s potential costs, benefits, and transfers, and OMB has reviewed this proposed amendment pursuant to the Executive order.

Paperwork Reduction Act Statements

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and Federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). This helps to ensure that the public understands the Department’s collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the information collection requests (ICRs) included in the proposed amendments to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128. To obtain a copy of the ICRs, contact the PRA addressee shown below or go to <https://www.RegInfo.gov>. The Department has submitted a copy of the amendments to the OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronically delivered responses).

Commenters may send their views on the Department’s PRA analysis in the same way they send comments in response to these proposed rules (for example, through the www.regulations.gov website), including as part of a comment responding to the broader proposal. Comments are due by January 2, 2024 to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to James Butikofer,

Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210, or ebbsa.opr@dol.gov. ICRs also are available at <https://www.RegInfo.gov> (<https://www.reginfo.gov/public/do/PRAMain>).

Amendments to PTE 75–1

The Department proposes to amend PTE 75–1, Part V, to include a new disclosure requirement requiring the plan or IRA to receive a written disclosure of certain terms before the extension of credit. The disclosure must include the rate of interest or other fees that will be charged on such extension of credit, and the method of determining the balance upon which interest will be charged. The plan or IRA must additionally be provided with prior written disclosure of any changes to these terms. The Department believes that it is a usual and customary business practice to maintain records required to demonstrate compliance with disclosure distribution regulations mandated by the Securities and Exchange Commission (SEC). The Department believes that this new disclosure requirement is consistent with the disclosure requirement mandated by the SEC in 17 CFR 240.10b–16(1) for margin transactions. Therefore, the Department concludes that this requirement produces no additional burden to the public.

The Department is also amending PTE 75–1, Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRAs to financial institutions. The amended class exemption requires as a condition for relief that financial institutions engaging in the exempted transactions (rather than the plans or IRAs) to retain or cause to be maintained all records pertaining to such transactions for six years and provide access to the records upon request to the specified parties.

Finally, the Department is proposing to amend PTE 75–1 Parts III and IV, which currently provide relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions.

Broker-dealers registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), reporting dealers, and banks are eligible to rely on the exemption. According to the SEC, approximately 3,508 broker-dealers

were SEC-registered as of December 2021.¹⁵ Not all broker-dealers perform services for employee benefit plans. In 2021, 54 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.¹⁶ Assuming the percentage of broker-dealers provide advice to retirement plans is the same as the percent of investment advisers providing services to plans, the Department estimates 54 percent, or 1,894 broker-dealers, would be affected by PTE 75–1.

According to the Federal Deposit Insurance Corporation, there are 4,096 commercial banks as of March 31,

2023.¹⁷ If one-half of these banks (about 2,048) and 54 percent of broker-dealers (about 1,894 broker-dealers) relied on this exemption, there would be approximately 3,942 respondents.¹⁸

Recordkeeping Requirements

The Department has assumed that financial service providers that transact with employee benefit plans will maintain these records on behalf of their client plans. Because of the sophisticated nature of financial service providers and the regulation of the securities industry by State and federal government, and by self-regulatory organizations, the Department has

assumed that the records required by this class exemption are the same records kept in the normal course of business, or in compliance with other requirements. The Department requests comment on this assumption.

The Department has estimated that the additional time needed to maintain records for the financial institutions to be consistent with the exemption will be four hours per entity annually at a wage rate of \$190.63 per hour.¹⁹ Thus, the Department estimates it would take 15,768 hours at an equivalent cost of \$3,005,854 to maintain the records and make the records available for inspection.²⁰

TABLE 1—HOURL BURDEN AND EQUIVALENT COST ASSOCIATED WITH RECORDKEEPING

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Manager	15,768	\$3,005,854	15,768	\$3,005,854
Total	15,768	3,005,854	15,768	3,005,854

Summary

In sum, the Department estimates the total burden hours for the amended PTE 1975–1 is 15,768 hours at a total equivalent burden cost of \$3,005,854. The total cost burden is estimated to be de minimis. The Department assumes that required records are maintained by the relevant affected entities, the broker-dealers and banks. Thus, there are no additional tasks performed outside of those performed by the brokerage firms/banks.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Exemption 75–1 (Security Transactions with Broker-Dealers, Reporting Dealers and Banks).

OMB Control Number: 1210–0092.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 3,942.

Estimated Number of Annual Responses: 3,942.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 15,768 hours.

Estimated Total Annual Burden Cost: \$0.

Amendments to PTE 86–128

The Department is proposing to amend Section VI of PTE 86–128 to require financial institutions to maintain or cause to be maintained for six years the records necessary for the Department, IRS, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether conditions of this exemption have been met.

In addition, the amendment would impose conditions on IRAs. Section III of the class exemption imposes the following requirements on fiduciaries of employee benefit plans that effect or execute securities transactions and the independent plan fiduciaries

authorizing the plan or IRA to engage in the transactions with the investment advice provider (“authorizing fiduciary”) under the conditions contained in the exemption:

(1) The authorizing fiduciary must provide the investment advice provider with an advance written authorization for the transactions;

(2) The investment advice provider must provide the authorizing fiduciary with information necessary to determine whether an authorization should be made, including a copy of the exemption, a form for termination, a description of the investment advice provider’s brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests;

(3) The investment advice provider must provide the authorizing fiduciary with a termination form, at least annually, explaining that the authorization is terminable at will, without penalty to the plan, and that failure to return the form will result in continued authorization for the

¹⁵ Estimates based on SEC’s FOCUS filings and SEC’s Form ADV filings.

¹⁶ Cerulli Associates, *U.S. RIA Marketplace 2022*, Exhibit 5.10, Part 1, The Cerulli Report.

¹⁷ Federal Insurance Deposit Corporation, *Quarterly Banking Profile*, Statistics at a Glance- as of March 31, 2023, <https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf>.

¹⁸ Reporting dealers covered by the exemption are not accounted for separately because they are banks

and security brokerages that trade in U.S. Government Securities; thus, reporting dealers are already accounted for in the number of broker-dealer firms and banks. The New York Federal Reserve Bank reported 21 primary dealers on March 21, 2013. http://www.newyorkfed.org/markets/pridealers_current.html.

¹⁹ Internal Department calculation based on 2023 labor cost data. For a description of the Department’s methodology for calculating wage rates, see <https://www.dol.gov/sites/dolgov/files/>

EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.

²⁰ The burden is estimated as follows: (3,942 financial institutions × 4 hours) = 15,768 hours. A labor rate of \$190.63 is used for a financial manager. The labor rate is applied in the following calculation: (3,942 × 4 hours) × \$190.63 = \$3,005,854.

investment advice provider to engage in securities transactions on behalf of the plan or IRA;

(4) The investment advice provider must provide the authorizing fiduciary with either (a) a confirmation slip for each individual securities transaction within 10 days of the transaction containing the information described in Rule 10b-10(a)(1-7) under the Securities Exchange Act of 1934, 17 CFR 240.10b-10 or (b) a quarterly report containing certain financial information including the total of all transaction-related charges incurred by the plan or IRA;

(5) The investment advice provider must provide the authorizing fiduciary with an annual summary of the confirmation slips or quarterly reports, containing all security transaction-related charges, the brokerage placement practices (if changed), and a portfolio turnover ratio;

(6) An investment advice provider who is a discretionary trustee must provide the authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis.

Using data from 2021 Form 5500, the Department estimates that 1,257 unique plans hired service providers denoting on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 also reported that they provided investment management services or received investment management fees paid directly or indirectly by the plan.²¹ Based on these values, the Department estimates on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate. The Department requests comment on how many plans have discretionary fiduciaries with full discretionary control and how many would continue to rely on PTE 1986-128 under the proposed amendments.

The Department estimates that of the estimated 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.²² Based on these assumptions, the Department estimates that 75 plans would be affected by the proposed amendments to PTE 1986-128.²³

The Department lacks reliable data on the number of managed IRAs that would experience such a transaction in a given year. The Department estimates that there are 10,000 managed IRAs. The Department also does not have data on the number of new IRA accounts that are opened each year. However, in 2022, of the 67.8 million IRA owners, 1.4 million, or approximately 2.1 percent, opened an IRA for the first time.²⁴ Inferring from this statistic, the Department estimates that 2.1 percent of IRA accounts are new each year. The Department acknowledges that some IRA owners may have multiple IRAs, and as such, this statistic may underestimate the percentage of new IRAs opened.²⁵ This results in an estimate of 210 IRAs that are new accounts or new financial advice relationships.²⁶

The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption. For the purposes of this analysis, the Department assumes that the number of discretionary fiduciaries relying on the exemption is equal to the estimated number of broker-dealers estimated to be affected by the amendments to PTE 2020-02, or 1,894 investment advice providers.²⁷

The Department requests comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data.

The following wage rates are assumed: an in-house rate of \$159.34 for legal professionals and \$63.45 for clerical staff.²⁸ In addition, the Department assumes that 100 percent of plans will use electronic means to

deliver the required information with no associated cost burden. The Department also assumes that 94.2 percent of IRAs and financial institutions will use electronic means to deliver the required information with no associated cost burden.²⁹ The Department assumes that is similar to the percent receiving electronically under the Department's 2020 electronic disclosure safe harbor.³⁰ The Department requests comments on these assumptions.

Recordkeeping Requirement

The Department is proposing to amend Section VI to require financial institutions to maintain or cause to be maintained for six years the records necessary for the Department, IRS, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether conditions of this exemption have been met.

Each of the 1,894 investment advice providers will maintain these records on behalf of their client plans in their normal course of business. Therefore, the Department has estimated that the additional time needed to maintain records consistent with the exemption will only require about one-half hour, on average annually for a financial manager at an hourly rate of \$190.63 to organize and collate the documents. This results in 947 hours of burden at an equivalent cost of \$180,527.³¹ The recordkeeping requirement will also require 15 minutes of clerical time at an hourly rate of \$63.45 to prepare and send the documents for inspection, resulting in 474 hours of burden at an equivalent cost of \$30,044.³²

In total, the recordkeeping requirement is expected to impose an hour burden of 1,421 hours with an equivalent cost of \$210,571.

²⁴ Cerulli Associates, *U.S. Retirement End-Investor 2023: Fostering Comprehensive Relationships*, The Cerulli Report.

²⁵ The Department lacks data on the number of IRA owners that own multiple IRAs. To provide scope of magnitude, one source reported that in 2019, 19 percent of IRA owners contributed to both a traditional IRA and Roth IRA. (See Investment Company Institute, *The Role of IRAs in U.S. Households' Saving for Retirement*, 2020, 27(1) *ICI Research Perspective*, (2021).) This statistic does not account for individuals who own multiple IRAs of each type or those who did not contribute in 2019, but it provides a lower bound.

²⁶ $(10,000 \text{ managed IRAs} \times 2.1 \text{ percent of IRAs are new}) = 210 \text{ IRAs}$.

²⁷ Estimates are based on the SEC's FOCUS filings and Form ADV filings for broker-dealers.

²⁸ Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

²⁹ The Department estimates approximately 94.2 percent of retirement investors receive disclosures electronically. This is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2 percent) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36 percent).

³⁰ 85 FR 31884 (May 27, 2020).

³¹ The burden is estimated as follows: $[(1,894 \text{ investment advice providers} \times 30 \text{ minutes}) \div 60 \text{ minutes}] = 947 \text{ hours}$. A labor rate of \$190.63 is used for a financial manager. The labor rate is applied in the following calculation: $[(1,894 \text{ investment advice providers} \times 30 \text{ minutes}) \div 60 \text{ minutes}] \times \$190.63 \text{ per hour} = \$180,527$.

³² The burden is estimated as follows: $1,894 \text{ investment advice providers} \times 15 \text{ minutes} = 474 \text{ hours}$. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: $[(1,894 \text{ investment advice providers} \times 15 \text{ minutes}) \div 60 \text{ minutes}] \times \$63.45 \text{ per hour} = \$30,044$.

²¹ Estimates based on 2021 Form 5500 data.

²² EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

²³ The number of new plans is estimated as: $1,000 \text{ plans} \times 7.5 \text{ percent of plans are new} = 75 \text{ new plans}$.

TABLE 2—HOURLY BURDEN AND EQUIVALENT COST ASSOCIATED WITH RECORDKEEPING

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Manager	947	\$180,527	947	\$180,527
Clerical	474	30,044	474	30,044
Total	1,421	210,571	1,421	210,571

Written Authorization From the Authorizing Fiduciary to the Broker-Dealer

Authorizing fiduciaries of new plans and IRAs entering into a relationship with an investment advice provider are required to provide the investment advice provider with an advance written authorization to perform transactions for the plan or IRA. The Department estimates that there are approximately 285 plans and IRAs that are new or that enter new arrangements each year.³³ Therefore, the Department estimates

that approximately 285 authorizing fiduciaries are expected to send an advance written authorization. It is assumed that a legal professional will spend 15 minutes per plan reviewing the disclosures and preparing an authorization form. This results in an hour burden of 71 hours with an equivalent cost of \$11,353.³⁴ To produce and distribute the authorization, the Department assumes that 100 percent of plans and 94.2 percent of IRAs will use traditional electronic methods at no additional burden, and the remaining 5.8 percent

of IRAs will be mailed. The Department assumes that clerical staff will spend 5 minutes preparing and sending the authorization, resulting in an hour burden of approximately 24 hours with an equivalent cost of \$1,507.³⁵ It is assumed that the authorization will be two pages and paper authorizations will cost \$0.76 each, which results in a cost burden of \$9.³⁶

In total, the written authorization requirement is expected to result in a total hour burden of 95 hours with an equivalent cost of \$12,860 and a total cost burden of \$9.

TABLE 3—HOURLY BURDEN, EQUIVALENT COST, POSTAGE AND MATERIAL COST ASSOCIATED WITH THE WRITTEN AUTHORIZATION

Activity	Year 1				Subsequent years			
	Burden hours	Equivalent burden cost	Pages	Material cost	Burden hours	Equivalent burden cost	Pages	Material cost
Legal	71	\$11,353	0	\$0	71	\$11,353	0	\$0
Clerical	24	1,507	2	9	24	1,507	2	9
Total	95	12,860	2	9	95	12,860	2	9

Provision of Materials for Evaluation of Authorization of Transaction

Prior to a written authorization being made, the authorizing fiduciary must be provided by the financial institution with a copy of the exemption, a form for termination of authorization, a description of broker's placement practices, and any other reasonably available information. This information is assumed to be readily available.

To produce and distribute the materials, the Department assumes that

94.2 percent of financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the materials. The Department estimates that a clerical staff member will spend five minutes to prepare and distribute the required information to the authorizing fiduciary. This information will be sent to the 285 plans and IRAs entering into an agreement with a financial institution, and based on the above, the Department

estimates that this requirement results in an hour burden of 24 hours with an equivalent cost of \$1,507.³⁷ It is assumed that this information will be seven pages and paper distribution will cost \$1.01 each, which results in a cost burden of about \$17.³⁸

In total, the written authorization requirement is expected to result in a total hour burden of 24 hours with an equivalent cost of \$1,507 and a total cost burden of \$17.

³³ 75 plans + 210 IRAs = 285 plans and IRAs that are new or that enter new arrangements each year.

³⁴ The burden is estimated as follows: [(285 plans and IRAs × 15 minutes per plan or IRA) ÷ 60 minutes] = 71 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(285 plans and IRAs × 15 minutes per plan or IRA) ÷ 60 minutes] × \$159.34 per hour = \$11,353.

³⁵ The burden is estimated as follows: [(285 plans or IRAs × 5 minutes per plan or IRA) ÷ 60 minutes] = 24 hours; A labor rate of \$63.45 is used for a

clerical worker. The labor rate is applied in the following calculation: [(285 plans or IRAs × 5 minutes per IRA) ÷ 60] × \$63.45 = \$1,507.

³⁶ The burden is estimated as follows: (2 pages × \$0.05 per page) + \$0.66 for postage = \$0.76; The mailing rate is applied in the following calculation: (210 authorizations for IRAs × 5.8 percent paper) × \$0.76 = \$9.

³⁷ The burden is estimated as follows: [(75 plans × 5 minutes per plan) ÷ 60 minutes] + [(210 IRAs × 5 minutes per IRA) ÷ 60 minutes] = 24 hours; A labor rate of \$63.45 is used for a clerical worker.

The labor rate is applied in the following calculation: {[(75 plans × 5 minutes per plan) ÷ 60 minutes] × \$63.45} + {[(210 IRAs × 5 minutes per IRA) ÷ 60 minutes] × \$63.45} = \$1,507.

³⁸ The burden is estimated as follows: 7 pages × \$0.05 per page + \$0.66 for postage = \$1.01; The mailing rate is applied in the following calculation: (75 plans × 5.8 percent paper × \$1.01) + (210 materials packages for IRAs × 5.8 percent paper × \$1.01) = \$17.

TABLE 4—HOURLY BURDEN, EQUIVALENT COST, POSTAGE AND MATERIAL COST ASSOCIATED WITH PROVISION OF MATERIALS FOR TRANSACTION AUTHORIZATION

Activity	Year 1				Subsequent years			
	Burden hours	Equivalent burden cost	Pages	Material cost	Burden hours	Equivalent burden cost	Pages	Material cost
Clerical	24	\$1,507	7	\$17	24	\$1,507	7	\$17
Total	24	1,507	7	17	24	1,507	7	17

Provision of an Annual Termination Form

Each authorizing fiduciary must be supplied annually with a form expressly providing an election to terminate the written authorization. It is assumed that legal professionals with each of the 1,894 investment advice providers will spend on average 15 minutes preparing the termination forms, which results in an hour burden of 474 hours with an equivalent cost of \$75,447.³⁹

To produce and distribute the termination form to the 10,000 IRAs and 1,000 plans, the Department assumes that 94.2 percent of financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the termination forms. The Department estimates that clerical staff will spend five minutes per plan or IRA preparing and distributing the termination forms

resulting in an hour burden of 917 hours with an equivalent cost of \$58,163.⁴⁰ It is assumed that the form will be two pages, so paper copies will cost \$0.76 each, which results in a cost burden of approximately \$485.⁴¹

In total, providing the annual termination form is expected to impose an hour burden of 1,391 hours with an equivalent cost of \$133,610 and a total cost burden of \$485.

TABLE 5—HOURLY BURDEN, EQUIVALENT COST, POSTAGE AND MATERIAL COST ASSOCIATED WITH PROVISION OF THE ANNUAL TERMINATION FORM

Activity	Year 1				Subsequent years			
	Burden hours	Equivalent burden cost	Pages	Material cost	Burden hours	Equivalent burden cost	Pages	Material cost
Legal	474	\$75,447	0	\$0	474	\$75,447	0	\$0
Clerical	917	58,163	2	485	917	58,163	2	485
Total	1,391	133,610	2	485	1,391	133,610	2	485

Transaction Reporting

The investment advice provider engaging in a covered transaction must furnish the authorizing fiduciary with either a conformation slip for each securities transaction or a quarterly report containing specified information. As discussed above, the provision of the confirmation already is required under SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending conformation slips, no additional hour and cost burden will occur.

Annual Statement

In addition to the transaction reporting requirement, investment

advice providers are required to send an annual report to each of the 11,000 authorizing fiduciaries⁴² containing the same information as the quarterly report and also containing all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio. Collecting and generating the information required for the annual report is reported as a cost burden. Postage cost is not included here as it is assumed that the annual statement will be sent with the annual termination form and postage costs are accounted for there. It is assumed that the annual statement will be five pages, and the paper and print costs are \$0.25 each.⁴³ Therefore, the overall cost

burden for the paper and print costs are about \$160.⁴⁴

In addition, it is assumed that the information that must be sent annually could be sent together; therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement. Therefore, no additional hour burden has been reported.

In total, providing the annual statement is expected to impose a total cost burden of \$160.

³⁹ The burden is estimated as follows: [(1,894 investment advice providers × 15 minutes per financial institution) ÷ 60 minutes] = 474 hours; A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,894 investment advice providers × 15 minutes per financial institution) ÷ 60 minutes] × \$159.34 per hour = \$75,447.

⁴⁰ The burden is estimated as follows: [(1,000 plans × 5 minutes per plan) ÷ 60 minutes] + [(10,000

IRAs × 5 minutes per IRA) ÷ 60 minutes] = 917 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: {[(1,000 plans × 5 minutes per plan) ÷ 60 minutes] × \$63.45} + {[(10,000 IRAs × 5 minutes per IRA) ÷ 60 minutes] × \$63.45} = \$58,163.

⁴¹ The burden is estimated as follows: 2 pages × \$0.05 per page + \$0.66 for postage = \$0.76. The mailing rate is applied in the following calculation:

(1,000 plans × 5.8 percent paper × \$0.76) + (10,000 IRAs × 5.8 percent paper × \$0.76) = \$485.

⁴² 1,000 plans + 10,000 IRAs = 11,000 plans and IRAs.

⁴³ 5 pages × \$0.05 per page = \$0.25.

⁴⁴ (11,000 plans and IRAs × 5.8 percent paper × \$0.25) = \$160.

TABLE 6—HOURL BURDEN, EQUIVALENT COST, POSTAGE AND MATERIAL COST ASSOCIATED WITH THE ANNUAL STATEMENT

Activity	Year 1				Subsequent years			
	Burden hours	Equivalent burden cost	Pages	Material cost	Burden hours	Equivalent burden cost	Pages	Material cost
Clerical	0	\$0	5	\$160	0	\$0	5	\$160
Total	0	0	5	160	0	0	5	160

Report of Commissions Paid

A discretionary trustee must provide an authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis. The collecting and generation of the information for the quarterly report is reported as a cost burden. The clerical hour burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually.

A financial institution who is a discretionary trustee must provide each

of the 11,000 authorizing fiduciaries with an annual report showing commissions paid to affiliated and non-affiliated brokers, on both a total dollar and a cents-per-share basis. As the report is sent annually, it is assumed that it could be sent with the transaction report, therefore postage costs are not counted here. The Department estimates that 94.2 percent of financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the annual reports. It is assumed that the report will be two pages, and the paper and print costs are \$0.10 each.⁴⁵

Therefore, the overall cost burden of the paper and print costs is \$64.⁴⁶

Financial institutions are required to report specific transaction fees and information to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. It is assumed that it costs the financial institution \$3.30 per plan or IRA to track this information.⁴⁷ With approximately 11,000 affected plans and IRAs, this results in a cost burden of approximately \$36,300 annually.⁴⁸

In total, providing the report is expected to impose a total cost burden of \$36,364.⁴⁹

TABLE 7—HOURL BURDEN, EQUIVALENT COST, POSTAGE AND MATERIAL COST ASSOCIATED WITH THE REPORT OF COMMISSIONS PAID

Activity	Year 1				Subsequent years			
	Burden hours	Equivalent burden cost	Pages	Material cost	Burden hours	Equivalent burden cost	Pages	Material cost
Clerical	0	\$0	2	\$36,364	0	\$0	2	\$36,364
Total	0	0	2	36,364	0	0	2	36,364

Summary

In total, the conditions of this exemption will result in the production of 33,570 disclosures.⁵⁰ The Department assumes that 100 percent of plans will use electronic methods to distribute the required information, at de minimis burden. The Department also assumes that 94.2 percent of IRAs and financial institutions will use electronic methods to distribute the required information, at de minimis burden, while 1,943⁵¹ disclosures will be on paper. Production and distribution of disclosures will result in an overall hour burden of 2,929 hours with an equivalent cost of

\$358,548 and an overall cost burden of \$37,034.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision to an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: PTE 86–128 (Securities Broker-Dealers).

OMB Control Number: 1210–0059.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 2,179.

Estimated Number of Annual Responses: 33,570.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 2,929 hours.

Estimated Total Annual Burden Cost: \$37,034.

Amendments to PTE 77–4, 80–83 and PTE 83–1

The Department has determined that PTE 77–4 and PTE 80–83 do not have information collections impacted by the removal of advice from the exemption. There is no paperwork burden related to PTE 83–1.

⁴⁵ 2 pages × \$0.05 per page = \$0.10.

⁴⁶ (11,000 plans and IRAs × 5.8 percent paper × \$0.10) = \$64.

⁴⁷ This estimate is based on information from a Request for Information and from industry sources.

⁴⁸ (11,000 plans and IRAs × \$3.30) = \$36,300.

⁴⁹ This estimate is calculated as: \$64 + \$36,300 = \$36,364.

⁵⁰ The total number of disclosures is calculated in the following manner: 285 (Written authorization disclosures) + 285 (Provision of materials for evaluation of authorization of transaction) + 11,000 (Annual termination form) + 11,000 (Annual Statement) + 11,000 (Report of Commissions Paid) = 33,570 disclosures.

⁵¹ The total number of paper disclosures is calculated in the following manner: (210 Written

authorization disclosures for IRAs × 5.8 percent paper) + (285 Provision of materials for evaluation of authorization of transaction × 5.8 percent paper) + (11,000 Annual termination form × 5.8 percent paper) + (11,000 Annual Statement × 5.8 percent paper) + (11,000 Report of Commissions Paid × 5.8 percent paper) = 1,943 disclosures.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)⁵² imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.⁵³ Under section 603 of the RFA, agencies must submit an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This proposed amended exemption, along with related amended exemptions and a proposed rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this proposed amendment on small entities is included in the IRFA for the entire project, which can be found in the related notice of proposed rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995⁵⁴ requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposed amended exemption does not include any Federal mandate that will result in such expenditures.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have “substantial direct effects” on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their

consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this proposed class exemption has federalism implications because it has no 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.

General Information

The attention of interested persons is directed to the following: (1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary, or other party in interest or disqualified person with respect to a Plan, from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge his or her duties respecting the Plan solely in the interests of the participants and beneficiaries of the Plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the Plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries; (2) Before the proposed exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), the Department must find that it is administratively feasible, in the interests of Plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of the Plan and IRA owners; (3) If granted, the proposed exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and (4) The proposed exemption, if granted, is supplemental to, and not in derogation of, any other provisions of ERISA and the Code,

including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Proposed Amendments to Class Exemptions Prohibited Transaction Exemption 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

The Department proposes to amend Prohibited Transaction Exemption 75–1 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

I. PTE 75–1, Part I, *Agency transactions and services*, subparts (b) and (c), are revoked in their entirety.

II. Part II, *Principal transactions*, the first sentence of subpart (2) is revoked; the sentence beginning “The exemptions set forth in (1) and (2) is designated as Part II(2) and amended to read, “The exemption set forth in (1) above is subject to the following conditions:” and new section II(2)(d) is revised to delete the phrase “Except with respect to transactions described in section (2) above,”.

III. Part II, *Principal transactions*, sections (e) and (f) are revised to read as follows: (e) The broker-dealer, reporting dealer, or bank engaging in the covered transaction maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (f) of this exemption to determine whether the conditions of this exemption have been met, except that:

(1) No party in interest other than the broker-dealer, reporting dealer, or bank engaging in the covered transaction, shall be subject to the civil penalty, which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (f) below; and

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the broker-dealer, reporting dealer, or bank, such records are lost or destroyed prior to the end of such six-year period.

(f)(1) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are

⁵² 5 U.S.C. 601 *et seq.*

⁵³ 5 U.S.C. 601(2), 603(a); see also 5 U.S.C. 551.

⁵⁴ Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

reasonably available for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the plan, or IRA owner, or the duly authorized representative of such participant or beneficiary; and

(2) None of the persons described in subparagraph (1)(B)-(D) above shall be authorized to examine trade secrets or commercial or financial information of the broker-dealer, reporting dealer, or bank which is privileged or confidential, or records regarding a plan or IRA other than the plan or IRA with respect to which they are the fiduciary, contributing employer, employee organization, participant, beneficiary, or IRA owner.

(3) Should such broker-dealer, reporting dealer, or bank refuse to disclose information on the basis that such information is exempt from disclosure, the broker-dealer, reporting dealer, or bank shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

(4) Failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It does not affect the relief for other transactions.

For purposes of this exemption, the terms “broker-dealer,” “reporting dealer” and “bank” shall include such persons and any affiliates thereof, and the term “affiliate” shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e).

IV. Part III, *Underwritings*, is amended by inserting a new section III(h) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section and regulations thereunder.

V. Part IV, *Market-making*, is amended by inserting a new section IV(g) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

VI. Part V, *Extension of Credit*, is amended by replacing Sections (c) and (d) with the following: (c) Notwithstanding section (a)(2), a fiduciary under ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) may receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if:

(1) The potential failure of the purchase or sale of the securities is not caused by such fiduciary or an affiliate;

(2) The terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm’s length transaction between unaffiliated parties;

(3) Prior to the extension of credit, the plan or IRA receives written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged, in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. This section (e)(3) will be considered satisfied if the plan or IRA receives the disclosure described in Securities Exchange Act Rule 10b–16;⁵⁵

(d) The broker-dealer engaging in the covered transaction maintains or causes to be maintained for a period of six years from the date of such transaction in a manner that is reasonably accessible for examination, such records as are necessary to enable the persons described in paragraph (e) of this exemption to determine whether the conditions of this exemption have been met with respect to a transaction, except that:

(1) No party other than the broker-dealer engaging in the covered transaction shall be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for

examination as required by paragraph (e) below; and

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the broker-dealer, such records are lost or destroyed prior to the end of such six-year period.

(e)(1) Except as provided in paragraph (e)(2) of this exemption, and notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (d) are reasonably available at their customary location for examination during normal business hours by:

(A) An authorized employee or representative of the Department of Labor or the Internal Revenue Service,

(B) Any fiduciary of a plan that engaged in a transaction pursuant to this exemption, or any authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by a plan described in paragraph (e)(1)(B), or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of a plan described in paragraph (e)(1)(B), IRA owner or the authorized representative of such participant, beneficiary or owner.

(2) None of the persons described in paragraph (e)(1)(B)–(D) of this exemption are authorized to examine records regarding a recommended transaction involving another investor, or privileged trade secrets or privileged commercial or financial information, of the broker-dealer engaging in the covered transaction, or information identifying other individuals.

(3) Should the broker-dealer engaging in the covered transaction refuse to disclose information on the basis that the information is exempt from disclosure, the broker-dealer must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

(4) Failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It does not affect the relief for other transactions.

For purposes of this exemption, the terms “party in interest,” “disqualified person” and “fiduciary” shall include such party in interest, disqualified

⁵⁵ 17 CFR 240.10b–16.

person, or fiduciary, and any affiliates thereof, and the term “affiliate” shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21 and 26 CFR 54.4975–9. Also, for the purposes of this exemption, the term “IRA” means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

Prohibited Transaction Exemption 77–4, Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans

The Department proposes to amend Prohibited Transaction Exemption 77–4 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

I. A new section II(g) is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of section 3(21)(A)(ii) of ERISA or 4975(e)(3)(B) of the Code and regulations thereunder.

Prohibited Transaction Exemption 80–83, Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds To Reduce or Retire Indebtedness to Parties in Interest

The Department proposes to amend Prohibited Transaction Exemption 80–83 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

I. A new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of section 3(21)(A)(ii) of ERISA or 4975(e)(3)(B) of the Code and regulations thereunder.

Prohibited Transaction Exemption 83–1, Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts

The Department proposes to amend Prohibited Transaction Exemption 83–1 under the authority of ERISA section

408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

I. A new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of section 3(21)(A)(ii) of ERISA or 4975(e)(3)(B) of the Code and regulations thereunder.

Prohibited Transaction Exemption 86–128, Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers

The Department proposes to amend Prohibited Transaction Exemption 86–128 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

I. New sections II(d) is inserted as follows:

(d) *Exception.* No relief from the restrictions of ERISA 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

II. Section IV(a) is deleted.

III. Section IV(b) is redesignated as Section IV(a), and IV(a)(1) is deleted and Sections IV(b)(2) and (3) are redesignated as Sections IV(b)(1) and (2).

IV. Section IV(c) is redesignated as Section IV(b) and is amended to read:

(c) Recapture of profits. Sections III(a) and III(i) of this exemption do not apply in any case where the person engaging in a covered transaction returns or credits to the plan all profits earned by that person in connection with the securities transactions associated with the covered transaction.

V. The following is added to the end of Section III(a)

“Notwithstanding the foregoing, this condition does not apply to a trustee that satisfies Section III(h) and (i).”

VI. New Section VII is inserted as follows:

Section VII. Recordkeeping Requirements

(a) The plan fiduciary engaging in a covered transaction maintains or causes to be maintained for a period of six years, in a manner that is reasonably

accessible for examination, the records necessary to enable the persons described in Section VI(b) to determine whether the conditions of this exemption have been met, except that:

(1) If such records are lost or destroyed, due to circumstances beyond the control of the plan fiduciary, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than such plan fiduciary who is responsible for complying with this paragraph (a), will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or are not available for examination as required by paragraph (b) below; and

(b)(1) Except as provided below in subparagraph (2), or as precluded by 12 U.S.C. 484, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in the above paragraph are reasonably available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the plan or the authorized representative of such participant or beneficiary.

(2) None of the persons described in subparagraph (1)(B)–(D) above are authorized to examine privileged trade secrets or privileged commercial or financial information of such fiduciary or are authorized to examine records regarding a plan or IRA other than the plan or IRA with which they are the fiduciary, contributing employer, employee organization, participant, beneficiary or IRA owner.

(3) Should such plan fiduciary refuse to disclose information on the basis that such information is exempt from disclosure, such plan fiduciary must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

(4) Failure to maintain the required records necessary to determine whether

the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It

does not affect the relief for other transactions.

Signed at Washington, DC, this 24th day of October, 2023.

Lisa M. Gomez,

*Assistant Secretary, Employee Benefits
Security Administration, U.S. Department of
Labor.*

[FR Doc. 2023–23782 Filed 11–2–23; 8:45 am]

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Part V

Federal Communications Commission

47 CFR Parts 8 and 20

Safeguarding and Securing the Open Internet; Proposed Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 8 and 20

[WC Docket No. 23–320; FCC 23–83; FR ID 179272]

Safeguarding and Securing the Open Internet

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission's (Commission) adopted a Notice of Proposed Rulemaking (NPRM) that proposes to reestablish the Commission's authority over broadband internet access service by classifying it as a telecommunications service under Title II of the Communications Act. This NPRM proposes to classify broadband internet access service as a telecommunications service and provide the Commission with authority necessary to safeguard the open internet, advance national security, and protect public safety. The NPRM also proposes to reestablish conduct rules for internet service providers that would provide a national approach for safeguarding internet openness.

DATES: Comments are due on or before December 14, 2023, and reply comments are due on or before January 17, 2024. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public and other interested parties on or before January 2, 2024.

ADDRESSES: You may submit comments, identified by WC Docket No. 23–320 by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing ECFS: <https://www.fcc.gov/ecfs/>.

- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

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.

- 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.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

- 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, 35 FCC Rcd 2788 (2020). <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

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 & Governmental Affairs Bureau at (202) 418–0530 (voice).

FOR FURTHER INFORMATION CONTACT:

Wireline Competition Bureau, Competition Policy Division, Openinternet2023@fcc.gov. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to PRA@fcc.gov or contact Nicole Ongele, Nicole.Ongele@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM) in WC Docket No. 23–320, FCC 23–83, adopted on October 19, 2023 and released on October 20, 2023. The full text of the document is available on the Commission's website at <https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf>. To request materials in accessible formats for people with disabilities (e.g., braille, large print, electronic files, audio format, etc.), send an email to FCC504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice).

Initial Paperwork Reduction Act of 1995 Analysis

This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due January 2, 2024.

Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's

burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) way to further reduce the information collection burden on small business concerns with fewer than 25 employees. 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.

Providing Accountability Through Transparency Act

The Providing Accountability Through Transparency Act, Public Law 118–9, requires each agency, in providing notice of a rulemaking, to post online a brief plain-language summary of the proposed rule. The required summary of this Notice of Proposed Rulemaking/Further Notice of Proposed Rulemaking is available at <https://www.fcc.gov/proposed-rulemakings>.

Synopsis

I. Proposed Classification of Broadband Internet Access Service

1. Today, we propose to return BIAS to its classification as a telecommunications service under Title II of the Act. We further propose to reclassify mobile BIAS as a commercial mobile service. In the time since the *RIF Order* (83 FR 7852 (Feb. 22, 2018)), propelled by the COVID–19 pandemic, BIAS has become even more essential to consumers for work, health, education, community, and everyday life. In light of this reality, we believe that looking anew at the classification of BIAS is necessary and timely given the critical importance of ensuring the Commission's authority to fulfill policy objectives and responsibilities to protect this vital service. Notable among these is enabling the Commission to safeguard the fair and open internet through a national regulatory approach. The Commission also has an important statutory mandate to protect “life and property” by supporting national security and public safety. We anticipate that the proper classification of BIAS as a telecommunications service will enhance the Commission's ability to advance these and other important interests, including protection of consumers' privacy and data security

interests and consumers' ability to access BIAS. Beyond these areas, we believe that classification of BIAS as a telecommunications service represents the best reading of the text of the Act in light of the marketplace reality of how the service is offered and perceived today. Below, we seek comment on our proposed classification framework, and particularly seek comment on its benefits and burdens. Additionally, we seek comment on the impact of reclassification on small businesses and entities, including small ISPs.

A. Broadband Internet Access Service Is Essential

2. While BIAS connections have long been important to full participation in our society and economy, we believe the COVID-19 pandemic dramatically changed the importance of the internet today, and seek comment on our belief. Not unlike other essential utilities, such as electricity and water, BIAS connections have proved essential to every aspect of our daily lives, from work, education, and healthcare, to commerce, community, and free expression. BIAS connections were so critical during the pandemic that Congress undertook a number of federal initiatives to improve the accessibility and affordability of BIAS across America, finding in the preamble to § 60101 of the bipartisan Infrastructure Investment and Jobs Act (Infrastructure Act) that "access to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States." A Pew Research Center survey highlighted this reality, showing that high speed internet was essential or important to 90 percent of U.S. adults during the COVID-19 pandemic. That finding is backed by the tremendous use during the pandemic of text messaging applications, voice services, and video conferencing for work, school, civic engagement, and connecting with family and communities, accessed through consumers' fixed and mobile broadband connections. The increased importance of BIAS connections has persisted post-pandemic. Compared to last year, nearly 45 percent of respondents to one survey said their internet usage had increased, while the average amount of time respondents spent actively using the internet on a phone, tablet, or computer was eight hours, excluding passive activities, such as streaming music or video in the background. OpenVault reports that almost 50 percent of fixed broadband subscribers in the U.S. used 533 gigabytes (GB) or more of bandwidth per month through the fourth quarter of 2022, compared to about 10 percent of subscribers in 2017.

From year-end 2020 to year-end 2021, monthly data usage per smartphone subscriber rose to an average of 12.1 GB per subscriber per month—an increase of approximately 12 percent. We seek comment on how consumers' usage and view of BIAS has changed since 2018, when Title II classification was reversed, and particularly since the onset of the pandemic in 2020. In what ways has the importance of BIAS to consumers stayed the same? How should any evolution in the importance of BIAS to consumers drive our analysis today? We also seek comment on how the importance of BIAS is expected to evolve going forward.

3. We tentatively conclude that developments in the importance of the internet to consumers demonstrate that consumers perceive and use BIAS as a standalone service that provides telecommunications. In the *2015 Open Internet Order* (80 FR 19737 (April 13, 2015)), the Commission concluded that consumers perceive BIAS both as a standalone offering and as providing telecommunications. The D.C. Circuit found in *USTA* that these conclusions had "extensive support in the record and together justify the Commission's decision to reclassify broadband as a telecommunications service." As the D.C. Circuit recognized, "[e]ven the most limited examination of contemporary broadband usage reveals that consumers rely on the service primarily to access third-party content." We believe that the increased importance of BIAS to consumers since the onset of the pandemic shows that consumers' perception and use of BIAS as a standalone telecommunications service is even more pronounced now than it was in 2015. Indeed, consumers' use of BIAS today appears to go to the very heart of the purposes for which consumers have historically utilized "telecommunication services": to "transmi[t], between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." We seek comment on our tentative conclusion and this analysis.

4. We also believe that the COVID-19 pandemic, and the increased importance of BIAS to consumers, has spurred ISPs to market BIAS as a telecommunications service that is essential to accessing separate data-related "add-on" offerings. In the *2015 Open Internet Order*, the Commission concluded that ISPs "market and offer consumers separate services that are best characterized as (1) a broadband internet access service that is a telecommunications service; and (2)

'add-on' applications, content, and services that are generally information services" separate from the underlying broadband service. The Commission specifically found that ISPs market their BIAS "primarily as a conduit for the transmission of data across the internet," with fixed providers distinguishing service offerings on the basis of transmission speeds, while mobile providers advertise speed, reliability, and coverage of their networks. Although the *RIF Order* contended that "ISPs generally market and provide information processing capabilities and transmission capabilities together as a single service," it did not provide examples. Examples of ISP marketing today appear even more focused than in 2015 on the capability of BIAS to transmit information of users' choosing between internet endpoints, rather than its capability to generate, acquire, store, transform, process, retrieve, utilize, or make available that information. Such marketing emphasizes faster speeds aimed at connecting multiple devices, unlimited data for mobile service, and reliable and secure coverage. At the same time, ISPs appear to advertise data-related offerings as separate services that can be bundled with or added on to their BIAS services, including subscriptions to unaffiliated video and music streaming services, new devices, access to Wi-Fi hotspots, or mobile security apps. We seek comment generally on how BIAS offerings are advertised today. Have fixed or mobile ISPs changed their marketing or advertising of BIAS since 2018? We seek evidence and examples of how the BIAS market is shaped today, and particularly how it has changed in response to developments in consumers' perception about the essential nature of BIAS connections. How does the current marketing of BIAS by ISPs bear on our tentative determination that such service is a telecommunications service? We also seek comment on ways ISPs' advertising of bundled services and devices as "add-ons" to their BIAS offerings has evolved as a result of recent changes in the importance of BIAS to consumers. How do these additional offerings modify the underlying BIAS offered by the ISP, if at all?

5. We further seek comment on the development of third-party services and devices that utilize BIAS. We believe that since the 2018 reclassification of BIAS, and particularly as a result of the COVID-19 pandemic, there is substantial market proliferation of third-party services and devices and that

consumers' use of these offerings significantly outweigh their use of ISPs' affiliated offerings. We seek comment on this observation. How have trends in third-party services and devices impacted consumer use of BIAS? In what ways have these services and devices driven demand for fixed and mobile BIAS?

B. Reclassification is Necessary To Ensure Internet Openness, Safeguard National Security, Protect Public Safety, and Support Other Public Interest Goals

6. Given how essential BIAS is to consumers' daily lives, we believe that our proposed reclassification of BIAS as a telecommunications service is necessary to unlock tools the Commission needs to fulfill its objectives and responsibilities to safeguard this vital service. Critical among these is enabling the Commission to ensure that the internet is open and fair, including by establishing a national regulatory approach that would provide consistent protections for consumers and certainty for ISPs. We also believe that the proposed reclassification would enhance the Commission's ability to safeguard national security and protect public safety. Further, we anticipate that returning BIAS to its telecommunications service classification would provide us with better tools to address policy initiatives to protect consumers when they use communications services and support their ability to access BIAS, including through the Commission's universal service programs. We believe the *RIF Order's* reclassification of BIAS as an information service not only inhibits the Commission's ability to achieve these outcomes, but that its policy rationales failed to support that reclassification. Below, we seek comment on these views and on any other considerations bearing on the grounds for us to return to a telecommunications service classification of BIAS, including the impact of our proposed reclassification on small ISPs and other small entities. In seeking comment on potential reclassification, we also welcome the submission of economic analyses that weigh the costs and benefits of the Commission taking such action. We also invite commenters to identify whether there are any other regulatory frameworks administered by the Commission, not discussed below, that might be affected by our proposed reclassification, and seek comment on how such reclassification would affect those frameworks.

7. Beyond these issues, we invite comment on additional public policy

considerations we should examine in our analysis of BIAS classification. For instance, to what extent are there any reasonable reliance interests we should consider? We expect any commenters claiming reliance to submit evidence demonstrating the existence, magnitude, and reasonableness of any alleged reliance interests.

1. Ensuring Internet Openness

8. In light of how essential BIAS connectivity is to consumers following the COVID-19 pandemic, we believe that the open internet must be protected to ensure consumers can use their BIAS connections in all the lawful ways they see fit. We tentatively conclude that reclassification of BIAS as a telecommunications service will allow the Commission to safeguard the open internet and seek comment on this tentative conclusion. As an initial manner, following Title II classification, the Commission could rely on its authority in sections 201 and 202 of the Act to address practices that are unjust, unreasonable, or unreasonably discriminatory. Below, we also propose to reinstate rules that prohibit ISPs from blocking or throttling the information transmitted over their networks or engaging in paid or affiliated prioritization arrangements. Additionally, we propose to reinstate a general conduct standard that would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Our proposal would leave the existing transparency requirements undisturbed. The proposed rules would establish clear standards for ISPs to maintain internet openness and would give the Commission a solid basis on which to take enforcement action against conduct that prevents consumers from fully accessing all of the critical services available through the internet. We seek comment on this analysis. In particular, how would these rules ensure that consumers can continue to use their internet connections for healthcare, education, work, commerce, and civic engagement? What would be the potential impact on these uses if the open internet is not secured?

9. We further believe reclassification would enable the Commission to establish a nationwide framework of open internet rules for ISPs. In both the *2015 Open Internet Order* and the *RIF Order*, the Commission expressed concern that potentially inconsistent state laws could increase burdens for ISPs and hinder the broadband market. With the goal of avoiding this, the Commission, in each instance,

attempted to establish a framework that would preempt any inconsistent state laws. However, by reclassifying broadband as a Title I service and eliminating the conduct rules established in the *2015 Open Internet Order*, the *RIF Order* failed to achieve this goal, because the *Mozilla* court vacated the *RIF Order's* blanket preemption of inconsistent state laws, concluding that the Commission "fail[ed] to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority." Thus, instead of creating "a uniform set of federal regulations," the *RIF Order's* hands-off approach to BIAS has led to the existence of state-by-state open internet requirements it sought to avoid. We remain concerned that differing state open internet requirements may be burdensome for ISPs, particularly small ISPs, thus hindering the broadband market, and at the same time, fail to ensure that all consumers are protected from conduct harmful to internet openness. We believe that reclassification will put our authority to preempt any inconsistent state laws on substantially stronger legal footing, thereby enabling the Commission to create a set of open internet standards that will apply nationwide. We seek comment on this analysis.

2. Safeguarding National Security and Preserving Public Safety

10. We tentatively conclude that the demonstrated need to address national security and public safety concerns makes it necessary and timely to revisit the statutory classification of BIAS. The D.C. Circuit criticized the *RIF Order* for giving short shrift to the evidence of public safety concerns in the record before it. The *RIF Remand Order* (86 FR 994 (Jan. 7, 2021)), in declining to reclassify BIAS as a telecommunications service on that basis, largely dismissed such concerns as speculative. But developments in recent years have highlighted national security and public safety concerns arising in connection with the U.S. communications sector, ranging from the security risks posed by malicious cyber actors targeting network equipment and infrastructure to the loss of communications capability in emergencies through service outages. We believe it is now timely for us to reevaluate the classification of BIAS to ensure the Commission can use all of its capabilities to address threats to national security and public safety.

11. *National Security and Law Enforcement.* We tentatively conclude that authority under applicable Title II provisions, reinforced by the Commission's existing authority, would

enhance the Commission's efforts to protect the national defense. The Commission's attention to national security is a responsibility that underlies its other statutory obligations, as evidenced by Congress's statement in the Communications Act that among the reasons it created the Commission was "for the purpose of the national defense." This responsibility was affirmed by Presidential Policy Directive 21, which described how the FCC could, to the extent permitted by law, exercise its authority and expertise to identify and address vulnerabilities in the communications sector. We seek comment generally on how reclassification would advance the Commission's fulfillment of its national security responsibilities and how it specifically would affect the Commission's efforts, in coordination with other agencies, and with ISPs themselves, to protect the nation's communications networks from entities and equipment and services that pose threats to national security and law enforcement.

12. We tentatively conclude that our proposed reclassification would enhance the Commission's ability to protect the nation's communications networks from entities that pose threats to national security and law enforcement pursuant to its authority under section 214 of the Act, and we seek comment on this tentative conclusion. Under section 214, carriers must be authorized by the Commission to provide domestic and international telecommunications service in the United States. Section 214, however, applies to common carriers, and thus does not apply to BIAS under its current classification as an information service, potentially exposing the nation's communications networks to national security and law enforcement threats by entities providing BIAS. In the *China Telecom Americas Order on Revocation and Termination*, *China Unicom Americas Order on Revocation*, and *Pacific Networks and ComNet Order on Revocation and Termination*, the Commission extensively evaluated national security and law enforcement considerations raised by existing section 214 authorizations and determined, based on the record, that the present and future public interest, convenience, and necessity was no longer served by those carriers' retention of their section 214 authority. In particular, the Commission identified national security and law enforcement concerns with respect to those entities' access to Internet Points of Presence (PoPs) (usually located within data centers)

and other harms in relation to the services provided by those entities pursuant to section 214 authorization. The Commission concluded that China Telecom Americas' (CTA) provision of services pursuant to its section 214 authority, "whether offered individually or as part of a suite of services—combined with CTA's physical presence in the United States, CTA's ultimate ownership and control by the Chinese government, and CTA's relationship with its indirect parent [China Telecommunications Corporation], which itself maintains a physical presence in the United States—present unacceptable national security and law enforcement risks to the United States," and it reached similar conclusions in the other proceedings. We believe the same national security and law enforcement threats identified in those proceedings equally exist with respect to entities providing BIAS, and that reclassifying BIAS as a telecommunications service would allow the Commission to use its section 214 authority to address those threats and other threats to our communications networks. We seek comment on this analysis.

13. We also seek comment on other ways the proposed reclassification would enhance the Commission's ability to address national security and law enforcement threats by entities providing BIAS. Are there other specific national security and law enforcement risks in connection with the provision of BIAS resulting from the current classification of BIAS as an information service? Have there been relevant and demonstrable changes with respect to how nation-states have sought to exploit the technological convergence of broadband and other services that present vulnerabilities affecting the national defense? We ask commenters to provide detailed comments on any regulatory requirements designed to address such risks that would newly apply to these entities if the Commission were to reclassify BIAS as a telecommunications service. For instance, could the Commission prohibit ISPs from entering into internet traffic exchange arrangements with certain companies that operate data centers or other Internet Exchange Points in the U.S.? Would reclassification enable the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector to review telecommunications licenses or authorizations meeting appropriate thresholds of foreign ownership or control for national security and law

enforcement concerns? Would reclassification increase law enforcement agencies' ability to seek lawful assistance, including identification and disruption of illegal activity, for investigations involving ISP networks? For mobile BIAS, would reclassification extend the foreign ownership restrictions for wireless common carriers that the Commission applies under section 310(b) of the Act and its implementing rules? In the absence of reclassification, does the Commission have other authority that it could use that is sufficient to protect the nation's communications networks against ISPs that pose national security and law enforcement threats? If so, we ask commenters to indicate the statutory authority and how the Commission could use such authority to ensure national security and law enforcement concerns are addressed.

14. We also seek comment on how reclassification would support the Commission's efforts to safeguard the nation's communications network infrastructure from equipment and services that pose a security threat. Pursuant to its universal service authority in section 254 of the Act, its authority to regulate equipment in sections 302 and 303 of the Act, and new mandates established by Congress through the Secure and Trusted Communications Networks Act of 2019, as amended, and the Secure Equipment Act of 2021 to address communications equipment and service that poses an unacceptable risk to national security, the Commission has undertaken significant efforts to improve supply chain security. In particular, the Commission has: prohibited the use of universal service fund (USF) support to purchase or obtain any equipment or services produced or provided by companies posing a national security threat; prohibited the use of federal subsidies administered by the Commission and used for capital expenditures to provide advanced communications service to purchase, rent, lease, or otherwise obtain such equipment or services; created and maintained a list of communications equipment and services that pose an unacceptable risk to the national security ("covered equipment and services"); established the Secure and Trusted Communications Networks Reimbursement Program (Reimbursement Program) to reimburse the costs providers incur to remove, replace, and dispose of covered Huawei and ZTE equipment and services from their networks; and prohibited the authorization of equipment that poses a

threat and the marketing and importation of such equipment in the United States. We seek comment on how reclassification may allow the Commission to further these efforts. For instance, would reclassification give the Commission additional authority to restrict a larger class of entities from using equipment and services that pose a threat? Additionally, would reclassification give the Commission more robust authority to require more entities to remove and replace covered Huawei and ZTE communications equipment and services? Could the Commission prohibit the use of covered equipment or services in any network infrastructure that is used to route or transmit communications, including data centers and internet exchange facilities? Could we use the additional authority under Title II to prohibit carriers from interconnecting with other carriers who have a PoP within the U.S. and its territories that use such equipment and services? Are there other ways Title II authority could be used to address national security threats arising from equipment and services outside the scope of our prior actions? How does the Commission's role fit with that of other agencies that help to address potential security threats from foreign actors to the nation's communications network and equipment, and how would enhancements to the Commission's regulatory authority as a result of reclassification bolster that role?

15. *Cybersecurity.* We believe that returning BIAS to its telecommunications service classification would reinforce the Commission's authority to support its efforts to enhance cybersecurity in the communications sector, and we seek comment on this tentative conclusion. Among such efforts are those pursuant to Presidential Policy Directive 21, which tasks the Commission with "identifying communications sector vulnerabilities and working with industry and other stakeholders to address those vulnerabilities . . . [and] to increase the security and resilience of critical infrastructure within the communications sector. . . ." The Commission is actively involved in federal interagency cybersecurity planning, coordination, and response activities. However, the current classification of BIAS limits the regulatory and operational actions that the Commission can take to address cyber incidents impacting the communications sector, as well as other critical infrastructure sectors. For example, the Commission has limited

authority to require providers of non-Title II services (e.g., ISPs) to adopt cybersecurity standards or performance goals, which inhibits the Commission's ability to protect U.S. communications services and infrastructure from cyberattacks and to ensure that communications devices and equipment do not pose security risks to other critical infrastructure sectors. While the Commission will continue to work closely with ISPs to secure their networks, reclassification of BIAS as telecommunications service would provide the Commission with the authority to act in the absence of voluntary action by ISPs or in cases of emergency or significant risk. We tentatively conclude that the proposed reclassification could address this issue by enhancing the Commission's cybersecurity authority, and we seek comment on this tentative conclusion.

16. Another initiative is the Commission's inquiry into vulnerabilities threatening the security and integrity of the Border Gateway Protocol (BGP), which impacts "the transmission of data from email, e-commerce, and bank transactions to interconnected Voice-over Internet Protocol (VoIP) and 9-1-1 calls." The Commission noted that "BGP's initial design, which remains widely deployed today, does not include security features to ensure trust in the information that it is used to exchange," which allows a bad network actor to "deliberately falsify BGP reachability information to redirect traffic to itself or through a specific third-party network, and prevent that traffic from reaching its intended recipient." Would reclassification provide the Commission with additional authority to address BGP vulnerabilities, including, for example, by requiring providers to deploy solutions to address BGP vulnerabilities in the absence of voluntary action?

17. In what other ways could reclassification bolster the Commission's authority to address cybersecurity in the communications sector? For instance, would it strengthen the Commission's ability to establish rules mandating that service providers implement cybersecurity practices and risk management plans? Similarly, would reclassification permit the Commission to consider cybersecurity in its annual inquiry under section 706 of the Telecommunications Act 1996? For example, could the Commission determine that only broadband services that meet certain cybersecurity standards constitute "advanced telecommunications capability"? To what extent would reclassification allow

us to address threats related to the DNS, which enables domain names to resolve to the correct IP addresses, and other naming protocols? Could the Commission use Title II authority to require ISPs to block IP addresses that originate malicious software and ransomware? Would reclassification allow the Commission to mandate the adoption of Communications Security, Reliability, and Interoperability Council (CSRIC) best practices directed to ISPs and audit or enforce the implementation? Would it likewise enable the Commission to use Title II authority to require ISPs to implement or certify to their implementation of network security practices, such as those recommended in Executive Order 14028, the National Cybersecurity Strategy, or related cybersecurity measures recommended by the Deputy National Security Advisor, the Office of National Cyber Director, and other government agencies or intergovernmental agencies, such as the Federal Acquisition Security Council (FASC)? Would reclassification give the Commission sufficient authority to establish cybersecurity requirements for other components that facilitate communications between end points, such as internet exchange facilities and data centers that route communications and deliver applications? Could the Commission rely on authority in section 218 to require more comprehensive cyber incident reporting? Would reclassification permit the Commission to rely on a broader range of regulatory tools to ensure network and service reliability and better support an effective 911 and emergency preparedness efforts?

18. *Public Safety.* We next tentatively conclude that reclassifying BIAS as a telecommunications service would enable the Commission to advance several public safety initiatives, and we seek comment on this tentative conclusion. As the Commission recognized in the *RIF Remand Order*, "[a]dvancing public safety is one of our fundamental obligations." Indeed, the Commission is "required to consider public safety by . . . its enabling act." The *Mozilla* court explained that when "'Congress has given an agency the responsibility to regulate a market such as the telecommunications industry that it has repeatedly deemed important to protecting public safety,' then the agency's decisions 'must take into account its duty to protect the public.'" We believe that the Commission's responsibility to address public safety is becoming increasingly important as the severity and frequency of natural

disasters are on the rise. We tentatively conclude that reclassification would enhance the Commission's jurisdiction over ISPs, which it could use in combination with other statutory authority to ensure BIAS meets the needs of public safety entities and individuals when they use those services for public safety purposes. We seek comment on this tentative conclusion and analysis below. We note that the *RIF Order* concluded that Title I classification advances, and does not harm, public safety, primarily based on its overarching policy rationales for reversing Title II classification. We seek comment on the *RIF Order's* policy rationales and framework for protecting against harms elsewhere in this *Notice*, and we invite commenters to address whether those rationales sufficiently advance public safety. In particular, we invite comment on whether the Commission's ability to adopt *ex ante* regulations would provide better public safety protections than an *ex post* enforcement framework.

19. We seek comment on how our proposed reclassification would enable the Commission to support public safety officials' use of BIAS for public safety purposes. As a general matter, broadband services play an important role in how public safety officials communicate with each other and how they deliver and receive information from the public. Although much of the communications between public safety entities and first responders take advantage of enterprise-level dedicated public safety broadband services, they often rely on commercial broadband services to communicate during emergency situations. Increasingly, public safety entities rely on retail BIAS to access various databases, share data with emergency responders, and stream video into 911 and emergency operations centers. We also are aware that public safety officials often use services accessible over-the-top (OTT) of broadband connections, such as social media, to communicate important and timely information to the public and to gain valuable information from the public and build on-the-ground situational awareness. We seek comment on the extent to which public safety officials rely on BIAS for public safety purposes and on our tentative conclusion that reclassification would give us additional jurisdiction to advance the existing uses of BIAS by these officials.

20. We also seek comment on how reclassification could further other public safety initiatives. For instance, while the Commission has taken important steps to improve the

effectiveness of Wireless Emergency Alerts (WEAs), would classification of BIAS as a telecommunications service enable the Commission to make the nation's alert and warning capabilities more effective and resilient by, for instance, requiring ISPs to transmit emergency alerts to their subscribers? More recently, the Commission modernized its priority services rules to authorize service providers to offer, on a voluntary basis, priority treatment of data, video, and IP-based voice services for public safety personnel and first responders, including by removing outdated requirements that may impede the use of IP-based technologies. Would reclassification allow the Commission to go a step further by requiring service providers to offer prioritized routing for all IP-based services and prioritized restoration for all network infrastructure? Could the Commission require ISPs to participate in Telecommunications Service Priority (TSP), Government Emergency Telecommunications Service (GETS), and Wireless Priority Service (WPS)? How, if at all, would reclassification allow the Commission to expand the applicability, and therefore the public safety benefits, of the Communications Assistance for Law Enforcement Act (CALEA) requirements?

21. We tentatively conclude that BIAS also plays an increasingly important role in allowing the public to communicate with first responders during emergency situations and seek comment on this tentative conclusion. In the *RIF Remand Order*, the Commission noted that retail broadband services are used to translate communications with 911 callers and patients in the field and to deliver critical information about 911 callers that is not delivered through the traditional 911 network. Are there other ways in which BIAS can or does supplement traditional 911 communications? The Commission has undertaken various efforts in recent years to improve how the public reaches and shares information with emergency service providers. What effect, if any, would Title II classification of BIAS have on these and future efforts? Would reclassification enhance the Commission's jurisdiction to improve the flow of voice communications, photos, videos, text messages, real-time text (RTT), or any other type of communication from the public to emergency service providers through Next Generation 911 or over the use of Wi-Fi calling to reach emergency service providers? If so, how? We also believe BIAS is critical when used by

individuals with disabilities to communicate with public safety services, and the Commission has taken several steps to improve access to IP-enabled 911 communications for people with disabilities. How will reclassification fortify our existing jurisdiction to ensure these communications are not interrupted or degraded? To what extent does or will BIAS support alternatives to 911 communications, and will reclassification help to ensure that BIAS-based emergency communications meet certain reliability and security standards? Would reclassification of BIAS enhance the access to, availability of, and service quality for IP-based communication services used by people with disabilities in emergencies, including the IP-based forms of telecommunications relay services (TRS)?

22. BIAS is also critical for allowing the public to easily and efficiently access public safety resources and information. In particular, members of the public often rely on BIAS during emergencies to enable them to find and receive potentially life-saving information. As the Commission stated in the *RIF Remand Order*, "consumers regularly use their mobile devices and broadband connections 'to access broadly available information regarding threatening weather, shelter-in-place mandates, ongoing active-shooter scenarios, and other matters essential to public safety.'" The COVID-19 pandemic, severe natural disasters, and other incidents have demonstrated the importance of the public being able to access public safety information using their BIAS connections. We seek comment on how reclassification would allow the Commission to ensure that the public can access life-saving public safety resources and information using BIAS.

23. Furthermore, BIAS is important for public safety communications that occur outside of emergencies. The Commission observed in the *RIF Remand Order* that the COVID-19 pandemic demonstrated that many Americans rely on telemedicine over mass-market broadband services for routine health care, triage, and basic health advice, and that the ability of 5G networks to transmit massive amounts of data in real time will also help enable new applications for advanced communications between the public and health care officials, such as through the use of wireless sensors to for remote patient monitoring and data transmission so doctors can identify problems before they become emergencies, and through the

development of connected ambulance services for faster patient transport. BIAS connections are also playing a more important role in home safety and security as consumers increasingly purchase home security and monitoring systems that use connected devices to monitor, deter, and address theft, breaking and entering, and other home threats and BIAS connections are increasingly important for in-home monitoring of individuals who are elderly or disabled. We seek comment on the impact that reclassification may have on these and other public safety applications that rely on BIAS.

24. Network Resiliency and Reliability. We tentatively conclude that reclassifying BIAS as a telecommunications service would enhance the Commission's ability to ensure the nation's communications networks are resilient and reliable, and we seek comment on this tentative conclusion. For instance, under the Commission's Network Outage Reporting System (NORS), qualifying communications providers are required to report to the Commission network outages that satisfy certain criteria, and the Commission uses this information to advance network resiliency and reliability. Because this reporting requirement has generally been limited to outages affecting voice services, the Commission has historically lacked reliable outage information for today's modern, essential broadband networks, which inhibits the Commission from fully ensuring the resiliency and reliability of those networks. Would reclassification support the Commission's ability to expand the scope of NORS to require ISPs to submit outage reports in response to service incidents that cause outages or the degradation of communications services, such as cybersecurity breaches, wire cuts, infrastructure damages from natural disaster, and operator errors or misconfigurations? Under rules implemented in 2022, Federal, State, Tribal and Territorial public safety agencies are eligible to obtain direct read-only access to outage information filed in NORS and the Disaster Information Reporting System (DIRS) for their jurisdictions. Would reclassification and enhanced NORS reporting afford public safety officials greater transparency during outages and disasters to assess the operational status of networks for dissemination of emergency information or to assess where support is needed? Would it support reliability efforts for calls and texts to 911 and the 988 Suicide and Crisis Lifeline? How, if at all, would

reclassification allow us to further our goal to improve the reliability of wireless networks? Would broadband reclassification give the Commission additional authority to facilitate the use of Wi-Fi calling during emergencies or network outages, and if so, to what extent could the Commission apply reliability standards for Wi-Fi calling? Are there other ways that reclassification of BIAS would help us improve network resiliency and reliability, such as requirements for network upgrades and changes, rules relating to recovery from network outages, and improving our incident investigation and enforcement authority? What impact would any such actions have on ISPs, particularly small ISPs?

3. Protecting Consumers' Privacy and Data Security

25. Since before the adoption of the 1996 Act, the Commission has consistently protected consumers from activities that undermine their ability to use communications services freely, fairly, and free from abuse by bad actors. As the communications industry has changed and the tactics used by bad actors have evolved, so too have the Commission's efforts. The current information service classification of BIAS, however, appears to inhibit the Commission's ability to fully ensure that consumers are protected from harmful conduct when they use communications services today and able to utilize these services in a fair and secure manner. We believe that classification of BIAS as a telecommunications service could support the Commission's efforts to protect consumers' privacy and data security and relieve them from unlawful robocalls and robotexts. We seek comment on this view.

26. Privacy and Data Protection. We tentatively conclude that reclassification of BIAS as a telecommunications service would support the Commission's efforts to safeguard consumers' privacy and data security, and we seek comment on this tentative conclusion. Highlighting the Commission's important role in this area, earlier this year, Chairwoman Rosenworcel established the FCC Privacy and Data Protection Task Force to coordinate the agency's efforts to protect against and respond to consumer privacy infringements and data breaches by communications providers. The Commission's efforts will rely on, among other things, its authority under section 222 of the Act. That provision governs telecommunications carriers' protection and use of information obtained from their customers or other carriers, and calibrates the protection of

such information based on its sensitivity. Congress imposed a duty on every telecommunications carrier to protect the confidentiality of its customers' proprietary information, according the category of customer proprietary network information (CPNI) the greatest level of protection.

27. When the Commission classified BIAS as a telecommunications service in the 2015 *Open Internet Order*, it declined to forbear from applying section 222 of the Act, citing the need to protect consumers' privacy regardless of whether they communicate via broadband or telephone services. The *RIF Order* eliminated these statutory protections for broadband customers and surrendered the Commission's authority over ISPs' privacy and data protection practices. We believe that ISPs are situated to collect vast swaths of information about their customers, including personal information, financial information, and information regarding subscriber online activity. We further believe that consumers currently may not fully comprehend—and therefore may not be able to meaningfully consent to—ISPs' collection, processing, and disclosure of customer information, including potentially through the use of artificial intelligence models. We are also concerned that, absent statutory and regulatory requirements to do so, ISPs may not adopt adequate administrative, technical, physical, and procedural safeguards to protect their customers' data. Indeed, ISPs appear to continue to be attractive targets to hackers and other bad actors, putting BIAS customer data at significant risk of compromise. We seek comment on these views.

28. Based on the foregoing, we once again propose herein not to forbear from section 222. Returning BIAS to its telecommunications service classification would bring ISPs back under the section 222 privacy and data security framework, and therefore restore those protections for consumers. Additionally, classifying BIAS as a telecommunications service could support a consistent privacy and data security framework for voice and data services, which we believe consumers often subscribe to from one provider in a bundle and perceive to be part of the same service, particularly for mobile services. We seek comment on this proposed analysis.

29. We further believe that, in addition to protecting consumers, reclassifying BIAS as a telecommunications service and declining to forbear from section 222 would protect information concerning entities that interact with ISPs. Section

222 places an obligation on telecommunications carriers to protect the confidentiality of the proprietary information of and relating to other telecommunication carriers (including resellers), equipment manufacturers, and business customers. We seek comment on how reclassification of BIAS will affect telecommunications carriers and equipment manufacturers who interact with ISPs, as well as the customers those entities serve, such as content creators and edge providers. Would these protections also have national security benefits by, for example, deterring ISPs from contracting with foreign companies that may pose a national security threat or are owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries? Would these section 222 requirements create a meaningful burden on ISPs, especially small ISPs?

30. *Robocalls and Robotexts.* We seek comment on whether reclassification can serve to enhance the Commission's authority to support consumer privacy by combating illegal robocalls and robotexts. In recent years, the Commission has undertaken extensive efforts to address these invasive communications, including by establishing rules for call authentication, robocall mitigation, and call blocking; expanding requirements and restrictions to robotexts; and taking enforcement action against providers who originate and transport these communications. Yet bad actors continue to evolve their techniques to find new ways to interrupt consumers and perpetuate fraud. We note that many illegal robocalls are transmitted via VoIP networks and many illegal robotexts are transmitted by OTT messaging services (e.g., iMessage, WhatsApp, and Signal). We seek comment on the extent to which Title II classification would help the Commission in its efforts to combat these practices. Would Title II classification grant the Commission oversight to reach a larger class of entities, particularly for messages and calls delivered via broadband networks? For example, to the extent robotext scams include links to spoofed websites designed to defraud consumers, would reclassification allow us to require that ISPs block traffic to IP addresses associated with those websites? Would reclassification allow the Commission to apply new requirements and restrictions beyond what it can achieve under the sources of authority the Commission has relied on to date for its robocall and robotext actions? If so, how? Are there other ways in which reclassification

would help the Commission combat illegal robocalls and robotexts? How would this affect ISPs, especially small ISPs?

4. Supporting Access to Broadband Internet Access Service

31. From the Commission's inception, it has played a critical role in facilitating the proliferation of communications networks and ensuring that consumers have access to the services these networks provide. While these efforts are crucial to the Commission's mission, we believe that the information service classification of BIAS has limited the Commission's efforts to achieve these goals for the communications service that has become fundamental to consumers' everyday lives. Classifying BIAS as a telecommunications service will enable the Commission to better support the deployment of wireline and wireless infrastructure, advance universal service, and increase the accessibility of communications networks. We seek comment on this tentative conclusion. We also seek comment on whether, and how, we could leverage our proposed reclassification in other proceedings to further encourage access to BIAS by all consumers.

32. *Wireline and Wireless Infrastructure.* We seek comment on the public policy impact of our proposed reclassification of BIAS on the Commission's goals to support investment in and deployment of wireline and wireless infrastructure. For example, section 224(b) of the Act grants the Commission clear authority to regulate the rates, terms, and conditions of pole attachments by a cable television system or provider of telecommunications service. Since 2011, the Commission has undertaken a series of reforms with the goal of improving access to poles to, among other things, help speed the deployment of broadband infrastructure. However, in the *RIF Order*, the Commission effectively eliminated section 224 pole attachment rights of broadband-only providers as a result of its classifying broadband as an information service. In 2020, following the *Mozilla* court's direction that the Commission "grapple with the lapse in legal safeguards" for broadband-only providers that resulted from the *RIF Order*, the Commission concluded that while there were potentially adverse effects to this class of providers resulting from the loss of pole attachment rights, the benefits of returning BIAS to an information service classification outweighed any drawbacks. We tentatively conclude that the Commission erred in its 2020

analysis and believe that reclassifying BIAS as a telecommunications service will help support the Commission's goals to facilitate broadband deployment, and we seek comment on this tentative conclusion. How has the market for broadband-only ISPs changed since 2015, in particular for new entrants and those ISPs seeking infrastructure access via pole attachments? What effect has the Commission's elimination of pole attachment rights for broadband-only ISPs had on the deployment of broadband, particularly to unserved or underserved areas? How would reinstatement of pole attachment rights benefit or burden ISPs, particularly small ISPs? As the Commission has recognized, Congress recently has made available unprecedented levels of federal funding for broadband buildout, including a variety of programs administered by the National Telecommunications and Information Administration (NTIA), including the Broadband, Equity, Access, and Deployment Program (BEAD), the State Digital Equity Capacity Grant Program and its federal counterpart, the Middle Mile Infrastructure Grant Program, and the Tribal Broadband Connectivity Program. We believe that ensuring the protections of section 224 are restored to all ISPs, including broadband-only providers, will pave the way for quicker and less expensive broadband deployment, thereby enabling that funding to go as far as possible. We seek comment on that view.

33. We also seek comment on how reclassifying BIAS as a telecommunications service and classifying mobile BIAS as a commercial mobile service will impact the Commission's authority over wireless infrastructure. Although section 332(e)(7) of the Act, and Commission interpretation thereof, regulate state and local authority over the placement, construction, and modification of personal wireless service facilities, are there ways in which classifying broadband as a telecommunications service can further advance the Commission's goals to "improve service quality and lower prices for consumers" for broadband access? Finally, we also seek comment on how reclassification of BIAS as a telecommunications service may affect the Commission's application of the Act's preemption frameworks in sections 253(d) and 332(c)(3) regarding infrastructure used to provide broadband-only services.

34. *Universal Service.* We tentatively conclude that classifying BIAS as a telecommunications service will strengthen our policy initiatives to

support the availability and affordability of BIAS through USF programs, and we seek comment on this tentative conclusion. The Communications Act defines universal service as an “evolving level of telecommunications services,” and charges the Commission with periodically establishing such services. BIAS is now clearly an essential service upon which consumers rely, and we believe that placing BIAS outside of the Commission’s Title II authority weakens the Commission’s ability to deliver universal service support for that essential service, especially in rural areas. We seek comment on this view. In *Mozilla*, the court found that the Commission failed to explain how its universal service authority over telecommunications carriers in section 254(e) of the Act could extend to ISPs without BIAS classified as a telecommunications service for purposes of the Lifeline program, and it remanded the issue back to the Commission. Although the Commission conceded in the *RIF Remand Order* that under a Title I regime, BIAS could not be a section 254(c) supported service because section 254(c) defines universal service as an “evolving level of telecommunications services,” it nevertheless asserted a theory under section 254(e) to enable Lifeline support for BIAS offered by eligible telecommunications carriers (ETCs), similar to the theory under which the Commission has funded broadband-capable networks through the High-Cost Program.

35. We tentatively conclude that reclassifying BIAS as a telecommunications service will bolster the Commission’s ability to provide High-Cost and low-income support, and seek comment on this tentative conclusion. Among other things, we believe that reclassifying BIAS as a telecommunications service could eventually allow broadband-only providers to once again participate in the Lifeline program, and would give the Commission the ability to adjust certain service obligations for ETCs. We further believe that reclassifying BIAS as a telecommunications service would enhance our ability to connect low-income households in rural areas, including through the Link Up program, which provides support to reduce connection charges for eligible residents of Tribal lands who subscribe to telecommunications service from a telecommunications carrier receiving high-cost support. We seek comment on these views, including how this may

impact ISPs, especially smaller ISPs and ISPs serving rural areas.

36. We also tentatively conclude that classification of BIAS as a telecommunications service protects public investments in BIAS access and affordability. Since the inception of BIAS, the Commission, along with other federal and state entities, have made significant investments to ensure that BIAS networks reach all consumers and are affordable, particularly through the Affordable Connectivity Program. These efforts increased dramatically since the beginning of the COVID-19 pandemic as Congress directed a large influx of funding in broadband deployment and consumer access. We believe our proposed reclassification will enable the Commission to protect these investments on an ongoing basis by enabling the Commission to ensure the connections supported by these funds align with the other policy goals we detail here: advancing national security and public safety and protecting consumers. In doing so, we believe we can ensure these connections continue to achieve their primary purpose of benefiting consumers. We seek comment on these views.

37. *Multiple-Tenant Environments (MTEs)*. We seek comment on how reclassification may impact the Commission’s authority to take action to promote tenant choice and competition in the provision of broadband services to the benefit of those who live and work in MTEs. The Commission has long prohibited agreements between providers of certain communications services and MTE owners that grant the provider exclusive access and rights to provide service to the MTE. In 2019, the Commission released a Notice of Proposed Rulemaking that sought comment about these practices and others that could have the effect of dampening competition or deployment, and on the Commission’s authority to target different kinds of entities, including telecommunications providers, MVPDs, and broadband-only providers. In 2022, relying on sections 201 and 628 of the Act, the Commission adopted rules to prohibit telecommunications carriers and MVPDs from entering into exclusive and graduated revenue sharing agreements, and to require that telecommunications carriers and MVPDs include disclaimers on marketing materials distributed to MTE tenants that inform tenants of the existence of an exclusive marketing arrangement, among other things. The Commission determined that it was appropriate to “proceed incrementally,” but cautioned that it would “continue to monitor competition in MTEs to

determine whether we should alter the scope of our rules to cover other providers,” including broadband-only providers. We seek comment whether reclassification of BIAS would provide additional authority for the Commission to further promote competition and consumer choice in communications services in MTEs.

38. *Free Expression*. We believe BIAS connections promote diversity of viewpoints by allowing traditionally disadvantaged communities to express themselves outside of traditional media. Social media websites and other platforms particularly have become important platforms for free expression, political engagement, and social activism. Indeed, Congress has recognized that “the internet offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” Accordingly, we invite comment on any free expression-related considerations associated with classifying BIAS as a telecommunications service and any benefits or drawbacks of such classification for relevant communications.

39. *Digital Equity*. 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 have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality, invites comments 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 as the scope of the Commission’s relevant legal authority.

5. Access for Persons With Disabilities

40. We seek comment on how reclassification may impact the Commission’s authority to ensure that individuals with disabilities can communicate using BIAS. People with disabilities “increasingly rely upon internet-based video communications, both to communicate directly (point-to-point) with other persons who are deaf or hard of hearing who use sign language, and through video relay service.” Section 716 of the Act requires that interoperable video conferencing services be accessible, regardless of how those services are transmitted—by broadband or otherwise—and also requires that text messaging, email,

other electronic messaging services, and interconnected and non-interconnected VoIP services, be accessible. In addition, section 718 of the Act requires that internet browsers installed on mobile phones must be accessible to people who are blind or visually impaired to ensure the accessibility of mobile broadband. How would reclassification affect the Commission's ability to implement and enforce these provisions? We seek comment on the impact, if any, that reclassification may have on the Commission's goals to ensure that BIAS remains accessible to individuals with disabilities. For instance, if the Commission declines to forbear from section 255 of the Act, as we propose below, would that provide additional authority for the Commission to require that ISPs' telecommunications services and equipment be accessible to and usable by people with disabilities?

6. The RIF Order's Policy Rationales Did Not Justify Reversing the Classification of Broadband Service

41. In the *RIF Order*, the Commission's primary policy justifications for reclassifying BIAS as a Title I service were its conclusions regarding the alleged harm to investment by Title II classification and the benefits to investment by Title I classification. However, the *RIF Order* gave little weight to the *2015 Open Internet Order's* showing that investment continued for broadband services that were regulated as Title II common carrier services, including digital subscriber line (DSL), which was regulated as such until 2005.

42. We tentatively conclude that the Commission's conclusions in the *RIF Order* that ISP investment is closely tied to the classification of BIAS were unsubstantiated. Instead, we agree with the *RIF Order's* statement that "owners of network infrastructure make long-term, irreversible investments," which we believe makes it unlikely that changes in investment shortly following the adoption of each *Order* were actually related to the effects of each *Order*. We seek comment on this belief. We note that the Commission received conflicting viewpoints regarding the actual effect of Title II classification on investment. Instead of concluding, as the *2015 Open Internet Order* did, that conflicting viewpoints concerning the effect of classification on investment prevented the Commission from being certain which viewpoint was more accurate, the Commission chose to rely on certain studies purporting to show that Title II classification in the *2015 Open Internet Order* hurt investment to reach its conclusion about the effect of

Title II classification on investment, even as the Commission seemed to recognize the weaknesses of those studies. Additionally, similar to the *2015 Open Internet Order* record, the *RIF Order's* record showed opposing views on the likely long-term effects of the Commission's regulatory decisions on investment. We believe, as the Commission did in 2015, that "no party [could] quantify with any reasonable degree of accuracy how either a Title I or a Title II approach may affect future investment." As such, we tentatively conclude that changes in ISP investment following the adoption of each *Order* were more likely the result of other factors unrelated to the classification of BIAS, such as broader economic conditions at the time, technology changes such as the transition from 3G to 4G LTE networks, and ISPs' general business development decisions. We seek comment on this tentative conclusion. Is there any evidence that ISP investment is closely tied to the regulatory classification of BIAS? Can any declines or increases in investment following adoption of either the *2015 Open Internet Order* or the *RIF Order* be directly attributed to the classification of BIAS in those *Orders*? What other factors besides the regulatory classification of broadband impact investment decisions? We invite parties to comment on the strength of any evidence submitted on these issues.

43. Notwithstanding these tentative conclusions, we seek comment generally on how, and the extent to which, our proposed classification of BIAS as a telecommunications service will affect ISPs' investment incentives today. How will it affect small ISPs? Is it possible to evaluate ISPs' investment incentives independent of any incentives and investment activity that may result from the billions of dollars in federal and state funding that has been and will be provided to ISPs to support infrastructure deployment and broadband connectivity?

C. Scope of Reclassification

44. *Broadband Internet Access Service*. We propose to continue using the definition of "broadband internet access service" as a "mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service," as well as "any service that the Commission finds to be providing a functional equivalent of the service described [in

the definition] or that is used to evade the protections set forth" in part 8 of the Commission's rules. The Commission has chiefly retained this definition since it first defined broadband internet access service in the *2010 Open Internet Order* (76 FR 60754 (Sept. 30, 2011)). We seek comment on whether there is any reason to depart from this definition of broadband internet access service.

45. Similarly, we propose to continue to define "mass market" as the Commission did in the *2015 Open Internet Order* and *RIF Order*—"a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as school and libraries." In addition to including broadband internet access service purchased with support from the E-Rate, Lifeline, and Rural Health Care programs, as well as any broadband internet access service offered using networks supported by the Connect America Fund or the Rural Digital Opportunity Fund, we propose that such "mass market" services would also include any broadband internet access service purchased with support from the Affordable Connectivity Program and the Connected Care Pilot Program. Consistent with the *2015 Open Internet Order* and *RIF Order*, the proposed definition excludes enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements, and special access services. We seek comment on our proposal. Should we apply the modified definition of broadband internet access service used for the broadband label requirement in this context to make clear that enterprise services are excluded even when they are supported by the Commission's broadband access and affordability programs?

46. We also propose to remain consistent with the Commission's conclusions in prior *Orders* to include in the term "broadband internet access service" those services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite. We seek comment on this proposal. We continue to intend broadband internet access service "to cover the entire universe of internet access services at issue in the Commission's prior broadband classification decisions, as well as all other broadband internet access services offered over other technology platforms that were not addressed by prior classification orders." As in prior orders, we propose that "fixed"

broadband internet access service refers to a broadband internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other internet access device to the internet, and encompasses the delivery of fixed broadband service over any medium, including various forms of wired broadband service (e.g., cable, DSL, fiber), fixed wireless broadband service (including fixed services using unlicensed spectrum), and fixed satellite broadband service. Likewise, we propose that "mobile" broadband internet access service refers to a broadband internet access service that serves end users primarily using mobile stations, and includes, among other things, services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the internet, as well as mobile satellite broadband service. Consistent with the existing definition, we propose to include within the definition of broadband internet access service any such service, regardless of whether the ISP leases or owns the facilities used to provide the service. We seek comment on our proposals.

47. We also propose that to the extent coffee shops, bookstores, airlines, private end-user networks such as libraries and universities, and other businesses acquire broadband internet access service from an ISP to enable patrons to access the internet from their respective establishments, provision of such service by the premise operator would not itself be considered BIAS unless it was offered to patrons as a retail mass-market service. Likewise, when a user employs, for example, a wireless router or a Wi-Fi hotspot to create a personal Wi-Fi network that is not intentionally offered for the benefit of others, we believe he or she is not offering a broadband internet access service under our proposed definition, because the user is not marketing and selling such service to residential customers, small businesses, and other end-user customers. Such proposed findings are consistent with the manner in which the Commission has historically defined broadband internet access service, and we seek comment on any changed circumstances that would justify a different outcome.

48. We seek comment on whether there are other types of services we should address in defining the scope of broadband internet access service. For example, with respect to 5G deployments, new network architectures and uses of the technology are emerging, including some that offer

both private and public 5G connectivity, like 5G Internet of Things (IoT). We seek comment on how we should view these services for purposes of defining broadband internet access service—are these types of services best viewed as enterprise services excluded from the definition of broadband internet access service or should they be treated as non-BIAS data services?

49. *Non-BIAS Data Services.* We also seek comment on whether to continue excluding non-BIAS data services (formerly "specialized services") from the scope of broadband internet access service. In the *2015 Open Internet Order*, the Commission explained that certain services offered by ISPs that share capacity with broadband internet access service over ISPs' last-mile facilities were not broadband internet access service and provided examples and characteristics of services that, at that time, likely fit within this category of non-BIAS data services. The Commission defined characteristics of these services, explaining that they (1) are not used to reach large parts of the internet; (2) are not a generic platform, but rather a specific "application level" service; and (3) use some form of network management to isolate the capacity used by these services from that used by broadband internet access service. We seek comment on whether these characteristics still appropriately describe non-BIAS data services. Are there any other characteristics of such services on which we should rely? Are these still appropriate examples of data services that are outside the scope of broadband internet access service? Have the distinctions between mass-market retail and non-BIAS data services changed, particularly from a consumer, technical, or other perspective, to warrant reconsideration of this exclusion?

50. We also tentatively conclude that we should maintain the *2015 Open Internet Order's* approach to continue closely monitoring the development of non-BIAS data services. In the *2015 Open Internet Order*, the Commission emphasized that non-BIAS data services might still be subject to enforcement action if the Commission determined that: (1) a particular service is providing the functional equivalent of BIAS; (2) an ISP claimed or attempted to claim that a service that is the equivalent of BIAS is a non-BIAS data service not subject to any rules that would otherwise apply; or (3) a non-BIAS data service offering is undermining investment, innovation, competition, and end-user benefits. We are especially concerned about activities that may undermine national security and public safety, consumers' use of

broadband internet access service, and the ability of consumers to access broadband internet access service. We also share the Commission's concern in the *2015 Open Internet Order* "that over-the-top services offered over the internet are not impeded in their ability to compete with other data services." We seek comment on our proposed approach.

51. *Internet Traffic Exchange.* We next tentatively conclude that broadband internet access service, as we propose to define it, includes arrangements for the exchange of internet traffic by an edge provider or an intermediary with the ISP's network, referred to as internet peering, traffic exchange or interconnection, to the extent they provide the "capability to transmit data to and receive data from all or substantially all internet endpoints . . . [and] enable the operation of the communications service." We seek comment on this position. As the Commission explained in 2015, "[t]he representation to retail customers that they will be able to reach 'all or substantially all internet endpoints' necessarily includes the promise to make the interconnection arrangements necessary to allow that access" and "the promise to transmit traffic to and from those internet endpoints back to the user." We tentatively conclude that the Commission's findings and rationale regarding internet traffic exchange in the *2015 Open Internet Order*—that such "edge service" is derivative of broadband internet access service and constitutes the same traffic—remain valid, and we seek comment on our tentative conclusion. We observe that the *RIF Order* does not appear to dispute the Commission's previous conclusion that broadband internet access service includes this "edge service," and instead determined that internet traffic exchange arrangements were appropriately regulated as an information service by virtue of its conclusion that broadband internet access service is an information service. We seek comment on whether there are circumstances under which "edge service" would not be best characterized as a part of broadband internet access service, and how commenters would characterize that service, given the *Verizon* court's conclusion that, in addition to the retail service provided to consumers, "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers.'" We seek comment on the *Verizon* court's characterization of broadband internet access service in

relation to service provided to both consumers and edge providers. How, if at all, has edge service changed in relation to broadband internet access service? Are there any grounds to depart from the Commission's prior treatment of edge service and edge providers as a "derivative" service of broadband internet access service?

52. We also seek comment on whether we should exclude any particular services or functions from the definition of broadband internet access service. For example, should we exclude virtual private network (VPN) services, web hosting services, and/or data storage services from the scope of broadband internet access service? For purposes of this NPRM, "data storage services" refers to the provision of access to data storage platforms. The term is distinct from "caching," which involves the temporary storage of data for purposes of delivering content to specific endpoints. While the Commission has previously excluded content delivery networks (CDNs) and internet backbone services, including transit arrangements, we seek comment whether a different approach may be warranted because these services are integral to transmitting data and delivering communications to internet endpoints, thus falling within the proposed definition of "broadband internet access service." We observe that these services directly or indirectly provide data on behalf of their clients. For example, while VPN servers reflect one end-point of an underlying communication stream, they act as a launching pad to forward traffic to the destination identified by the user. We seek comment on this proposed analysis. Do these services fall within the scope of broadband internet access service, as we propose to define it?

D. Classifying Broadband Internet Access Service as a Telecommunications Service

53. The 1996 Act enacted the "telecommunications service" and "information service" definitional frameworks, and since that time, the Commission and courts have grappled with the classification of internet access services as technology and the communications marketplace have evolved and the internet has become essential to our daily lives. Courts have long recognized the Commission's authority to interpret and implement the Communications Act of 1934. Both the 2015 *Open Internet Order* and the *RIF Order* recognized this authority. And on review of each of those decisions, the D.C. Circuit accepted the Commission's authority to make classification

decisions, even when this involved a change in course. In addressing a prior Commission decision classifying BIAS, in *Brand X*, the Supreme Court confirmed not only that an administrative agency *can* change its interpretation of an ambiguous statute, but that it "*must* consider varying interpretations and the wisdom of its policy on a continuing basis, for example in response to . . . a change in administrations." In light of this precedent, we believe that we not only have the authority to classify BIAS, but that we must reevaluate the 2018 information service classification in consideration of the policy rationales and marketplace developments we have described above as warranting a return to the telecommunications service classification. We seek comment on this view.

54. In evaluating the classification of BIAS, three definitional terms are relevant. First, the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Second, the Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Finally, the Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . , but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." When Congress enacted the definitions of "telecommunications service" and "information service" in the 1996 Act, it substantially incorporated the "basic" and "enhanced" service classifications from the *Computer Inquiries* line of decisions. Under the *Computer Inquiries*, facilities-based telephone companies were obligated to offer the transmission component of their enhanced service offerings—including broadband internet access service offered via DSL—to unaffiliated enhanced service providers on nondiscriminatory terms and conditions pursuant to tariffs or contracts governed by Title II. Thus, there is no disputing that until 2005, Title II applied to the transmission component of DSL service.

Further, because the statutory definitions substantially incorporated the Commission's terminology under the *Computer Inquiries*, Commission decisions regarding the distinction between basic and enhanced services—in particular, decisions regarding features that are "adjunct to basic" services—are relevant to our analysis, as discussed further below, because the Commission's definition of "adjunct to basic" services has been instrumental in determining which functions fall within the "telecommunications systems management" exception to the "information service" definition.

55. We tentatively conclude that both a reasonable and the best reading of these definitional provisions supports classifying BIAS as a telecommunications service. As explained in the 2015 *Open Internet Order*, "the critical distinction between a telecommunications and an information service turns on what the provider is 'offering.'" If the provider is offering "telecommunications" to the public for a fee, then the service is necessarily a telecommunications service. Thus, in 2015, the Commission interpreted these terms to classify BIAS as a telecommunications service, finding that BIAS, as then offered, is sufficiently independent from the information services that ISPs may also offer. Consistent with the Commission's finding in 2015, we believe that BIAS is best understood as making available high-speed access to the internet (that may be bundled with other applications and functions)—and therefore that it provides telecommunications—and that ISPs offer BIAS to the public for a fee. Accordingly, we tentatively conclude the best reading of the Act is that BIAS, as offered to and understood by consumers today, is a telecommunications service rather than an information service. We seek comment on this tentative conclusion.

56. *Broadband Internet Access Service Provides Telecommunications.* We tentatively conclude that BIAS provides "telecommunications" as it is defined under the Act, and seek comment on this conclusion. As discussed above, the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." As discussed above, we believe that users rely on BIAS to transmit "information of the user's choosing," "between or among points specified by the user." We further believe, as the Commission has previously found, that the term "points

specified by the user” is ambiguous, and that “uncertainty concerning the geographic location of an endpoint of communication is irrelevant for the purpose of determining whether a broadband internet access service is providing ‘telecommunications.’” We also contend that these points are not constrained to be defined in one particular format. They may be in the form of an IP address or perhaps more commonly associated with fully qualified domain names resolved by the DNS, such as *www.example.com*. This is consistent with the Commission’s prior deduction that while consumers often do not know the precise physical or virtual location of the edge provider or other user they want to access, “there is no question that users specify the end points of their internet communications” and “would be quite upset if their internet communications did not make it to their intended recipients or the website addresses they entered into their browser would take them to unexpected web pages.” As the Commission explained, “numerous forms of telephone service qualify as telecommunications even though the consumer typically does not know the geographic location of the called party,” including cell phone service, toll free 800 service, and call bridging service. Likewise, the fact that DNS may resolve the same domain name to one or more virtual locations (e.g., due to load balancing), just as in the toll free arena a single telephone number may route to multiple locations, “does not transform that service to something other than telecommunications.” In the *RIF Order*, the Commission conceded that at least some telecommunications are used as an input into BIAS and “an ISP makes use of telecommunications” in the provision of BIAS, but found that it “need not further address the scope of the ‘telecommunications’ definition in order to justify [its] classification of broadband internet access service,” and did not further address the Commission’s interpretation and application of the “telecommunications” definition in the *2015 Open Internet Order*. We seek comment on the analysis that BIAS provides “telecommunications,” including whether there is any reason to depart from it.

57. We further tentatively conclude that there is no change or modification to the form or content of information during transmission, and seek comment on this analysis. In 2015, the Commission explained that “the packet payload (i.e., the content requested or sent by the user) is not altered by the

variety of headers that a provider may use to route a given packet” and therefore, the “form and content of the information” is the same when an IP packet is sent by the sender as when the same packet is received by the recipient. We seek comment on whether this analysis of packet transmission remains accurate and relevant today. Have there been any developments or changes in how BIAS is provisioned that would cause us to reconsider this analysis? How do ISPs transmit data information from one point on the network to another? How does it differ from how PSTN calls are transmitted today?

58. *Broadband Internet Access Service is a Telecommunications Service*. Here, we propose to build off our tentative conclusion that BIAS provides telecommunications and our belief that current factual circumstances show that consumers perceive BIAS as a standalone offering used to access third-party services and, as such, ISPs routinely market BIAS widely to the general public. Viewed together, ISPs would necessarily offer BIAS “for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used,” and therefore we tentatively conclude that BIAS is a telecommunications service as defined in the Act. We seek comment on our tentative conclusion and assessment. We further propose to find that the implied promise to make arrangements for exchange of internet traffic as part of the BIAS offering does not constitute a private carriage arrangement, and that the rationale adopted in the *2015 Open Internet Order* remains persuasive. We seek comment on this approach. How do internet traffic arrangements with negotiated terms differ from mass-market services offered to the public? Have there been any significant developments in the internet traffic exchange market since 2015 that would cause us to reconsider these proposals? We observe that in 2015, the Commission concluded that “some individualization in pricing or terms is not a barrier to finding that a service is a telecommunications service,” and the *RIF Order* does not appear to disturb this finding. We seek comment on this analysis.

59. *Broadband Internet Access Service Is Not Best Classified an Information Service*. We tentatively conclude that, as offered today, BIAS is not an information service under the best reading of the Act. The Act defines an information service as the offering “of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available

information via telecommunications.” We believe that the Commission’s reasoning in the *RIF Order*—that because BIAS has the “capability” to be used to engage in the activities within the information service definition, it is best interpreted as an information service—is flawed. Concluding that BIAS “is an information service irrespective of whether it provides the entirety of any end user functionality or whether it provides end user functionality in tandem with edge providers,” as the Commission did in the *RIF Order*, fails to recognize the relationship of BIAS transmission services to other functions, which may be offered by either the ISP or a third party of the end user’s choice. Logically, under the framework set out in the *RIF Order*, even traditional switched telephone service would be classified as an information service, as it provides customers with the ability to make information available to others (e.g., public service announcements), retrieve information from others, and process and utilize stored information from others (e.g., by interacting with a call menu). We tentatively conclude that the best and more reasonable interpretation of the statutory language is that BIAS is a telecommunications service, while the applications that run over BIAS either constitute distinct information services or fall within the exception to the information service definition for capabilities used “for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” We seek comment on this proposed analysis.

60. We tentatively conclude that companion services, such as DNS and caching, when provided with BIAS, fit within the telecommunications systems management exception to the definition of “information service,” and therefore when these services are provided with BIAS, they do not convert BIAS into an information service. We seek comment on this tentative conclusion. The Act’s telecommunications systems management exception excludes from the definition of “information service” “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” In the *2015 Open Internet Order*, the Commission concluded that when DNS and caching are offered with BIAS, they “either fall within the telecommunications systems management exception or are separate offerings that are not inextricably integrated with broadband internet

access service, or both.” In the *RIF Order*, the Commission took a contrary view, concluding that “DNS and caching functionalities . . . offered by ISPs[] are integrated information processing capabilities offered as part of broadband internet access service to consumers today.” On review of the *RIF Order*, Judge Millet explained in her concurrence that “the question is whether the combination of transmission with DNS and caching *alone* can justify the information service classification. If we were writing on a clean slate, that question would seem to have only one answer given the current state of technology: No.” She added that “new factual developments call[ed] for serious technological reconsideration and engagement through expert judgment. Instead, the Commission’s exclusive reliance on DNS and caching blinkered itself off from modern broadband reality, and untethered the service ‘offer[ed]’ from both the real-world marketplace and the most ordinary of linguistic conventions.” We intend to guide our decisionmaking about the role of DNS and caching based on today’s broadband reality, and we seek information on the present circumstances.

61. We tentatively conclude that the Commission’s 2015 analysis provides the more reasonable application of the relevant statutory terms and Commission precedent to DNS functionality with respect to BIAS, and we seek comment on this tentative conclusion. In the *2015 Open Internet Order*, the Commission analogized DNS to adjunct-to-basic services, such as speed dialing, call forwarding, and computer-provided directory assistance, and concluded that because it is effectively equivalent to routing information and does not alter the fundamental character of the telecommunications service, it falls within the telecommunications systems management exception to the definition of “information service.” “Adjunct-to-basic” functions were those features and services that met the literal definition of “enhanced service” but did not alter the fundamental character of the associated basic transmission service and thus were treated as basic (*i.e.*, telecommunications) services even though they went beyond mere transmission. The Commission has held that such functions: (1) must be “incidental” to an underlying telecommunications service—*i.e.*, “‘basic’ in purpose and use” in the sense that they facilitate use of the network; and (2) must “not alter the fundamental character of [the

telecommunications service].” The *RIF Order* rejected the adjunct-to-basic comparison largely based on its contention that adjunct-to-basic services and the telecommunications systems management exception must be viewed narrowly, effectively to only include functions that solely facilitate transmission. Because it concluded that DNS, as then used, is a core function of BIAS that provides more than a functionally integrated address-translation capability, it determined that DNS did not fall within the exception. We tentatively disagree with the *RIF Order*’s narrow characterization of adjunct-to-basic services and the telecommunications systems management exception as not mandated by the statutory language; however, even under that unnecessarily narrow characterization, we believe DNS would fall under the telecommunications management exception, as its fundamental purpose is to route information—*i.e.*, to facilitate transmission.

62. We further believe that even if DNS did not fall within the telecommunications systems management exception to the Act’s definition of “information services,” it is not so inextricably intertwined so as to convert the entire BIAS offering into an information service, consistent with the Commission’s finding in 2015. In support of the *2015 Open Internet Order*’s conclusion, the Commission explained that IP packet transfer can work without DNS and that DNS lookup is available through third parties. In the *RIF Order*, the Commission argued that even though DNS can also be provided by third parties, the focus should remain on the capabilities that ISPs offer, which it concluded is a single, inextricably intertwined information service. However, in her *Mozilla* concurrence, Judge Millet noted that “DNS, much like email, is now free and widely available to consumers in the internet marketplace.” We tentatively conclude that the *2015 Open Internet Order*’s showing that DNS is not a necessary component of BIAS, which the *RIF Order* did not dispute, provides the better rationale for evaluating whether DNS transforms the entire BIAS offering into an information service, and tentatively conclude that it does not. We seek comment on this tentative conclusion. Does the Commission’s 2015 analysis of DNS as it relates to BIAS remain relevant, accurate, and persuasive? Why or why not? Are there any technical or commercial developments that should cause us to reconsider this analysis?

63. For the same reasons the Commission found in 2015, we believe that caching, when provided in connection with BIAS, is “used to facilitate the transmission of information so that users can access other services, in this case by enabling the user to obtain ‘more rapid retrieval of information’ through the network,” and thus falls within the telecommunications systems management exception. We seek comment on this analysis. The Commission concluded otherwise in the *RIF Order*, finding that “ISP-provided caching does not merely ‘manage’ an ISP’s broadband internet access service and underlying network, it enables and enhances consumers’ access to and use of information online” and that because it is “useful to the consumer,” caching does not fall within the telecommunications systems management exception. However, we do not believe consumers consider caching capabilities when purchasing BIAS. We seek comment regarding the technical and commercial aspects of caching, how caching functionality is both provisioned by ISPs and offered to customers, as well as the relevance (if any) of Commission precedent as applied to caching today.

64. In particular, given that web pages today change constantly and are often customized on a per-user basis, we question whether ISPs cache popular content requested by multiple users to supply the same web page when requested later, rather than fetching the page anew. Further, as Judge Millet observed in *Mozilla*, caching “does not work when users employ encryption,” which as of 2017 constituted a majority of internet traffic, which suggests “that caching no longer enjoys the pride of place ascribed to it” by the *RIF Order*. We seek comment on whether ISPs use this practice and, to the extent that commenters contend they do, why (given the ever-changing nature and high customization of contemporary web pages). In addition, should the Commission distinguish between caching by ISPs and the kind of caching that third-party content providers use to keep copies of content (such as videos and images, but possibly also web pages) closer to users? We preliminarily conclude that caching of this kind is not provided by ISPs and thus is not a part of BIAS, and as such does not transform BIAS into an information service.

65. We also seek comment on whether there are other functionalities provided or offered with BIAS, besides DNS and caching, that might fall into the telecommunications systems management exception, as well as on

other add-on information services offered in conjunction with BIAS and how they might affect our analysis with respect to the classification of BIAS. The 2015 *Open Internet Order* identified examples of processing-related capabilities that fall within the telecommunications systems management functions, such as security virus protection and blocking denial of service attacks, as well as add-on information services such as cloud-based storage services, email, and spam protection that were often offered in conjunction with BIAS but were not inextricably intertwined with it. Consistent with the Commission's finding in 2015, we propose that "such services are not inextricably intertwined with [BIAS], but rather are a product of the provider's marketing decision not to offer the two separately," and seek comment on this proposal. We believe that, to the extent BIAS is offered along with other capabilities that would otherwise fall into the "information service" definition, such an offering does not turn BIAS into a functionally integrated information service. Are there examples of other information services or capabilities that are often offered by ISPs in conjunction with BIAS? How do consumers view and use these products in relation to their BIAS subscription? How has the market for third-party information services offered in tandem with BIAS developed since the *RIF Order* was adopted? We also seek comment on any devices or applications, such as Wi-Fi hotspots, wearables, appliances, and other IoT devices that an ISP may include with its BIAS offering and how they may function both in conjunction with and apart from the underlying BIAS. How does a secondary market for such devices and applications impact our interpretation that they are separable information services?

66. *Major Questions Doctrine Applicability.* We seek comment on whether, and if so how, the major questions doctrine—the notion that Congress is expected to speak clearly when delegating authority in certain extraordinary cases—should inform the conclusions we reach based on the text and structure of the Act. In the *USTA* decision, the D.C. Circuit reasoned that *Brand X* conclusively held that the Commission has the authority to determine the proper statutory classification of BIAS and that its determinations are entitled to deference, and so there is no need to consult the major questions doctrine here. In opinions respecting the denial of rehearing *en banc*, several judges

debated how (if at all) the major questions doctrine would otherwise apply to the issue. The *RIF Order* did not directly dispute this conclusion, but stated that the doctrine supported its decision to classify BIAS as an information service in order to steer clear of any major questions doctrine issues.

67. What factors are relevant to the Commission's consideration of whether the major questions doctrine applies to the classification of BIAS, taking account of evolving Supreme Court precedent? Among other factors, we ask that commenters consider the extent to which this matter falls within the Commission's recognized expertise and authority as the federal regulator responsible for "regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, . . . wire and radio communications service with adequate communications facilities at reasonable charges." In light of relevant Commission precedent, both before and shortly after Congress adopted the 1996 Act, classifying analogous transmission services—including the transmission component of broadband internet access service offered via digital subscriber line (DSL)—as common carrier services, what basis is there, if any, for concluding that the Commission's proposed classification action here is an exercise of "newfound power" not previously recognized? Has Congress acted or failed to act on proposals to clarify the proper classification of broadband in subsequent years, and to what extent does such action or inaction inform the Commission's exercise of its claimed classification authority or the application of the major questions doctrine?

68. We also seek comment on how and to what extent each relevant factor should affect the Commission's analysis of whether the classification of BIAS implicates the major questions doctrine. Commenters should consider how the relevant factors apply to the specific proposals here. For example, should the Commission evaluate the applicability of the major questions doctrine for BIAS as a whole, or should it distinguish between or among particular categories of BIAS offerings? How would the major questions doctrine apply in the case of particular rules we might adopt if we determine BIAS meets a given statutory classification?

69. Separately, even assuming *arguendo* that the major questions doctrine were applied to our classification of BIAS, we seek comment on whether Congress has spoken

sufficiently clearly in the Act—in definitional provisions or more generally—to satisfy that standard.

E. Classifying Mobile Broadband Internet Access Service as a Commercial Mobile Service

70. In addition to our proposed return to the 2015 *Open Internet Order's* classification of BIAS as a telecommunications service, we propose to return to that *Order's* classification of mobile BIAS as a commercial mobile service. In the alternative, even if mobile BIAS does not meet the definition of "commercial mobile service," we propose to find that it is the functional equivalent of a commercial mobile service and, therefore, not private mobile service.

71. Section 332(d)(1) of the Act defines "commercial mobile service" as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission." As an initial matter, we tentatively conclude that mobile BIAS is a "mobile service" because subscribers access the service through their mobile devices. Next, we tentatively conclude that mobile BIAS is provided "for profit" because ISPs offer it to subscribers with the intent of receiving compensation. We also tentatively conclude that mobile BIAS is widely available to the public, without restriction on who may receive it.

72. We also propose to return to the 2015 *Open Internet Order's* determination that mobile BIAS is an interconnected service. Section 332(d)(2) states that the term "interconnected service" means "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission). . . ." In the 2015 *Open Internet Order*, the Commission reached the conclusion that mobile BIAS was an interconnected service through the application of an updated definition of "public switched network" that included networks that use public IP addresses. In doing so, the Commission highlighted the Commission's longstanding determination from the *Second CMRS Report and Order* (59 FR 18493 (Apr. 19, 1994)) that the term "public switched network" "should not be defined in a static way" as "the network is continuously growing and changing because of new technology and increasing demand." The Commission reversed course in the *RIF Order*, reinstating the prior definition of

“public switched network.” We believe the Commission’s decision in the *RIF Order* fails to align with the technological reality and widespread use of mobile BIAS. The ubiquity of mobile BIAS that the Commission recognized in 2015 is even more pronounced today, as mobile broadband networks have continued to develop and grow in the intervening years, with more users and increased mobile data traffic. In 2022, there was more than 73 trillion megabytes of mobile data traffic exchanged in the United States, representing a 38 percent increase from the previous year. Continued growth of mobile BIAS is expected, with one forecast predicting that there will be 410 million 5G mobile subscriptions in North America by 2028. In light of these factors, we propose to return to the 2015 *Open Internet Order*’s modernized definition of “public switched network” in § 20.3 of the Commission’s rules, specifically defining the term to mean “the network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services.” We believe this definition, which includes IP addresses, embodies the current technological landscape and the widespread use of mobile broadband networks, and is therefore more consistent with the Commission’s recognition that the public switched network will grow and change over time. We seek comment on this analysis and our proposed approach.

73. We further propose to reach the same conclusion the Commission did in the 2015 *Open Internet Order* that mobile BIAS is interconnected with the “public switched network,” as we propose to define it today. The 2015 *Open Internet Order* found that mobile BIAS should be considered interconnected because it was a broadly available mobile service that provided users with the ability to send and receive communications to all other users of the internet. Given the “universal access” and expected future growth of mobile BIAS, the 2015 *Open Internet Order* determined that finding mobile BIAS to be interconnected and a commercial mobile service was consistent with Congress’ objective in section 332 of the Act in creating a symmetrical regulatory framework among similar mobile services that were available to the public. Mobile BIAS remains a broadly available mobile service that provides its users with the

ability to send and receive communications and is an essential component of today’s technology landscape. As discussed above, there has been a marked increase in the amount of mobile data traffic in recent years, and continued growth is predicted. Given the continued widespread use and availability of mobile BIAS, we propose to find that mobile BIAS is an interconnected service, and propose to support this finding by applying the Commission’s analysis from the 2015 *Open Internet Order* to today’s marketplace. We seek comment on our proposed approach.

74. We also propose to rely on the Commission’s analysis from the 2015 *Open Internet Order* that mobile BIAS is an interconnected service for the additional reason that it provides users with the capability to communicate with other users of the internet and with people using telephone numbers through VoIP applications. The 2015 *Open Internet Order* found that “users on mobile networks can communicate with users on traditional copper based networks and IP based networks, making more and more networks using different technologies interconnected.” It further identified mobile VoIP, as well as over-the-top mobile messaging, as “among the increasing number of ways in which users communicate indiscriminately between [North American Numbering Plan (NANP)] and IP endpoints on the public switched network.” Since 2015, mobile BIAS users continue to communicate using these tools, with 85 percent of Americans owning a smartphone that offers access to VoIP and over-the-top communications apps. We seek comment on whether there have been any material changes in technology, the marketplace, or other facts that would warrant refinement or revision of the analysis regarding the interconnected nature of mobile BIAS from the 2015 *Open Internet Order*.

75. In connection with this approach, we seek comment on whether we should readopt the 2015 *Open Internet Order*’s revised definition of “interconnected service” in § 20.3 of the Commission’s rules. That *Order* defined “interconnected service” to mean a service that gives subscribers the ability to “communicate to or receive communications from other users of the public switched network,” removing the requirement that such service provide the ability to communicate with *all* other users of the public switched network. It did so to ensure that services that provide the *capability* to access all other users, including through the use of OTT services, but limit that access in

certain limited ways, are not excluded from the definition of “interconnected service.” The *RIF Order* reverted to the prior definition, concluding that “the best reading of ‘interconnected service’ is one that enables communication between its users and all other users of the public switched network” and that the service “must itself provide interconnection to the public switched network using the NANP.” We seek comment on whether it is necessary to return to the definition of “interconnected service” in the 2015 *Open Internet Order* to ensure that all appropriate services are covered by the definition.

76. Because we also propose to reclassify mobile BIAS as a telecommunications service, we believe that classifying it as a commercial mobile service would avoid the inconsistency that would result if the service were both a telecommunications service and a private service. The Commission explained this reasoning in the 2015 *Open Internet Order*, and we propose to adopt a consistent rationale here. The Commission stated that, because it determined mobile BIAS to be a telecommunications service, “designating it also as commercial mobile service subject to Title II is most consistent with Congressional intent to apply common carrier treatment to telecommunications services.” The Commission found that classifying mobile BIAS as a commercial mobile service was necessary “to avoid a statutory contradiction that would result if the Commission were to conclude both that mobile broadband internet access was a telecommunications service and also that it was not a commercial mobile service. A statutory contradiction would result from such a finding because, while the Act requires that providers of telecommunications services be treated as common carriers, it prohibits common carrier treatment of mobile services that do not meet the definition of commercial mobile service. Finding mobile broadband internet access service to be commercial mobile service avoids this statutory contradiction and is most consistent with the Act’s intent to apply common carrier treatment to providers of telecommunication services.” We seek comment on this proposal.

77. In the alternative, to the extent that mobile BIAS falls outside the definition of “commercial mobile service,” we propose to find that it is the functional equivalent of a commercial mobile service and, thus, not private mobile service. The Commission found that mobile BIAS service was functionally equivalent to

commercial mobile service because, “like commercial mobile service, it is a widely available, for profit mobile service that offers mobile subscribers the capability to send and receive communications on their mobile device to and from the public. Although the services use different addressing identifiers, from an end user’s perspective, both are commercial services that allow users to communicate with the vast majority of the public.” The *RIF Order* found that the *2015 Open Internet Order*’s focus on the public’s “ubiquitous access” to mobile BIAS alone was “insufficient” to establish functional equivalency and that the test established in the *Second CMRS Report and Order* provided a more thorough consideration of factors of whether a service is closely substitutable for a commercial mobile service. We seek comment on both of these analyses. As the *RIF Order* acknowledged, however, the Commission has discretion to determine whether services are functionally equivalent. Congress expressly delegated authority to the Commission to determine whether a particular mobile service may be the functional equivalent of a commercial mobile service, defining “private mobile service” as “any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.” For the reasons outlined in the *2015 Open Internet Order* and in light of the continued increased use and distribution of mobile broadband services and devices, we propose to find that mobile BIAS is the functional equivalent of commercial mobile service. We seek comment on this proposal and on any other or different definition of “functional equivalent” that the Commission should adopt.

78. We anticipate that returning mobile BIAS to its classification as a commercial mobile service and reinstating openness requirements on a larger set of mobile ISPs will allow mobile providers that would become subject to such rules to continue to be able to compete successfully in the marketplace and continue to have incentives to develop new products and services. For example, the Commission has applied open access rules to upper 700 MHz C Block licensees, including Verizon Wireless, for more than a decade, and the mobile operators subject to these requirements have continued to compete successfully in the marketplace. We seek comment on this view and on any policy

consequences that commenters believe may result from the proposed reclassification of mobile BIAS.

F. Preemption of State and Local Regulation of Broadband Service

79. We seek comment on how best to exercise our preemption authority to ensure that BIAS is governed primarily by a national framework, including a uniform floor of ISP conduct rules. The *RIF Order* adopted an expansive preemption decision, but the D.C. Circuit in *Mozilla* concluded that the *RIF Order* “fail[ed] to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority,” and vacated that preemption action. The D.C. Circuit concluded that “in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law.” A number of states quickly stepped in to fill that void, adopting their own unique regulatory approaches for BIAS, including their own versions of open internet requirements, and even measures like regulation of retail rates that the *2015 Open Internet Order* found unnecessary. We anticipate that our proposed regulatory approach to BIAS will remedy the infirmities the D.C. Circuit identified in the *RIF Order*’s approach, and we seek comment on the best way to use our preemption authority.

80. We seek comment on the best sources of preemption authority for us, if needed. For one, we anticipate that the regulatory approach proposed here would give us authority to oversee BIAS under Title II with forbearance, under Title III in the case of mobile ISPs, as well as under section 706 of the 1996 Act. These sources of authority could enable us to adopt regulations that preempt contrary state requirements. We also expect that our proposed regulatory approach could make it more straightforward to rely on various express preemption provisions in the Act, such as the preemption that accompanies forbearance under section 10(e), the preemption that arises when state requirements hinder provision of services covered under sections 253 or 332(c)(7) of the Act, the preemption of state requirements contrary to federal universal service policies under section 254(f), and other possible preemption provisions. We expect that Commission decisions finding BIAS to be interstate for regulatory purposes largely resolve possible arguments premised on the limitation on FCC authority over state communications services under section 2(b) of the Act that otherwise could arise here. We seek comment on these views and on any additional sources of

statutory authority for preemption, if needed.

81. We seek comment on how far to go in this proceeding in exercising our preemption authority to ensure that BIAS principally is governed by a federal framework. Should we adopt a broad preemption decision like the Commission attempted to do in the *RIF Order*? Or should the Commission proceed more incrementally, such as by only addressing in this proceeding those state or local legal requirements squarely raised in the record, and otherwise deferring to future case-by-case adjudications of preemption? Under an incremental approach, should we identify in this proceeding issues where the Commission will decline to preempt state requirements and thereby share regulatory responsibility with the states, such as state privacy and consumer protection laws? For what issues, if any, is the Commission required to share regulatory responsibility with the states? What are the benefits and drawbacks of permitting state regulation in specific issue areas? What issues may benefit most from shared regulatory responsibility with states?

82. We also seek comment on how best to define the scope of preemption to ensure that BIAS is principally governed by a federal framework. For example, should open internet conduct rules of the sort proposed below be seen not only as an appropriate nationwide floor providing those protections to everyone, but also as an appropriate ceiling to reflect the balancing of relevant policy considerations? The *2015 Open Internet Order* stated that “should a state elect to restrict entry into the broadband market through certification requirements or regulate the rates of BIAS through tariffs or otherwise, we expect that we would preempt such state regulations as in conflict with our regulations.” Should the Commission affirmatively preempt in those scenarios here rather than leaving those scenarios for future case-by-case evaluation as it did in 2015? In addition, how should the Commission define what state or local actions are within the scope of any affirmative preemption it might adopt here? To what extent should these decisions be informed by traditional preemption frameworks, such as express preemption, field preemption, or conflict preemption?

II. Proposed Forbearance

83. We propose to forbear from applying some Title II provisions to BIAS in the event that we reclassify the service, and we seek comment on what

the parameters of such forbearance should be, taking into account as a primary matter that we believe we must enable the Commission to fulfill its responsibility under the Act to protect national security and public safety when executing its other statutory obligations. In the *2015 Open Internet Order*, the Commission accompanied Title II classification with “substantial” forbearance for BIAS in a way that was designed to “strike the right balance at this time of minimizing the burdens on ISPs while still adequately protecting the public, particularly given the objectives of section 706 of the 1996 Act.” We propose to return to largely the same forbearance that was adopted in the *2015 Open Internet Order*, tailored as appropriate in light of any updated conclusions the Commission reaches in this proceeding regarding the need for particular rules, requirements, or sources of authority covering BIAS. Notably, we propose to forbear from Title II provisions insofar as they would support the adoption of *ex ante* rate regulations for broadband internet access service.

84. However, subsequent developments have highlighted the importance of retaining statutory authority to enable the Commission to address national security and public safety concerns that could arise with respect to BIAS. Those considerations provide a leading basis for revisiting the statutory classification of BIAS, and therefore we propose to depart from the forbearance approach reflected in the *2015 Open Internet Order* by declining to forbear from applying section 214 of the Act, and expressly clarifying that our proposed forbearance would not encompass Title III licensing and authorization authorities, given that those statutory provisions could provide important additional tools to advance the Act’s national security and public safety objectives. We seek comment on that proposal and on any issues related to forbearance with respect to BIAS if classified as a Title II service, including the best understanding of the current status of the forbearance granted in the *2015 Open Internet Order*, the appropriate analytical approach to evaluating forbearance, and the substantive scope of forbearance that should be granted. We also seek comment on the impact of our proposed forbearance approach on ISPs, particularly small ISPs.

A. Forbearance Framework

85. As a threshold matter, we seek comment on the best way to interpret the effect of the *RIF Order* on the forbearance previously granted in the

2015 Open Internet Order. The *RIF Order* stated that, due to the reclassification decision there, “the forbearance granted in the [2015 *Open Internet Order*] is now moot,” and that “carriers are no longer permitted to use the [2015 *Open Internet Order*] forbearance framework (i.e., no carrier will be permitted to maintain, or newly elect, the [2015 *Open Internet Order*] forbearance framework).” We seek comment on how to interpret those statements in the *RIF Order*.

86. Next, we seek comment on the appropriate analytical approach to use when evaluating the statutory forbearance criteria. In the *2015 Open Internet Order*, the Commission stated that “[b]ecause the Commission is not responding to a petition under section 10(c), we conduct our forbearance analysis under the general reasoned decision making requirements of the Administrative Procedure Act [(APA)], without the burden of proof requirements that section 10(c) petitioners face.” The Commission explained how its approach to forbearance in the *2015 Open Internet Order* satisfied the statutory forbearance criteria, other relevant statutory objectives such as section 706 of the 1996 Act, and applicable procedural requirements under the Act and the APA, and the D.C. Circuit rejected challenges to that forbearance approach in its *USTA* decision. We propose to follow the same analytical approach here and seek comment on that proposal. We also seek comment on alternative analytical approaches or other ways to effectuate the forbearance analysis.

87. We seek comment on the interplay between our approach to forbearance and the argument in the *RIF Order* that the scope of forbearance granted in the *2015 Open Internet Order* suggests that classification of BIAS as a Title II service is contrary to the statutory scheme. In particular, does such an argument fail to account for important aspects of the approach to forbearance in the *2015 Open Internet Order*? For example, we note that in many cases the *2015 Open Internet Order* evaluated forbearance assuming *arguendo* that particular provisions of the Act or Commission rules apply to BIAS, rather than “first exhaustively determining provision-by-provision and regulation-by-regulation whether and how particular provisions and rules apply to this service.” Do objections to Title II classification premised on the scope of forbearance adequately account for that fact, or do they draw unduly broad conclusions based on simple counts of

rules or statutory provisions subject to the forbearance decision?

88. Separately, we propose to leave ISPs’ broadband transmission services—as distinguished from BIAS that relies on that transmission as an input—subject by default to the framework of the *Wireline Broadband Classification Order* (70 FR 60222 (Oct. 17, 2005)) as the Commission has done previously. The *RIF Order* observed that such services “have never been subject to the [2015 *Open Internet Order*] forbearance framework,” and stated that “carriers that choose to offer transmission service on a common carriage basis are, as under the *Wireline Broadband Classification Order*, subject to the full set of Title II obligations, to the extent they applied before the” *2015 Open Internet Order*. The *2015 Open Internet Order* did, however, allow a provider previously offering broadband transmission on a common carrier basis “to change to offer internet access services pursuant to the construct adopted in” that *Order* subject to filing with and review by the Wireline Competition Bureau of the provider’s proposal for the steps it would take to convert to such an approach. We propose to follow the same approach here, and seek comment on that proposal.

B. Proposed Forbearance

89. We seek comment on the particular statutory provisions and rules that should or should not be subject to forbearance. In this regard, we propose to use the forbearance granted in the *2015 Open Internet Order* as the starting point for our consideration of the appropriate scope of forbearance. There, although the Commission granted broad forbearance, the Commission did not forbear from a number of specific protections or authorities:

- The open internet rules and section 706 of the 1996 Act;
- “[S]ections 201, 202, and 208, along with key enforcement authority under the Act, both as a basis of authority for adopting open internet rules as well as for the additional protections those provisions directly provide”;
- Section 222 of the Act, “which establishes core customer privacy protections”;
- Section 224 of the Act and the Commission’s implementing rules, “which grant certain benefits that will foster network deployment by providing telecommunications carriers with regulated access to poles, ducts, conduits, and rights-of-way”;
- Sections 225, 255, and 251(a)(2) of the Act and the Commission’s implementing rules, “which collectively

advance access for persons with disabilities; except that the Commission forbears from the requirement that providers of broadband internet access service contribute to the Telecommunications Relay Service (TRS) Fund at this time”;

- Section 254 of the Act and “the interrelated requirements of section 214(e), and the Commission’s implementing regulations to strengthen the Commission’s ability to support broadband, supporting the Commission’s ongoing efforts to support broadband deployment and adoption”;

- Requirements governing the wireless licensing process in section 309(b) and (d)(1) of the Act and §§ 1.931, 1.933, 1.939, 22.1110, and 27.10 of the Commission’s rules.

90. We propose to forbear from all provisions of Title II that would permit Commission regulation of BIAS rates. We believe that Commission rate regulation is unnecessary because the tailored approach we adopt here will enable the Commission to promote broadband deployment and competition, and because we will be able to rely on sections 201 and 202 to address non-rate related issues. Therefore, while we do not propose to forbear from sections 201 and 202 of the Act as a general matter, we “do not and cannot envision adopting new *ex ante* rate regulation” or *ex post* rate regulation of BIAS, and we therefore propose to forbear from applying sections 201 and 202 to BIAS insofar as they would support adoption of rate regulations for BIAS. We seek comment on this proposal. With respect to section 254, we propose to forbear in part from the first sentence in section 254(d) and our associated rules “insofar as they would immediately require new universal service contributions associated with” BIAS, as the Commission did in 2015, and seek comment on this proposal.

91. In addition to declining to forbear from applying those specifically enumerated provisions of the Act and Commission rules, the Commission also more generally limited its forbearance to the scope of its section 10 forbearance authority, and thus did not forbear from applying statutory provisions or rules that “are not applied to telecommunications carriers or telecommunications services.” The Commission also did not forbear from applying provisions of the Act or Commission rules that already applied to BIAS irrespective of the Title II classification of that service. The Commission cited illustrative examples falling within one or both of those

categories, including provisions imposing obligations on the Commission, like section 257 of the Act, provisions that simply reserve state authority, and the CALEA requirements in section 229. In addition, the Commission did not forbear from provisions that would benefit ISPs. This would include, for example, preemption provisions such as those in sections 253 and 332(c) of the Act, as well as liability limitation provisions in sections 223, 230, and 231 of the Act. To the extent that forbearance was considered and rejected in the *2015 Open Internet Order* for particular statutory provisions, we propose to once again decline to grant forbearance here, and we seek comment on that proposal. As part of that analysis, we seek updated information and analyses regarding the application of the statutory forbearance criteria regarding these provisions and rules that were not subject to forbearance in the *2015 Open Internet Order*. We also seek comment on any relevant analyses or conclusions in the *RIF Order*.

92. Other than in the specific areas described above, the *2015 Open Internet Order* broadly granted forbearance from applying provisions of the Act and Commission rules that newly applied by virtue of the Title II classification of BIAS. We generally propose to again adopt broad forbearance consistent with that outcome, with the exception of statutory authorities that could enable the Commission to advance the Act’s goals of national security and public safety. For example, section 1 of the Act makes clear that the Commission was established, among other reasons, “for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications.” Section 4(n) of the Act directs the Commission to take steps to promote the “maximum effectiveness from the use of radio and wire communications in connection with safety of life and property.” In addition, the D.C. Circuit in *Mozilla* emphasized the need to consider the potential benefits of Title II classification of BIAS for the Commission’s authority to protect public safety. Although public safety considerations were an important element of the Commission’s overall decision in the *2015 Open Internet Order*, preserving the Commission’s public safety authority above and beyond that granted in sections 201 and 202 of the Act was not as explicit a focus in much of the Commission’s tailoring of forbearance there. We thus seek comment on what specific provisions should be excluded from the

scope of forbearance here in light of those national security and public safety interests, as discussed in greater detail above.

93. Given the role section 214 of the Act has played in the Commission’s efforts to address national security and law enforcement concerns related to U.S. telecommunications networks, we tentatively conclude that we should exclude that provision from any forbearance granted here. How should the Commission apply its existing procedures for international section 214 authorizations, which include coordination of applications that have reportable foreign ownership with the relevant Executive Branch agencies, to BIAS providers? We seek comment on any implementation issues arising from our tentative conclusion and how we could best address them. For example, would implementation challenges arise if the Commission immediately applied to BIAS providers its existing procedures for international section 214 authorizations, which include coordination of applications that have reportable foreign ownership with the relevant Executive Branch agencies? We note that the *2015 Open Internet Order* recognized that certain implementation issues could arise from the application of section 222 and the Commission’s implementing rules to BIAS, and sought to mitigate those effects pending a rulemaking specifically focused on implementing section 222 for BIAS. Should we proceed in a similar manner with respect to some or all aspects of international section 214 authorizations, whether by adopting temporary forbearance, temporary grants of blanket international section 214 authority, or in some other manner? We also seek comment on any implementation issues concerning our domestic section 214 requirements.

94. We also make clear that our proposed forbearance would not encompass Title III licensing authorities, including sections 301–303, 307–309, 312, and 316 of the Act, which we believe likewise grant us important authority that can be used to advance national security and public safety with respect to the services and equipment subject to licensing. We also seek comment on whether we should exclude from the scope of our forbearance provisions sections 218 and 220 of the Act, which authorize the Commission to obtain information from common carriers, which could provide important tools to investigate public safety and security-related issues that arise. We seek comment on those proposals and on any other provisions of the Act or Commission rules that

likewise should be expressly excluded from the scope of forbearance based on national security and/or public safety considerations, including, for example, sections 305, 310, and 332 of the Act.

95. The D.C. Circuit's *Mozilla* decision also highlighted the potential benefits of Title II classification of BIAS for the Commission's authority to encourage deployment through regulation of pole attachments and to provide universal service support for low income households. In consideration of those interests, the Commission previously excluded sections 224 and 254 of the Act from the scope of its forbearance in the *2015 Open Internet Order*. We seek comment on whether there are additional or different ways those interests should be reflected in the tailoring of forbearance here.

96. We believe that the *RIF Remand Order* was too quick to dismiss concerns regarding public safety, pole attachments, and low income universal service support as speculative or unproven, and we seek comment on that view. Do commenters agree that the *RIF Remand Order* gave insufficient weight to the potential additional benefits that could be achieved through additional authority retained by virtue of Title II classification of BIAS?

97. We also seek comment on any additional or different ways that forbearance could be tailored here. For example, the *2015 Open Internet Order* adopted conditional forbearance from common carrier roaming regulations, subject to mobile ISPs complying with the data roaming requirements. Conditioned in that manner, the Commission was able to find the statutory forbearance criteria satisfied. We propose to follow the same approach with respect to our roaming rules here, and also seek comment on whether there are other provisions of the Act or Commission rules where conditional forbearance would satisfy the statutory forbearance criteria, even if unconditional forbearance would not. More generally, we also seek comment on alternative frameworks we might draw upon in deciding on how to tailor forbearance here. For example, in the *2015 Open Internet Order*, the Commission elected to grant broader forbearance despite some calls to limit forbearance just to the scope of relief previously granted to CMRS providers. We seek renewed comment on that approach, as well as any alternative options for tailoring forbearance here based on the regulatory experience in other contexts.

98. We also seek comment on whether forbearance should be differently

tailored in the specific context of the internet traffic exchange portion of BIAS. In the *2015 Open Internet Order*, the Commission's "definition for broadband internet access service include[d] the exchange of internet traffic by an edge provider or an intermediary with the broadband provider's network." Consequently, under the *2015 Open Internet Order*, internet traffic exchange was subject to the same forbearance as BIAS more generally. We propose to continue that uniform approach here, but also seek comment on whether and to what extent the internet traffic exchange component of BIAS should be subject to different tailoring of forbearance.

99. Finally, we also seek comment on any relevant new rules or statutory requirements enacted subsequent to the forbearance analysis in the *2015 Open Internet Order*.

III. Proposed Open Internet Rules

100. Today we propose to return to the basic framework the Commission adopted in 2015 to protect the openness of the internet. In 2015, consistent with its longstanding policy approach to protect internet openness through basic conduct "rules of the road," the Commission adopted a set of carefully tailored conduct rules to prevent specific practices harmful to an open internet—blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent deployment of new practices that would harm internet openness, and enhancements to the existing transparency rule. In the *RIF Order*, the Commission broke with this longstanding approach by altogether eliminating the open internet conduct rules, which we believe left consumers exposed to behavior that can hinder their ability to access the open internet. Below, we propose to reinstate straightforward, clear rules that are designed to prevent ISPs from engaging in practices harmful to consumers, competition, and public safety, and that would provide the basis for a national regulatory approach toward BIAS.

101. We first propose to reinstate the rules adopted in the *2015 Open Internet Order* that prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. We similarly propose to reinstate the general conduct standard adopted in the *2015 Open Internet Order*, which would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Finally, with regard to transparency, we propose to retain the current disclosures, and we

seek comment on the means of disclosure, the interplay between the transparency rule and the broadband label requirements, and any additional enhancements or changes we should consider. The rules we propose today are consistent with numerous other steps the Commission has taken to ensure that this country has access to affordable, competitive, secure, and reliable broadband. The proposed rules would establish clear standards for ISPs to maintain internet openness and would give the Commission a solid basis on which to take enforcement action against conduct that prevents people from fully accessing all of the critical services available through the internet.

A. Need for Rules

102. We believe that the rules we propose today will establish a baseline that the Commission can use to prevent and address conduct that harms consumers and competition when it occurs. Above, we express our belief that consumers perceive and use BIAS as an essential service, critical to accessing healthcare, education, work, commerce, and civic engagement. Because of its importance, we further believe it is paramount that consumers be able to use their BIAS connections without degradation due to blocking, throttling, paid prioritization, or other harmful conduct. The rules we propose today are designed to ensure these protections. Below, we seek comment on particular issues that inspire the need for these rules, including protecting public safety, ISPs' incentives and abilities to harm internet openness, the effects of harmful conduct on consumer demand and edge innovation, reliance on the Commission's communications sector expertise to address harmful conduct, and how the *RIF Order*'s oversight framework addresses harmful conduct. We invite commenters to submit economic analyses that weigh the costs and benefits of the Commission potentially adopting open internet rules.

1. Promoting Innovation and Free Expression

103. In the *2015 Open Internet Order*, the Commission found that internet openness helps promote innovation, investment, and free expression, among other goals. Among other things, the Commission found that the record there "overwhelmingly support[ed] the proposition that the internet's openness is critical to its ability to serve as a platform for speech and civic engagement," facilitate "the development of diverse content,

applications, and services,” and enable “a virtuous cycle of innovation.” We continue to place high importance on innovation, investment, and free expression, and we believe that conduct rules designed to ensure internet openness will better advance those goals, consistent with the reasoning in the 2015 *Open Internet Order*. We seek comment on that view.

104. We are skeptical of the *RIF Order*’s rejection of free expression as a likely benefit of internet conduct rules designed to advance internet openness. The *RIF Order* theorized that competition “will protect values such as free expression, to the extent that consumers value free expression as a service attribute and are aware of how their ISPs’ actions affect free expression.” We question, however, whether the *RIF Order* was correct to place such confidence in the marketplace as sufficient to advance free expression on the internet. Do consumers and the public have information about how ISP actions affect free expression on a sufficiently granular and detailed basis to act on that information? Separately, the *RIF Order* acknowledged that “[t]he competitive process and antitrust would not protect free expression in cases where consumers have decided that they are willing to tolerate some blocking or throttling in order to obtain other things of value.” We doubt that consumers are likely to act uniformly as a single, undifferentiated group, particularly where issues like free expression are concerned. We thus question how well the *RIF Order*’s analysis accounts for the interests of consumers who place different values on free expression. More generally, we seek updated information and analysis about the anticipated effects of internet conduct rules on free expression.

2. Protecting Public Safety

105. We believe that blocking, throttling, paid prioritization, and other potential conduct have the potential to impair public safety communications in a variety of circumstances and therefore harm the public. As discussed above, one of the Commission’s fundamental obligations under the Act is to advance public safety. The *Mozilla* court highlighted this charge and recognized the significance of it, emphasizing that “whenever public safety is involved, lives are at stake.” It went on to note that “[a]ny blocking or throttling of [safety officials’] internet communications during a public safety crisis could have dire, irreversible results.” Similarly, in the 2015 *Open Internet Order*, the Commission

recognized that paid prioritization and peering disagreements can negatively affect public safety communications traveling over the same networks. Above, we detail and seek comment on the wide range of public safety communications and applications that rely on broadband networks and on the related national security concerns implicating broadband service providers. We now seek comment on our belief that maintaining the *RIF Order*’s *ex post* enforcement framework will provide insufficient protection against conduct harms, which includes harms to public safety or national security. We note that the *Mozilla* court expressed specific skepticism about the Commission’s contention in the *RIF Order* that post-activity enforcement is a suitable method to address harmful conduct in the public safety context, emphasizing that “even if discriminatory practices might later be addressed on a post-hoc basis by entities like the Federal Trade Commission, the harm to the public cannot be undone.” We believe that the conduct rules we propose are necessary to prevent and mitigate harms to those public safety uses that would result from blocking, throttling, and other conduct, and we seek comment on our tentative conclusion. Our proposed conduct rules may also support consumer use of telehealth service and remote healthcare monitoring, such as through connected devices, by ensuring consumers can continue to access these services without the threat of blocking, throttling, or other degradation. We seek comment on consumer experiences where they have been harmed.

106. We further believe our proposed conduct rules would have particular benefits for the safety of individuals with disabilities. Above, we highlighted that these individuals increasingly rely on internet-based communications, and that “[t]hese applications often require significant bandwidth, making their use particularly sensitive to data caps and network management practices.” We believe the use of broadband to facilitate internet-based communications by persons with disabilities for public safety purposes, such as to contact emergency service providers, has a higher likelihood of being degraded by prioritization of latency-sensitive applications on the same facilities than less data-intensive uses, such as email, software updates, or cached video. We accordingly believe that our proposed rules would prevent such degradation and seek comment on this proposed analysis.

107. We seek comment on any other public safety harms or unaddressed

concerns that the proposed rules would help to alleviate. For example, would the proposed rules help to improve public safety officials’ ability to communicate via alerting systems to help improve emergency preparedness? Would they help to provide additional necessary bandwidth for IP-based communications to Public Safety Answering Points via 9–1–1? Would such rules help the authorities responding to such calls to have better or more complete information about an emergency to ensure a more comprehensive or timely response? Would such rules help public safety and law enforcement authorities to better communicate with one another during their responses to emergencies? What public safety issues have arisen since the Commission’s prior 2015 and 2018 orders that the proposed rules would help to address?

3. ISPs’ Incentive and Ability To Harm Internet Openness

108. In both the 2010 *Open Internet Order* and 2015 *Open Internet Order*, the Commission concluded that open internet rules were needed because ISPs have the incentive and ability to engage in practices that pose a threat to internet openness. In particular, the Commission found that because ISP networks serve as platforms for internet ecosystem participants to communicate, ISPs “are in a position to act as a ‘gatekeeper’ between end users’ access to edge providers’ applications, services, and devices and reciprocally for edge providers’ access to end users.” The 2015 *Open Internet Order* highlighted several economic incentives ISPs have to exploit this gatekeeper role, “such as preferring their own or affiliated content, demanding fees from edge providers, or placing technical barriers to reaching end users.” This behavior, the Commission found, “has the potential to cause a variety of other negative externalities that hurt the open nature of the internet,” which ISPs do not internalize. The Commission also concluded that ISPs “have the technical ability to act on incentives to harm the open internet.”

109. The *RIF Order* offered several reasons for rejecting the prior rationales, including ISPs’ economic incentives and supposed material competitive restraints. We believe these conclusions presumed that there were other ISPs to which consumers can switch if they were suffering open internet harms, and that the switching costs would not deter such switching. In addition, we tentatively agree with the *Mozilla* court, which found that, “[t]aken together, the Commission fail[ed] to provide a fully

satisfying analysis of the competitive constraints faced by broadband providers.” The Commission also claimed that “from the perspective of many edge providers, end users do not single home, but subscribe to more than one platform (e.g., one fixed and one mobile) capable of granting the end user effective access to the edge provider’s content (i.e., they multi-home),” and “to the extent multihoming occurs in the use of an application, there is no terminating monopoly.” However, consumers may lack access to both fixed and mobile connections, and even when they do have access to both, the Commission did not show that these connections allow consumers to access all edge provider services unhindered, and therefore are truly competitive alternatives. Indeed, the Commission has since concluded that “fixed broadband and mobile wireless broadband are not substitutes in all cases,” finding that each type of service “enables different situational uses.” We seek comment on this analysis.

110. The *RIF Order* also found the Commission’s action in the *2015 Open Internet Order* was unjustified because it lacked evidence of harms to internet openness. Setting aside the several examples of harmful conduct discussed in the *2015 Open Internet Order* and detailed in the record for the *RIF Order*, we believe the *RIF Order*’s conclusion gave inadequate consideration to the effects of the Commission’s consistent efforts to apply and enforce the open internet standards since early 2005, which we believe deterred harmful ISP conduct. Thus, to the extent there is limited evidence of harmful conduct prior to the *2015 Open Internet Order*, we believe that demonstrates the Commission’s consistent efforts to apply and enforce open internet standards since 2005 were effective and are needed, not that the *2015 Open Internet Order* and the protections it adopted were unjustified. We seek comment on this analysis.

111. We tentatively conclude that ISPs continue to have the incentive and ability to engage in practices that pose a threat to internet openness, and seek comment on this tentative conclusion and the above analysis. We also seek to update the record underlying the conclusions in the *2010 Open Internet Order* and *2015 Open Internet Order*. How have changes in the marketplace or technology since 2015 affected ISPs’, including smaller ISPs, incentives and ability to engage in such practices? To what extent do ISPs have economic incentives and mechanisms to block or disadvantage a particular edge provider or class of edge providers? To what

extent do vertically integrated providers have particularized incentives to discriminate—on price, quality, or other bases—in favor of affiliated products? For instance, we believe that many major ISPs are affiliated with OTT services or continue to offer competitive vertically integrated OTT services, and frequently provide consumers with promotional offers that bundle OTT services with BIAS. Do these affiliate relationships and vertically integrated offerings create additional incentive for ISPs to favor those services over others? To what extent should the Commission evaluate the ability and incentives of other intermediaries involved in the exchange of internet traffic, such as middle mile and backbone providers, to engage in conduct harmful to internet openness, particularly with respect to their relationships with ISPs? We seek comment on this analysis.

112. We also seek comment on whether ISPs are incentivized to increase revenues by charging edge providers for access or prioritized access to the ISPs’ end users. Are there justifications for charging fees to edge providers that were not present in 2015? We seek comment on these and other economic incentives and abilities that ISPs may have to limit openness.

113. We seek comment on the state of competition in the BIAS market. We note that the Commission’s *2022 Communications Marketplace Report* found that, as of 2021, approximately 36 percent of households lack a competitive option for fixed broadband at speeds of 100/20 Mbps and that 70 percent of households in rural areas lack such an option. Preliminary FCC staff calculations using December 2022 Broadband Deployment Collection data yield similar results. While competition in the mobile BIAS market is somewhat more significant, fixed and mobile services have not proven to be substitutable. To what extent does the state of competition affect ISPs’ incentives to limit openness? Are there different incentives for small ISPs? Similarly, to what extent does the state of competition affect ISPs’ incentives to innovate and invest in their networks? We seek insight into whether consumers in all areas of the country have adequate choices in the fixed and mobile broadband service market. Also, to what extent do broadband services with substantially different technical characteristics serve as competitive substitutes? How, if at all, do commercial practices differ in places where consumers have only one or two choices, particularly when those choices use different technologies? Although the Commission previously found that its

authority is not predicated on a finding of market power, and this finding has twice been upheld, is there a reason we should engage in a market power analysis now with respect to ISPs and, if so, how? We further seek comment on whether there are other economic theories that we should consider to better understand and assess ISP incentives to engage in practices that affect the internet’s openness. We also seek comment on the extent to which the state of competition in the BIAS market should play a role in our decision as to whether or not to reclassify BIAS as a Title II service.

114. We further seek information on ISP conduct since the *RIF Order* was adopted. Are there examples of conduct that has harmed internet openness? We note that one 2019 study suggested that ISPs regularly throttle video content. Aside from specific examples of harm, could other factors have deterred ISPs from engaging in any behavior that might have violated open internet principles? For instance, while the *RIF Order* was published in the **Federal Register** in February of 2018, it was not until the *Mozilla* case concluded in October of 2019 that it was clear open internet rules would no longer be in effect. To what degree might long-term contracts, and the general difficulty of implementing new business models, also have played a role in making it difficult for ISPs to exploit opportunities the *RIF Order* created? Could the threat of regulation have led ISPs to make voluntary commitments to maintain service consistent with certain conduct rules established in the *2015 Open Internet Order*, as they did, and if so, would this threat have dimmed with time? Because broadband connections were so essential during the pandemic, we believe ISPs have been under increased scrutiny by the Commission, the media, and the public since March 2020, and therefore have had a strong incentive to follow their voluntary commitments. Further, following the *RIF Order*, ISPs have been subject to state laws and executive orders addressing internet conduct. How have state regulations addressing ISP conduct affected ISP conduct nationwide? We also observe that unprecedented consumer demand for BIAS and edge innovation that occurred during the pandemic also led to unprecedented growth for ISPs. How did this growth impact providers’ incentives either to comply with open internet principles or to engage in behavior that might increase their revenues at the expense of internet openness? Are smaller ISPs’ incentives or ability to engage in

conduct that might harm internet openness different from those facing larger ISPs? What are the costs and advantages of waiting to act only after ISPs begin to take actions that might harm internet openness? Would such conduct be immediately identifiable? How quickly could ISPs comply with new rules and what harms would occur in the meantime? Going forward, is there reason to believe that ISPs will engage in conduct that harms the open internet, particularly if the Commission chooses not to adopt open internet rules?

4. Consumer Demand and Edge Innovation

115. We believe that an important byproduct of an open internet is the edge innovation and consumer demand that promotes ISP investment, and seek comment on this position. In the *2015 Open Internet Order*, the Commission recognized that “innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.” The Commission referred to this as the “virtuous cycle,” and it was the foundation for the action the Commission took in both the *2010 Open Internet Order* and *2015 Open Internet Order*. The validity of the virtuous cycle was upheld by both the *Verizon* court and the *USTA* court. The *RIF Order*, however, discounted the *2015 Open Internet Order*’s reliance on the virtuous cycle, contending there was a two-sided market in which ISPs acted as platforms and benefited from facilitating interactions between both sides of the market—edge providers and end users—and profits from inducing both sides of the market to use its platform.

116. We tentatively conclude that the *RIF Order*’s explanation of how two-sided markets work does not address a central problem open internet rules are intended to address. When an ISP’s actions harm content creators and edge providers, the impact is distributed across all ISPs, not just the ISP undertaking the action. Yet, each ISP only accounts for the impact on its own operations. Consequently, a profit-making decision from the perspective of the individual ISP creates repercussions across all ISPs that harm the industry and the economy at large. When an ISP makes the profit-maximizing decisions the *RIF Order* describes, it only accounts for the impacts of its decision on its own company. It does not account for the impact of those actions on ISPs that lie outside its geographic market. These constitute the bulk of ISPs. Thus, an ISP, for example, that does not face fully

effective competition, might expect to see higher profits if it sets prices for edge providers that recover in expectation a little more than its long-term costs. However, consistent with the reasoning of the *RIF Order*, it will not set prices for edge providers that are so high that the impact on the quality of edge provider service would cause the ISP to lose more because it would be forced to lower prices to its own consumers. We believe that the difficulty with the *RIF Order* analysis is that in setting its profit-maximizing prices for edge providers, the ISP lowers service quality for all ISPs, but that harm does not feature in the ISP’s profit-maximizing calculation. While the impact on content quality of a single ISP setting prices for edge providers somewhat above the competitive level will be small and spread out over all ISPs, all similarly situated ISPs face similar incentives. Thus, since ISPs have no means of coordinating their behavior, and doing so could be illegal, each will behave in this way with material negative cumulative effects. The result is a breaking of the virtuous cycle described in the *2010 Open Internet Order*: not only will ISPs collectively be worse off, but so will the broader economy. We seek comment on this analysis and other bases for validating or questioning the *RIF Order*’s analysis.

117. We believe it is necessary to secure the open internet to preserve the virtuous cycle wherein market signals on both sides of ISPs’ platforms encourage consumer demand, content creation, and innovation, with each respectively increasing the other, providing ISPs incentives to invest in their networks. We further believe that if innovative edge services are subject to blocking, throttling, paid prioritization, or other conduct by ISPs that harms internet openness, that conduct will reduce edge innovation. This will, in turn, reduce the quality and quantity of edge services available to consumers, and, specifically with blocking and throttling, directly inhibit consumers from accessing the edge services they desire. The impacts on edge services and consumers will reduce demand for broadband connections and ultimately suppress the need for ISPs to invest in upgrades to their networks or new deployments to meet that demand. Stalled ISP network improvements ultimately will undermine new edge innovation and consumer demand. We seek comment on this proposed analysis.

118. We believe the conduct rules we propose will protect edge innovation and the ability of consumers to access

those new and developing services, thereby promoting both edge and ISP investment. We seek comment on this view. In particular, what is the role of the internet’s openness in facilitating consumer demand and edge innovation that encourages edge and ISP investment? We are also interested in understanding the role the open internet may play in the promotion of edge competition or in the reduction or elimination of barriers to edge entry and investment.

5. The Commission’s Ability To Address Conduct That Undermines an Open Internet

119. We believe that, as the expert agency on communications, the Commission is best positioned to safeguard internet openness. The *RIF Order* removed the Commission’s authority to enforce open internet requirements and left to the FTC the responsibility to address harmful ISP conduct. The current Chair of the FTC agrees that the Federal Communications Commission “has the clearest legal authority and expertise to fully oversee internet service providers,” noting specifically that she supports efforts by the Commission “to reassert that authority and once again put in place the nondiscrimination rules, privacy protections, and other basic requirements needed to create a healthier market.” We seek comment on whether the Commission’s longstanding oversight of the communications industry gives it unique technical, economic, and public interest aptitude in evaluating ISP conduct. To what extent does the Commission’s enforcement apparatus provide it with sufficient authority and capabilities to address harmful conduct by ISPs, including by securing administrative relief? What efficiencies would be achieved as a result of the Commission having authority over BIAS along with other communications services (e.g., voice and cable) that providers offer to customers as part of bundled offerings?

6. The *RIF Order*’s Framework

120. When the Commission repealed the open internet rules in the *RIF Order*, it broke from the Commission’s persistent efforts to preserve an open internet. The *RIF Order* did not address the longstanding bipartisan agreement that the Commission should prohibit ISPs from engaging in blocking, throttling, and other conduct that undermines an open internet and—importantly—that it should have the authority to enforce those restrictions. This was echoed by the *Mozilla* court, which was “troubled by the

Commission's failure to grapple with the fact that, for much of the past two decades, ISPs were subject to some degree of open Internet restrictions." The *Mozilla* court explained, that "[w]hile outside observers may associate 'light touch' with a distinct era in regulation and 'open Internet' with another era, the successive Commission majorities have consistently vowed fealty to both." We believe the *RIF Order* failed to ensure the most basic protections for the open internet—prohibitions on blocking and throttling—let alone other threats to the open internet identified in the *2015 Open Internet Order*. We seek comment on this analysis.

121. We believe that the *2015 Open Internet Order* was consistent with Commission precedent by applying a light-touch regulatory framework to preserve an open internet. When the *Verizon* court struck down the *2010 Open Internet Order*, the Commission sought to implement a solution to preserve longstanding open internet standards that supported the unprecedented growth in fixed and mobile subscribership, edge innovation, and network investment that occurred up to that point. The Commission determined that classifying BIAS as a Title II service was not only more consistent with a modern assessment of how the definition of "telecommunications service" applies to current BIAS offerings, but would also enable it to apply and enforce open internet rules. Thus, in establishing open internet rules using a light-touch application of Title II, we believe the *2015 Open Internet Order* ensured maintenance of the status quo that had existed for more than ten years prior to that *Order*. As such, we tentatively conclude that the action we propose today restores the status quo that had existed up until the Commission adopted the *RIF Order*, in which clear rules of the road ensure that edge innovation and investment flourish and consumers can access all lawful content they see fit. We seek comment on our proposed assessment.

122. *Transparency*. The Commission's transparency rule requires ISPs to publicly disclose the network practices, performance characteristics, and commercial terms of the BIAS they offer, including disclosure of any blocking, throttling, and affiliated or paid prioritization practices. We recognize that transparency is a valuable tool to protect the open internet, but that it is only one element of a comprehensive framework that prevents consumers from experiencing harms that inhibit their access to an open

internet. While the transparency requirements currently in place provide consumers and edge providers the ability to make informed decisions, we believe their effectiveness is limited because they do not restrict ISPs from engaging in activities that have long enjoyed bipartisan opposition—blocking, throttling, and discrimination—let alone other conduct that has the potential to cause harm, such as paid prioritization. Indeed, the *RIF Order* only requires that companies disclose their blocking, throttling, and paid or affiliated prioritization in their transparency disclosures; it does not prohibit companies from engaging in these practices. We tentatively conclude that these are the types of conduct that require *ex ante* intervention to ensure they do not happen in the first instance, and therefore tentatively conclude that the comprehensive set of conduct rules that we propose today are needed to protect consumers from this conduct. We seek comment on this tentative conclusion.

123. *Consumer Protection and Antitrust Law*. We seek comment on whether, in practice, consumer protection and antitrust laws provide sufficient protections against blocking, throttling, paid prioritization, and other conduct that harms the open internet, as the *RIF Order* asserted. The *Mozilla* court explained that the *RIF Order* "theorized why antitrust and consumer protection law is preferred to *ex ante* regulations but failed to provide any meaningful analysis of whether these laws would, in practice, prevent blocking and throttling." The *RIF Order* also seems to concede that blocking, throttling, and discrimination may be permitted under its chosen oversight and enforcement framework, and that paid prioritization may be found to be permissible in many instances.

124. We seek comment on the application of consumer protection laws by the FTC. Notably, a 2021 Supreme Court ruling restricted the FTC's ability to seek monetary relief on behalf of consumers, thereby reducing the deterrent effect of the FTC's actions. Congress has also created other exceptions to the FTC's consumer protection authority and assigned consumer protection responsibilities to other agencies that have expertise in both consumer protection and the relevant industry. Finally, we also observe that while the FTC has generally proceeded through *ex post* enforcement actions and public guidance, reclassification would allow the Commission to proceed by establishing *ex ante*, commonly applicable rules. We seek comment on

the benefits and burdens of such an approach.

125. We also seek comment on whether the FTC's and Department of Justice's (DOJ) antitrust enforcement authority is limited in its ability to protect against open internet harms. The *RIF Order* claims that antitrust would be effective because harmful conduct would be evaluated under the "rule of reason," which it claims amounts to a "consumer welfare test." However, the "rule of reason" analysis includes a subjective determination about whether alleged economic benefits outweigh recognized consumer harms. Because the analysis focuses on economic factors, does it provide sufficient weight to important non-economic factors, which courts have recognized are appropriate to consider under the public interest standard of the Act? Even if strict application of antitrust law does not reveal a violation of section 1 or section 2 of the Sherman Act, could there still be market distortions and power asymmetries, both between ISPs and other market players and between ISPs and consumers, that require *ex ante* intervention in the public interest, at least in instances where the Commission may find that conduct is unjust, unreasonable, or unreasonably discriminatory? For example, would regulatory intervention be necessary in instances when there is a high likelihood of harm to consumers and the likelihood or availability of effective remedies for consumers is speculative?

126. *Consumer Relief*. Even if the *RIF Order's* oversight and enforcement framework were to provide some protection, we seek comment on whether it gives consumers a meaningful opportunity to secure relief. The *RIF Order* concluded that its framework "ensures that consumers have means to take remedial action if an ISP engages in behavior inconsistent with an open Internet." It appears that consumers' primary means for seeking recourse under that framework is to submit complaints to the FTC with the goal of spurring the agency to direct its resources to investigate and address the alleged harms. With antitrust, in particular, it appears that to pursue relief, consumers must submit complaints that describe conduct that inhibits their access to the internet, attempt to tie that conduct to anticompetitive behavior that harms other entities, and otherwise rely on the FTC or other entities to bring suits alleging anticompetitive conduct that also harms the open internet. We seek comment on whether consumers can effectively use these mechanisms to obtain relief, and do so in a timely

manner, and we seek comment generally regarding consumers' experiences obtaining relief following the *RIF Order*.

127. Aside from the remedies offered by law, we seek comment on the adequacy of other methods the *RIF Order* offers that consumers can use to secure relief. First, the *RIF Order* suggests that consumers may be able to seek service from another ISP if they are experiencing harmful conduct, but as discussed above, it is not clear there is adequate local competition in many areas, especially rural areas, to give consumers a meaningful choice among providers, and we seek comment on this assessment. For instance, 36 percent of households lack a competitive option for broadband at speeds of 100/20 Mbps and 70 percent of households in rural areas lack such an option. At higher speeds, the level of competition becomes non-existent in most areas with approximately 96 percent of households lacking a competitive option for gigabit broadband service. Even when consumers have access to another provider not engaging in behavior that is inconsistent with an open Internet, to what extent is their choice between providers often negated because the alternatives charge significantly higher prices or provide lower performance and quality of service? Second, the *RIF Order* states that if ISPs engage in conduct that harms the open internet, public attention from consumer backlash would police their behavior, but it seems to assume that the harmful conduct by ISPs would be obvious or widespread—rather than surreptitious or sporadic—such that a sufficient number of consumers would be aware of the conduct and vocal in their objections to have the necessary force to influence ISP conduct. Third, even if ISP conduct was sufficiently egregious to result in a consumer backlash, how would that backlash police ISP behavior? We seek comment on the foregoing.

128. Further, to the extent the *RIF Order*'s oversight and enforcement framework can address harmful conduct when it occurs, we seek comment on whether the framework will still result in fewer instances where ISPs will be subject to enforcement action for conduct that is clearly harmful to an open internet. If the *RIF Order*'s framework becomes the settled approach, will consumers suffer a greater amount of harmful conduct than would exist under the open internet rules we propose, and receive fewer remedies when that harm occurs? Even when remedies are achieved, will they provide sufficient redress to harms

resulting from ISPs' conduct? Does the *RIF Order*'s regulatory framework adequately serve the public interest, given how essential broadband is to full participation in today's society and economy?

129. *Edge Provider Protections.* We believe the *RIF Order*'s reliance on antitrust protections undermines the virtuous cycle by failing to protect the small edge services that comprise an important part of the internet. While antitrust protections would apply where, for example, an ISP favored its own edge provider, or sought to harm a competing edge provider, antitrust protections do not forbid the unjust or unreasonable exercise of market powers. But it is exactly those practices that could unravel the virtuous cycle. As part of its justification for reliance on antitrust law, the *RIF Order* expresses particular concern about the effect of regulations on small ISPs. But we believe that there are far more edge services that are small—typically many times smaller than the smallest ISPs—which the *RIF Order* does not acknowledge or evaluate. We seek comment on this belief and on the extent to which providers of these edge services would have any leverage in negotiations with ISPs of any size, let alone large, vertically integrated ISPs. Should large, or even small, ISPs begin seeking paid prioritization arrangements, for example, would this disproportionately harm small edge providers, for example, because larger edge providers could use their own countervailing power to better manage the situation? Would this increase entry barriers, harming edge provider competition and innovation, for example, by discouraging new entry against larger established edge providers? In all of these cases, what legal case would a harmed edge provider be able to bring under antitrust law and what would the likelihood of success be? The *RIF Order* argues that ISPs have incentives to support nascent competition as more edge provider competition will reduce the countervailing power of large, entrenched ISPs. We seek comment on whether this is accurate, and in particular whether any efforts or investments by an ISP to help nascent edge providers would produce diffuse benefits to all ISPs, and thus whether any single ISP would have appropriate incentives to help develop edge provider competition.

130. Research in innovation economics suggests that edge innovation is heterogeneous. Some types of edge innovation will thrive under general purpose open networks. Such

innovations could have significant positive spillover effects that benefit the broader internet ecosystem. However, other types of edge innovation, especially during the early phases of the innovation process, may be facilitated by quality of service differentiation of the network. This suggests that a forward-looking open internet policy will be most supportive of innovation if it protects the openness of the access platforms for innovations with high spillover effects while at the same time allowing non-discriminatory forms of network differentiation to support edge innovations that are facilitated by such support. We seek comment on this proposed analysis.

131. *Costs of Oversight Regime.* We seek comment generally on the costs to ISPs resulting from the *RIF Order*'s chosen oversight regime. The *RIF Order* claims that its approach would lower compliance costs for ISPs. We reiterate, however, that because the *RIF Order*'s preemption directive was vacated by the D.C. Circuit in *Mozilla*, ISPs are now subject to a patchwork of state requirements for BIAS, rather than a national regulatory framework. We seek comment on the costs of this patchwork approach.

132. We also seek comment on the costs of the *RIF Order*'s consumer protection and antitrust oversight framework. We observe that whether an act is unfair or deceptive under consumer protection law each depends on its own three-prong subjective test, which can result in unforeseen outcomes, and the antitrust rule of reason relies on a case-by-case evaluation. In light of these factors, we seek comment on whether the *RIF Order*'s removal of bright-line, *ex ante* rules can result in significant compliance cost for ISPs. Relatedly, what are the costs to ISPs for having to evaluate the risks of their planned conduct under this consumer protection and antitrust oversight framework?

B. Conduct Rules

133. We propose to adopt rules to prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements, and also seek comment on the adoption of a proposed general conduct standard for ISPs. The last several years have demonstrated not only broadband's essential value, but also the consequences to consumers of its absence or degradation, and we therefore believe it important to establish clear, bright-line rules. We seek comment on the proposals and analyses herein.

134. The conduct rules we propose track the language of the rules the Commission adopted in the *2015 Open Internet Order*. In 2015, the Commission found that blocking, throttling, and paid prioritization arrangements were three practices that “in particular demonstrably harm the open internet.” The Commission adopted rules to ban these three practices, finding that they are “inherently unjust and unreasonable, in violation of section 201(b) of the Act, and that these practices threaten the virtuous cycle of innovation and investment that the Commission intends to protect under its obligation and authority to take steps to promote broadband deployment under section 706 of the 1996 Act.” Even while eliminating these protections in 2018, the *RIF Order* still recognized the harms of blocking and throttling practices and required disclosure of such practices under its revised transparency rule. Below, we seek comment on how experience since the *RIF Order* would help inform the scope and language of prohibitions on blocking, throttling, and paid prioritization arrangements. At the outset, however, we seek comment at a broader level on whether these three practices are still the key threats to internet openness.

135. We do not anticipate that the open Internet rules we propose today will have a harmful effect on investment. ISP investment was not inhibited from 2005 through 2016, when the Commission consistently sought to impose and enforce open internet standards. We also believe that many ISP investment decisions over the next several years will be significantly influenced by the influx of federal and state funding allocated to ISPs to support infrastructure deployment and broadband connectivity. In light of these facts, we do not expect that adopting open internet rules will change ISP investment decisions. Do commenters agree? Furthermore, we believe that “[w]ithout an open Internet, there would be less broadband investment and deployment” because of the expected harm to the virtuous cycle. As the Commission concluded in the *2015 Open Internet Order*, “to the extent that our decision might in some cases reduce providers’ investment incentives, we believe any such effects are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that our core broadband policies will promote.” We seek comment on these views.

1. Preventing Blocking of Lawful Content, Applications, Services, and Non-Harmful Devices

136. We propose to adopt a bright-line rule prohibiting ISPs from blocking lawful content, applications, services, or non-harmful devices. In 2015, the Commission found that ISPs function as gatekeepers for both their end-user customers who access the internet, and for various transit providers, CDNs, and edge providers attempting to reach the broadband provider’s end-user subscribers. The Commission concluded that ISPs have the economic incentives and technical ability to engage in practices that pose a threat to internet openness by harming other network providers, edge providers, and end users. Reversing course in 2018, the Commission determined, in contrast, that “ISPs have strong incentives to preserve internet openness, and these interests typically outweigh any countervailing incentives an ISP might have.” As discussed above, we tentatively conclude that ISPs continue to have the incentive and ability to engage in practices that threaten internet openness, and as such, we believe rules are needed to protect a consumer’s right to access lawful content, applications, and services, and to use non-harmful devices. We seek comment on this proposed analysis.

137. As the Commission found in the *2010 Open Internet Order* and the *2015 Open Internet Order*, we believe that “the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking is essential to the Internet’s openness.” To that end, we propose to adopt the following no-blocking rule applicable to both fixed and mobile providers of BIAS, which tracks the language of the prohibition adopted by the *2015 Open Internet Order*:

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

We seek comment on this proposed rule and whether this remains the best formulation of a no-blocking principle for ISPs. As in 2015, we intend that the phrase “content, applications, and services” refers to all traffic transmitted to or from end users of a broadband internet access service, including traffic that may not fit clearly into any of these categories. Is this language expansive enough to encompass all types of internet traffic, or are there additional categories that we should include? We also propose to make clear that the no-

blocking rule would prohibit ISPs from charging edge providers a fee to avoid having the edge providers’ content, service, or application blocked from reaching the broadband provider’s end-user customers. As in 2015, we also propose that this prohibition will apply to transmission of lawful content only and does not prevent or restrict an ISP from refusing to transmit unlawful material. We seek comment on these proposals. What other consequences of a no-blocking rule should we consider?

138. As far back as the Commission’s *Internet Policy Statement* in 2005, major ISPs have broadly accepted a no-blocking principle. Even after the repeal of the no-blocking rule, many ISPs continue to advertise a commitment to open internet principles on their websites, which include commitments not to block traffic except in certain circumstances. Rather than reflect a lack of potential harm to consumers and the open internet, we believe that these continued commitments to no-blocking principles emphasize their importance to the internet as we know it. We believe that codifying this principle in the Commission’s rules is necessary to protect consumers and internet openness against any ISP’s decision in the future to move away from this widely accepted principle. Furthermore, because this principle is so widely accepted, including by ISPs, we anticipate compliance costs will be minimal. We seek comment on this analysis. We seek comment on whether the predictive reasoning underlying the Commission’s repeal of the no-blocking rule in 2018 proved accurate. We also seek specific comment regarding any instances of an ISP blocking lawful content, applications, services or non-harmful devices in the years since the Commission repealed the no-blocking rule. Finally, we seek comment on the costs and benefits of a no-blocking rule.

2. Preventing Throttling of Lawful Content, Applications, Services, and Non-Harmful Devices

139. Next, we propose to adopt a rule to prevent ISPs from throttling lawful content, applications, services, and non-harmful devices. As part of the no-blocking rule that the Commission adopted in the *2010 Open Internet Order*, the Commission prohibited ISPs from “impairing or degrading particular content, applications, services, or non-harmful devices so as to render them effectively unusable (subject to reasonable network management),” because such conduct “can have the same effects as outright blocking.” In 2015, the Commission concluded that a standalone prohibition was required to

prevent ISPs from impairing or degrading lawful internet traffic. The Commission used the term “throttling” to refer to such conduct that is not outright blocking, but that inhibited the delivery of particular content, applications, or services, or particular classes of content, applications, or services.

140. We propose to adopt the following no-throttling rule applicable to both fixed and mobile providers of BIAS, which tracks the language of the Commission’s *2015 Open Internet Order*, and seek comment on our proposal:

A person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not impair or degrade lawful internet traffic on the basis of internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

As in 2015, we intend this rule to prohibit conduct that impairs or degrades lawful traffic to a non-harmful device or class of devices, which includes any conduct by an ISP to impair, degrade, slow down, or render effectively unusable particular content, services, applications, or devices, that is not reasonable network management. We also propose to give the same meaning to “content, applications, and services” as we propose in the context of the no-blocking rule, and we seek comment on this proposal. Have there been any technological changes or advancements in network management since 2015 that we should reflect in the proposed rule? As written, does the proposed rule provide clear guidance to ISPs and customers on what is considered prohibited conduct? As in 2015, we propose that transfers of unlawful content or unlawful transfers of content would not be protected by the no-throttling rule. Further, as with our proposed no-blocking rule, we propose to prohibit ISPs from imposing a fee on edge providers to avoid having the edge providers’ content, service, or application throttled. We seek comment on these proposals. What other aspects and consequences of a no-throttling rule should we consider?

141. As in 2015, we propose that while a no-throttling rule would address instances in which an ISP targets particular content, applications, services, or non-harmful devices, it would not address the practice of slowing down an end user’s connection to the internet based on a choice clearly made by the end user. For example, an ISP may offer a data plan in which a subscriber receives a set amount of data at one speed tier and any remaining data at a lower tier. We seek comment on our

proposal to maintain this distinction. We do not intend to leave such data plans without oversight, however, and therefore propose to allow the Commission to review the particulars of a certain data plan, as required by sections 201 and 202 of the Act, which prohibit unjust and unreasonable charges and practices, or our proposed general conduct standard, discussed below.

142. As discussed above, because BIAS connections were so essential during the pandemic, we believe ISPs have been under increased scrutiny by the Commission, the media, and the public since March 2020, and therefore have had a strong incentive to follow their voluntary commitments to maintain service consistent with certain conduct rules established in the *2015 Open Internet Order*. We believe that this, coupled with unprecedented consumer demand for BIAS during the pandemic and state regulations addressing ISP conduct, helped to constrain ISPs from engaging in conduct that could harm internet openness. These constraints, however, are neither permanent nor uniform, and we believe that incentives for ISPs to degrade competitors’ content, applications, or devices remain; as such, we propose that rules are needed to protect consumers’ right to access lawful internet traffic of their choice without impairment or degradation. We seek comment on this proposed analysis, and invite comment on ISPs’ incentives to engage in throttling conduct harmful to internet openness. As the Commission recognized in the *RIF Order*, “[t]he potential consequences of blocking and throttling lawful content on the internet ecosystem are well-documented in the record and in Commission precedent.” Even after the repeal of the no-throttling rule, ISPs continue to advertise on their websites that they do not throttle traffic except in limited circumstances. As a result, we anticipate that prohibiting throttling of lawful internet traffic will impose a minimal compliance burden on ISPs. Do commenters agree? We seek comment on specific costs or technical concerns that our proposed rule would impose on ISPs, including small providers. We also seek comment on the reasoning underlying the Commission’s repeal of the no-throttling rule in 2018. We seek specific comment regarding any instances of an ISP throttling lawful content, applications, services, or non-harmful devices in the years since the no-throttling rule was repealed.

3. No Paid or Affiliated Prioritization

143. We next propose to ban arrangements in which an ISP accepts

consideration (monetary or otherwise) from a third party to manage its network in a manner that benefits particular content, applications, services, or devices. Under this proposal, we would also prohibit arrangements in which a provider manages its network in a manner that favors the content, applications, services, or devices of an affiliated entity. The Act defines “affiliate” as “a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term ‘own’ means to own an equity interest (or the equivalent thereof) of more than 10 percent.” In 2015, the Commission adopted a rule banning these type of paid or affiliated prioritization agreements, finding that such practices “harm consumers, competition, and innovation, as well as create disincentives to promote broadband deployment.” We tentatively conclude that this reasoning remains applicable today. We seek comment on this proposal and the underlying analysis.

144. Tracking the language of the Commission’s *2015 Open Internet Order*, we propose to adopt the following definition of “paid prioritization” and rule banning such arrangements:

A person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. “Paid prioritization” refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.

In adopting a ban on paid prioritization in 2015, the Commission sought to prevent the bifurcation of the internet into a “fast” lane for those with the means and will to pay and a “slow” lane for everyone else. This development, the Commission reasoned, would introduce artificial barriers to entry, distort the market, harm competition, harm consumers, discourage innovation, undermine public safety and universal service, and harm free expression. The Commission was concerned that preferential treatment arrangements would create a chilling effect, disrupting the internet’s virtuous cycle of innovation, consumer demand, and investment, and that the widespread use of paid prioritization practices would cause damage to

internet openness that would be difficult to reverse and challenging to track. We tentatively conclude that these concerns remain valid today, and we seek comment on this conclusion. What are some examples of harms or categories of harms that paid prioritization arrangements might cause to the open internet and to consumers? Does the language of the proposed rule make clear the scope of this proposed prohibition? What other aspects or consequences of a ban on paid prioritization practices should we consider?

145. Previously, the Commission has found it well-established that ISPs have both the incentive and the ability to engage in paid prioritization. In its *Verizon* opinion, the D.C. Circuit noted the powerful incentives ISPs have to accept fees from edge providers in return for excluding their competitors or for granting prioritized access to end users. Some ISPs continue to advertise that they do not engage in paid or affiliated prioritization practices. Even with similar promises from ISPs in 2015, the Commission concluded that the potential harm to the open internet was too significant to rely on mere promises from ISPs because “the future openness of the internet should not turn on the decision of a particular company.” We tentatively conclude that this reasoning remains valid today, and we seek comment on this tentative conclusion, and any alternatives we should consider.

146. In choosing to repeal the ban on paid prioritization in 2018, the Commission found that the costs of a ban outweighed the benefits, and that the transparency rule and the enforcement of existing antitrust and consumer protection laws would sufficiently address many of the concerns regarding the dangers of paid prioritization arrangements. We seek comment on that assessment from 2018. In weighing the costs and benefits, the Commission did not identify specific compliance costs, but rather identified the costs in the form of forgone benefits. While we do not dispute that some potential benefits may result from paid prioritization arrangements, we tentatively conclude that the potential harms to consumers and the open internet outweigh any speculative benefits. Do commenters agree? Why or why not? What compliance costs might ISPs incur as a result of such a ban, including small providers? The Commission also found in 2018 that paid prioritization could be a tool in helping to close the digital divide by reducing BIAS subscription prices for consumers. Do commenters agree with

this assessment? We tentatively conclude that the Commission’s 2018 finding that existing antitrust and consumer protection laws, in conjunction with some form of a transparency rule, offer enough protection against the potential harms caused by paid prioritization arrangements was erroneous. We seek comment on this tentative conclusion.

147. As part of a rule prohibiting paid prioritization arrangements, we also propose to adopt a rule concerning waiver of such a ban that establishes a balancing test. Under our waiver rules, the Commission may waive any rule in whole or in part, “for good cause shown.” A general waiver of the Commission’s rules is only appropriate if special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest. In 2015, the Commission found that it was appropriate to adopt specific rules concerning the factors that it will use to examine a waiver request of the paid prioritization ban. We tentatively conclude that it remains appropriate to accompany a rule prohibiting paid prioritization arrangements with specific guidance on how the Commission would evaluate subsequent waiver requests. We seek comment on this conclusion. Tracking the language of the *2015 Open Internet Order*, we propose to adopt the following rule, and seek comment on this proposal:

The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the internet.

148. Following the framework the Commission established in 2015, we propose to require an applicant seeking a waiver of our proposed rule to prohibit paid prioritization arrangements to make two related showings. First, the applicant would need to demonstrate that the practice will have some significant public interest benefit. The applicant could make such a showing by providing evidence that the practice furthers competition, innovation, consumer demand, or investment. Second, the applicant would need to demonstrate that the practice does not harm the nature of the open internet. This second showing would include, but is not limited to, providing evidence that the practice: (i) does not materially degrade or threaten to materially degrade the BIAS of the general public; (ii) does not hinder consumer choice; (iii) does not impair competition, innovation, consumer demand, or investment; and

(iv) does not impede any forms of expression, types of service, or points of view. We seek comment on the continued relevance of these four examples. Should the Commission consider other factors when considering a request to waive our proposed ban on paid prioritization arrangements? Do commenters agree that this language creates a “high bar” for potential applicants to meet, ensuring that the Commission would only grant waiver relief in exceptional cases?

4. General Conduct Rule

149. We propose to adopt a general conduct standard, which would prohibit practices that unreasonably interfere with or disadvantage consumers or edge providers. In 2015, the Commission adopted a standard to prohibit, on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the internet content, services, and applications of their choosing or of edge providers to access consumers using the internet. The Commission reasoned that while the bright-line rules against blocking, throttling, and paid prioritization arrangements would act as “critical cornerstone[s] in protecting and promoting the open internet,” it also needed a mechanism to respond to “other current or future practices that cause the type of harms our rules are intended to address.” The general conduct standard was necessary, in other words, to ensure that ISPs did not find a technical or economic means to evade these bright line bans to wield their gatekeeper power in a way that would compromise the open internet. We agree with the Commission’s conclusion in 2015 that it is “critical that access to a robust, open internet remains a core feature of the communications landscape, but also that there remains leeway for experimentation with innovative offerings.” We believe that this reasoning continues to support the adoption of a general conduct standard to operate as the catch-all backstop to the three bright-line prohibitions, and we seek comment on this analysis.

150. We propose to adopt a general conduct standard that tracks the language of the *2015 Open Internet Order*, and we seek comment on this proposal:

Any person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users’ ability to select, access, and use broadband internet access service or the lawful internet content,

applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

In 2015, the Commission found that careful application of this standard would act to not only balance the benefits of innovation against the harms to end users and edge providers, but also act to protect free expression. If adopted, we anticipate that this general conduct standard would accomplish these same goals going forward, and we seek comment on this prediction. Does the proposed language capture the scope of behaviors that the Commission might need to address? Have there been any technical or market developments that should affect our approach? Is there an alternative standard we should adopt to establish a general conduct rule?

151. Consistent with the Commission's 2015 approach, we propose to enforce this standard with a framework and in a manner that would provide certainty and flexibility to the industry and encourage innovation, while best protecting the open internet. First, we propose to follow a case-by-case approach that would consider the totality of the circumstances when analyzing whether conduct satisfies the standard. Second, we propose a non-exhaustive list of factors that we would consider to aid in our analysis. These factors would include: (i) whether a practice allows end-user control and enables consumer choice; (ii) whether a practice has anti-competitive effects in the market for applications, services, content, or devices; (iii) whether a practice affects consumers' ability to select, access, or use lawful broadband services, applications, or content; (iv) the effect a practice has on innovation, investment, or broadband deployment; (v) whether a practice threatens free expression; (vi) whether a practice is application agnostic; and (v) whether a practice conforms to best practices and technical standards adopted by open, broadly representative, and independent internet engineering, governance initiatives, or standards-setting organizations. Do all of these factors remain relevant in today's internet ecosystem? If not, why not? Are there other factors we should consider including in this non-exhaustive list that would aid with industry compliance or Commission enforcement?

152. We believe that the general conduct standard we propose today, mirroring that adopted in the *2015 Open Internet Order*, provides sufficient guidance to ISPs for purpose of

compliance, a conclusion affirmed by the D.C. Circuit. Nonetheless, in 2018, the Commission repealed the general conduct standard because it found that it was "vague and ha[d] created regulatory uncertainty in the marketplace hindering investment and innovation." We seek comment on whether there are additional steps we should take to ensure that ISPs understand the types of conduct and practices that might be prohibited under our proposal. Are there any specific practices that would or would not violate this proposed rule, and if so, should we provide examples of those practices? For example, are there any zero rating or sponsored data practices that raise particular concerns under the proposed general conduct standard? What would the compliance costs be for ISPs, particularly small providers? How would our proposed general conduct standard affect current and future ISP business practices? What other aspects or consequences of imposing a general conduct standard should we consider? We seek comment on whether the Commission's prediction in 2018 that eliminating the internet conduct standard will "benefit consumers, increase competition, and eliminate regulatory uncertainty that has a 'corresponding chilling effect on broadband investment and innovation'" has been borne out. Is it reasonable to attribute any growth and development in broadband markets and services to elimination of the general conduct rule, or is such a potential connection too attenuated? The *RIF Order* also found that "the benefits of the internet conduct standard provides approximately zero additional benefits" when compared to the antitrust and consumer protection enforcement in place through the FTC, while imposing negative benefits in the form of delayed or never-brought-to-market innovations. We seek comment on whether elimination of the general conduct rule has resulted in new innovations which would not have been permissible under the general conduct rule.

153. In the alternative, we seek comment on whether we should instead rely on the "just and reasonable" standards in sections 201 and 202 of the Act. In 2015, the Commission explained that the general conduct rule was its interpretation of sections 201 and 202 in the broadband context. We seek comment on whether it remains necessary to enunciate a specific rule, like the proposed general conduct standard described above, by interpreting sections 201 and 202 in the context of broadband, or whether it

would be sufficient to rely on sections 201 and 202 alone to address potential harmful practices and behaviors. Would the latter alternative approach provide sufficient certainty and clarity to ISPs regarding what practices would violate the Act's standard? If we choose not to adopt a general conduct rule, are there other ways for us to aid our enforcement efforts related to sections 201 and 202 in the broadband context?

C. Transparency Rule

154. Policymakers have consistently recognized the importance of transparency regarding the terms and service characteristics of broadband offerings, even as certain details of the Commission's transparency requirements have changed over time. This includes not only transparency requirements that have been in place since they originally were adopted in the *2010 Open Internet Order*, but also the broadband label the Commission adopted in 2022, which gives consumers a convenient tool to research and compare broadband offerings. We propose to build upon the foundation of our existing transparency rule, informed by our recent experience in adopting broadband label requirements, and we seek comment on possible modifications or additions to update the transparency rule to ensure that end users, edge providers, the broader internet community, and the Commission have the information they need to assess ISPs' terms and conditions for BIAS in a timely and effective manner.

1. Policy Benefits of Transparency Requirements

155. We anticipate transparency requirements are likely to continue playing a key role in the broadband marketplace. In the *2010 Open Internet Order*, the Commission adopted its original BIAS transparency rule, explaining that "[e]ffective disclosure of broadband providers' network management practices and the performance and commercial terms of their services promotes competition—as well as innovation, investment, end-user choice, and broadband adoption." The Commission echoed this policy judgment in the *2015 Open Internet Order*, going on to adopt additional clarifications and enhancements to the transparency rule—along with a broadband label safe harbor—to "better enable end-user consumers to make informed choices about broadband services by providing them with timely information tailored more specifically to their needs," and to "provide edge providers with the information necessary to develop new content,

applications, services, and devices that promote the virtuous cycle of investment and innovation.” In discussing transparency in the *RIF Order*, the Commission noted that “[d]isclosure supports innovation, investment, and competition by ensuring that entrepreneurs and other small businesses have the technical information necessary to create and maintain online content, applications, services, and devices, and to assess the risks and benefits of embarking on new projects.” In that *Order*, however, the Commission elected to “return, with minor adjustments, to the transparency rule adopted in the *2010 Open Internet Order*,” under the theory that such an approach would “provide[] consumers and the Commission with essential information while minimizing the burdens imposed on ISPs.” We seek comment on how the Commission can ensure that its transparency rule most effectively advances these longstanding policy goals.

156. In 2021, Congress enacted and the President signed the Infrastructure Act, which, in relevant part, directs the Commission “to promulgate regulations to require the display of broadband consumer labels,” using as an initial point of reference the broadband label established in connection with the enhanced transparency rule adopted in the *2015 Open Internet Order*. The Infrastructure Act recognizes the benefits of a label “to disclose to consumers information regarding broadband internet access service plans,” further observing that consumers need the ability to “evaluate broadband internet access service plans” through information that is “available, effective, and sufficient” to meet that need. In November 2022, the Commission adopted the broadband consumer label rules and sought further comment in the accompanying *Broadband Label Further Notice*. These broadband label requirements promote “consumer access to clear, easy-to-understand, and accurate information about the cost for broadband services and will empower consumers to choose services that best meet their needs and match their budgets and ensures that they are not surprised by unexpected charges or service quality that falls short of their expectations.” We seek comment on the interplay between the broadband label requirements adopted in the *Broadband Label Order*, the possible amendments raised in the *Broadband Label Further Notice*, and any modifications to the transparency rule that we might adopt here. For example, to the extent that the content

of the required disclosures under the two requirements diverge, how can we avoid any undue duplication of effort in making each required disclosure, particularly for small providers? Should the broadband label requirements and the transparency rule as it might be modified here be legally distinct, or legally interrelated, requirements?

2. Content of Required Disclosures

157. We seek comment on what, if any, additional disclosures should be required under the transparency rule. As a starting point, we believe that the disclosures required under the current transparency rule are an appropriate baseline, and we propose to retain them in the transparency rule going forward. We seek comment on this proposal. As the Commission recently explained when adopting broadband label requirements, “the transparency rule seeks to enable a deeper dive into details of broadband internet service offerings, which could be relevant not only for consumers as a whole, but also for consumers with particularized interests or needs, as well as a broader range of participants in the internet community—notably including the Commission itself.” Are the current requirements of the transparency rule sufficient to enable that deeper dive into details of broadband internet service offerings?

158. We seek comment on whether enhancements to the content of disclosures required by the transparency rule under the *2015 Open Internet Order* should be incorporated in a revised transparency rule here. With respect to required disclosure of commercial terms, the *2015 Open Internet Order* provided additional specifications regarding ISPs’ disclosures about price and related terms and their relationship with disclosures regarding privacy and redress options. Regarding the disclosure of performance characteristics, the *2015 Open Internet Order* provided additional specifications regarding the disclosure of network performance and network practices. The *RIF Order* eliminated those enhancements under the theory that their burdens to ISPs exceeded their benefits. The *Broadband Label Order*, on the other hand, required ISPs to disclose in the broadband labels their typical upload and download speeds and typical latency metrics associated with their broadband services, noting that speed in particular “remains the network performance metric of greatest interest to the consumer.” The Commission similarly found that low delay or latency is important to any application involving users interacting

with each other, a device, or an application. We seek comment on these assessments, including updated evidence regarding the relative costs and benefits of the transparency enhancements based on experience following the *RIF Order*. To the extent that the transparency requirements were intended to provide needed information not only to consumers but also edge providers, the broader internet community, and the Commission, how should that affect our assessment of the overall benefits of the enhanced transparency requirements? Would the enhancements to the transparency rule adopted in the *2015 Open Internet Order*, or other modifications to the current transparency rule, assist the Commission in monitoring and enforcing compliance with the conduct rules proposed here? Are there any metrics that are particularly important to some subset of consumers that we should consider including despite those metrics not being of significant value to the average consumer?

159. In addition, we seek comment on other considerations relevant to possible changes to the content ISPs may be required to disclose under the transparency rule. For one, we seek comment on whether we should revise the transparency rule to incorporate the Commission’s clarifications and guidance regarding prior versions of the transparency rule. For example, a 2011 Public Notice (*2011 Advisory Guidance*) provided “examples of approaches to disclosure that would satisfy the transparency rule,” discussing point-of-sale disclosures, service descriptions, the extent of required disclosures, disclosures for the benefit of edge providers, and disclosures regarding security measures. A 2014 Public Notice (*2014 Advisory Guidance*) summarized the applicability and requirements of the transparency rule and the potential enforcement consequences if it were violated, and emphasized the importance of consistency between ISPs’ disclosures under the transparency rule and their advertising claims or other public statements. And a 2016 Public Notice (*2016 Advisory Guidance*) provided guidance regarding acceptable methodologies for disclosure of network performance information and point-of-sale disclosures consistent with the *2015 Open Internet Order*. The *RIF Order* subsequently eliminated the enhancements adopted in 2015, and the clarifications in the *2016 Advisory Guidance* along with it. The *RIF Order* endorsed the clarifications in the *2011 Advisory Guidance*, but neither endorsed nor disclaimed the

clarifications in the *2014 Advisory Guidance*. We seek comment on whether and to what extent the Commission should reaffirm, reject, or elaborate on any of that prior guidance in connection with any modification of the transparency rule here. Are there other areas where additional clarification or guidance would be beneficial either under the existing transparency rule or a revised transparency rule?

160. We also seek comment on the availability of information that ISPs can or should use to comply with the content of disclosures required under the current or modified transparency rule. For example, the *RIF Order* allowed fixed ISPs participating “in the Measuring Broadband America (MBA) program [to] disclose their results as a sufficient representation of the actual performance their customers can expect to experience.” Should we continue that approach here, or make use of the MBA program in some other way? To what extent can or should we allow ISPs to use other specific information sources or measurement approaches to provide transparency disclosures? Should we clarify that certain sources of information are permissible to rely on in making the required disclosures? Or should we go further in particular cases and require the use of certain data sources for reasons of uniformity, reliability, or otherwise? Should the Commission require ISPs to include additional information in transparency disclosures regarding their measurement methodologies and practices?

161. Finally, we seek comment on any other considerations relevant to our evaluation of the appropriate content of required disclosures under the transparency rule. Is there additional content that we should require? For example, the *2015 Open Internet Order* considered, but ultimately did not adopt, additional disclosure requirements regarding “the source, location, timing, or duration of network congestion,” packet corruption and jitter, and “disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage.” In light of subsequent experience, should we revisit the decisions not to require such disclosures? Should the Commission consider requiring more detailed disclosures regarding the requirements, restrictions, or standards for enforcement of data caps, and if so, how? We also seek comment on whether different content disclosures should be required for mobile ISPs than for fixed ISPs.

3. Means of Disclosure

162. We seek comment on how best to ensure that the content of the required disclosures is made available in a timely and effective manner without undue burdens on ISPs, both as a general matter and in the specific respects discussed below. In the *RIF Order*, the Commission allowed providers to make the required disclosures either “on a publicly available, easily accessible website,” or by “transmit[ing] their disclosures to the Commission,” which would then make them “available on a publicly available, easily accessible website.” We seek comment on practical experiences with that approach, and whether that approach should be retained in its current form, modified, or eliminated in favor of disclosures required specifically on provider websites—as had been the case under prior versions of the transparency rule. When the Commission recently adopted broadband label rules, it required ISPs to display labels on their websites, as well as at other points of sale. While it “aim[ed] to give providers flexibility in how they display labels,” the Commission also sought “to ensure that the labels are prominently displayed on any device on which the consumer accesses and views the labels, including mobile devices” and in a uniform format that will best assist consumers in comparing pricing, fees, performance characteristics, and data allowances across different providers. Are there lessons from the Commission’s recent experience crafting broadband label requirements that should inform our approach to the manner of making disclosures under the transparency rule?

163. We also seek comment on whether any additional requirements are warranted regarding ISPs’ website disclosures under the transparency rule. For ISPs electing to make the required disclosures on a “publicly available, easily accessible website,” the *RIF Order* “reaffirm[ed] the means of disclosure requirement from the [2010] *Open Internet Order* and the clarification found in the *2011 Advisory Guidance*.” Should the approach reflected in the current transparency rule, as informed by the *2010 Open Internet Order* and *2011 Advisory Guidance*, be retained or modified? Should we require the disclosures to be in machine-readable format, akin to the Commission’s recently-adopted approach for broadband consumer labels?

164. We also seek comment on whether disclosures under the transparency rule should be required in

additional locations. For instance, are there places on an ISP’s website besides a point of sale where disclosures should be made?

165. Ensuring that disclosures under the transparency rule are accessible to individuals with disabilities is a priority. The *RIF Order* explained that ISPs making website disclosures under the transparency rule must make them “in a manner accessible by people with disabilities.” Has this direction been adequate, or are additional requirements warranted to ensure that disclosures under the transparency rule are accessible to individuals with disabilities? For example, should we encourage or require that website disclosures under the transparency rule follow guidance developed by the Web Accessibility Initiative? Most recently, the Commission required ISPs to post broadband label information on their websites in an accessible format, and strongly encouraged them to use the most current version of the Web Content Accessibility Guidelines (WCAG). In the *Broadband Label Further Notice*, it sought comment on whether to adopt specific criteria, based on the WCAG standard. Are there other industry guidelines that providers should be encouraged or required to follow? To the extent that we ultimately require transparency disclosures in locations other than websites and in alternative formats besides websites, is there additional guidance or requirements we should adopt to ensure accessibility to individuals with disabilities?

166. Further, we seek comment on possible “direct notification” requirements, including the costs and benefits of such requirements. The *2015 Open Internet Order* had imposed such an obligation, but the *RIF Order* eliminated that requirement. The Commission also recently declined to adopt a direct notification requirement in the context of its broadband label rules, finding that the broadband labels are specifically intended to inform consumers at the time of purchase. We note, however, the broader purpose of the transparency rule compared to the broadband labels. We therefore seek further comment and updated information on the benefits and burdens of such a requirement in the specific context of the transparency rule, in light of this more recent experience.

167. Finally, we seek comment on any other changes to our transparency rule regarding the means of disclosure. Are there additional requirements regarding the means of disclosure under the transparency rule that the Commission should adopt to ensure that information is available in a timely and effective

manner? Conversely, are there existing requirements regarding the means of disclosure that commenters believe impose burdens that outweigh their benefits, and thus should be eliminated?

4. Implementation and Other Issues

168. We seek comment on any implementation issues associated with potential modifications to the transparency rule, and whether we should consider additional time for compliance by small providers.

169. We also seek comment on whether the Commission should adopt new safe harbors for compliance with the transparency rule. Are there particular data sources or methodologies for complying with particular elements of the transparency rule, whether in its current form or as it may be modified, that the Commission should treat as a safe harbor or otherwise presumptively reasonable? Are there safe harbors the Commission should adopt for compliance with the transparency rule as a whole, akin to the broadband label safe harbor adopted in the *2015 Open Internet Order*?

170. Further, we seek comment on whether we should adopt recordkeeping requirements governing the types of information or records ISPs rely upon to support the content of their disclosures made under the transparency rule. Would such a requirement be helpful to our enforcement of the transparency rule by enabling us to evaluate the reasonableness of ISPs' claims? Would such requirements help inform our evaluation of the effectiveness of the rule and the need for changes over time? This requirement could, for example, help to identify and account for particular data sources or methodologies that prove to be especially reliable or unreliable. In the *Broadband Label Order*, the Commission required ISPs to maintain an archive of all labels no longer posted on their websites and at alternate sales channels, along with evidence sufficient to support the accuracy of the labels' content. Given that ISPs must have a basis for the claims made in their disclosures under the transparency rule, are there particular ways of retaining that information that could minimize the burden on ISPs? If we elect to adopt recordkeeping requirements, what period of time would best balance the benefits to the Commission from having the information available against the compliance burden for ISPs?

171. In addition, we seek comment on the overall cost effectiveness of modifications we might adopt to the transparency rule. What are the most cost-effective ways of ensuring that

consumers and edge providers receive the information they need in a timely and effective manner? How can we minimize implementation and compliance burdens for ISPs, consistent with those goals?

D. Scope of Open Internet Rules

172. *Internet Traffic Exchange.* We propose to decline to apply any open internet rules to internet traffic exchange. We tentatively conclude, consistent with the *2015 Open Internet Order* and as discussed further below, that case-by-case review under sections 201 and 202 is "an appropriate vehicle for enforcement where disputes are primarily over commercial terms and that involve some very large corporations, including companies like transit providers and CDNs, that act on behalf of smaller edge providers." We believe that the best approach with respect to internet traffic exchange is to "watch, learn, and act as required" but to not intervene with prescriptive rules. We seek comment on our proposed approach.

173. *Reasonable Network Management.* We also propose that reasonable network management would not be considered a violation of prohibitions on blocking and throttling, or the general conduct rule, and seek comment on our proposal. In 2015, the Commission concluded that a reasonable network management exception to the conduct rules was necessary for ISPs to optimize overall network performance and maintain a consistent quality experience for consumers while carrying a variety of traffic over their networks. We tentatively conclude this analysis remains equally applicable today and seek comment on this tentative conclusion. Is excluding reasonable network management practices still both necessary and advisable? In the *RIF Order*, the Commission defined "reasonable network management" to mean "a practice 'appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband internet access service,'" returning to the definition the Commission adopted in the *2010 Open Internet Order*. In 2015, the Commission had slightly modified that definition, adding that "a network management practice is a practice that has a primarily technical network management justification, but does not include other business practices." We seek comment on how we should define "reasonable network management" for the purposes of our proposed open

internet rules, and invite commenters to provide examples of how this term is best interpreted with regard to management of today's broadband networks. Is it necessary for the Commission to provide further guidance on the reasonable network management exception to provide certainty for ISPs? How can we ensure that the reasonable network management exception is not used to circumvent the proposed rules, while also providing regulatory certainty to ISPs and enabling them to appropriately manage their networks?

E. Enforcement of Open Internet Rules

174. We seek comment on the best framework for enforcing any potential open internet rules. Our aims are to enable effective and timely conflict resolution and to provide clear guidance on allowed and prohibited practices. We seek comment on what enforcement regime will be most efficient and least burdensome for customers, edge providers, and ISPs, including small entities.

175. In 2010, the Commission adopted a multipart framework to ensure prompt and effective enforcement of the open internet rules and encouraged informal and private resolution of matters. The first component involved informal complaints filed under § 1.41 of the Commission's rules. The Commission noted that this vehicle was "already available" and that "no filing fee is required." "Although individual informal complaints will not typically result in written Commission orders," the Commission explained that the Enforcement Bureau "will examine trends or patterns in [informal] complaints to identify potential targets for investigation and enforcement action." Should informal or other means fail to resolve a dispute, the Commission adopted new procedures for filing formal complaints that would "permit anyone—including individual end users and edge providers—to file a claim alleging that another party has violated a statute or rule, and asking the Commission to rule on the dispute." The Commission opted to base the formal complaint rules on the Part 76 cable access complaint rules, finding that those rules are "more streamlined and thus preferable." Citing sections 403 and 503(b) of the Act, the Commission further observed that it has the authority to initiate enforcement actions on its own motion, including the issuance of forfeitures.

176. *Advisory Opinions and Enforcement Advisories.* In 2015, the Commission concluded that the use of advisory opinions, similar to those issued by DOJ's Antitrust Division,

would be in the public interest and had the potential to provide clarity, guidance, and predictability concerning the Commission's open internet rules. The *RIF Order* eliminated the advisory opinion process established in the *2015 Open Internet Order*, reasoning that without conduct rules, advisory opinions were no longer necessary, and concluding that the advisory opinion process did not diminish regulatory uncertainty, particularly for small providers, but rather added costs, caused uncertain timelines, and inhibited innovations. The elimination of the advisory opinion process was based on predictive comments in the record because no ISP had yet requested an advisory opinion through the Commission's process. When the D.C. Circuit in *USTA* rejected the challenge to the *2015 Open Internet Order's* general conduct standard as being unconstitutionally vague, the Court relied in part on the advisory opinion process the Commission had created in that *Order*. The D.C. Circuit found that the opportunity for parties to obtain prospective guidance through the advisory opinion process "provide[d] regulated entities with relief from [remaining] uncertainty."

177. In light of the D.C. Circuit's reasoning in *USTA*, and to advance our goal of legal certainty in the enforcement of any potential open internet rules, we propose to adopt an advisory opinion process if we adopt a general conduct standard. We seek comment on this proposal. In practice, we believe that advisory opinions have the potential to lower costs for providers by creating certainty up front, rather than risking potentially costly formal complaint litigation, remediation, or fines after the fact. Do commenters agree? Are there examples of other federal or state advisory opinion processes from which the Commission could learn? Are there specific barriers that would prevent smaller ISPs from engaging with the advisory opinion process, and if so, how could we address them? We seek comment on whether we should adopt the mechanisms delineated in the *2015 Open Internet Order* for the issuance of advisory opinions and enforcement advisories. What changes, if any, should we make to the process the Commission established in the *2015 Open Internet Order*? As an alternative to adopting an advisory opinion process, would a detailed explanation of the factors the Commission would use when analyzing potential violations of the general conduct standard be sufficient under the D.C. Circuit's reasoning to provide fair

warning to regulated entities of what the standard requires?

F. Investigations and Complaints

178. We next seek comment on whether it would be beneficial to re-establish a formal complaint process for complaints arising under our open internet rules, as the Commission did in 2015. In 2015, the Commission preserved the three avenues for enforcement of its open internet rules that the Commission had created in the *2010 Open Internet Order*: (i) parties could file informal complaints under § 1.41 of the Commission's existing rules; (ii) parties could file formal complaints under a new process that the Commission had created for this purpose; or (iii) the Commission could initiate enforcement actions on its own motion. While the informal complaint process under § 1.41 of the Commission's rules would remain available to parties with respect to any concerns arising out of any open internet rules that may be ultimately adopted, we seek comment on whether we should also adopt a formal complaint process. Is there value in providing parties with both of these options? Is our formal complaint process established pursuant to section 208 of the Act sufficient for this purpose, or is it necessary to establish a standalone formal complaint process? The Commission eliminated the open internet-specific formal complaint process in 2018. If we were to adopt a formal complaint process, should we implement one that returns to the rules the Commission adopted in the *2010 Open Internet Order* and preserved in the *2015 Open Internet Order*? If not, what alternatives do commenters recommend? The section 208 formal complaint rules were modified in 2018 and consolidated with the Commission's pole attachment rules. Should we use these existing rules for open internet disputes? We also seek comment on whether the Commission's informal complaint mechanism would be sufficient to resolve disputes under our proposed open internet rules.

G. Legal Authority

179. We seek comment on our authority to adopt open internet rules, including both the proposed conduct rules and any revised transparency rules. With respect to our proposed conduct rules, we propose to rely on the same sources of authority that the Commission relied upon when it adopted rules in the *2015 Open Internet Order*. As discussed below, we propose to return to our prior interpretation, upheld by the D.C. Circuit, that sections

706(a) and (b) of the 1996 Act are grants of regulatory authority and rely on that as a basis for our open internet rules. We also propose to rely on our authority under Title II of the Act with forbearance where appropriate under section 10 of the Act, insofar as we reclassify BIAS as a Title II service. And we propose to once again rely on our broad spectrum management authority under Title III of the Act as additional authority specifically in the case of mobile providers. With respect to any modifications to the transparency rule, we propose to rely on those same sources of authority along with section 257 (and associated authority now in section 13) of the Act, consistent with the reasoning of the *2010 Open Internet Order* and the *RIF Order*. We seek comment on those proposals, and any additional sources of authority for our proposed open internet rules, both as a general matter and in the specific respects discussed below. We also seek comment on how policy goals enumerated in the Act or other federal statutes should inform our exercise of regulatory authority here.

1. Section 706 of the 1996 Act

180. We seek comment on returning to an interpretation of section 706 of the 1996 Act as granting the Commission regulatory authority and, in turn, relying on that authority as a basis for open internet rules. In particular, although the *RIF Order* departed from the Commission's prior interpretation of section 706 and instead concluded that the provision was merely hortatory, we propose to return to the Commission's prior view and interpret sections 706(a) and (b) of the 1996 Act as grants of regulatory authority. We propose to do so in light of the considerations that persuaded the Commission to adopt such interpretations in the past, and that persuaded courts to affirm those interpretations. Consistent with that prior approach, we propose to rely on section 706(a) as part of our authority for open internet rules. We also propose to rely on section 706(b), in the event that the Commission were to conclude under section 706(a) that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion. We seek comment on those proposals generally.

181. First, we seek comment on the grounds for returning to the prior judicially affirmed interpretations of sections 706(a) and (b) of the 1996 Act as granting the Commission regulatory authority. The *RIF Order* principally grounded its rationale for changing the interpretation of section 706 on its view that section 706 was better interpreted

as hortatory, rather than as a grant of regulatory authority. To the extent that we instead believe that interpreting sections 706(a) and (b) as grants of regulatory authority represent the better reading of the statute, we believe that likewise should provide a basis for us to change our interpretation. We seek comment on this view. In addition, we seek comment on any other arguments bearing on whether and to what extent we should return to the prior interpretation of sections 706(a) and (b) as grants of regulatory authority.

182. Second, we seek comment on specific rationales for interpreting sections 706(a) and (b) of the 1996 Act as grants of regulatory authority. In the *2010 Open Internet Order*, the Commission explained why sections 706(a) and (b) each represent a grant of regulatory authority to the Commission after considering the statutory text, regulatory and judicial precedent, and legislative history, and rejecting objections to that interpretation. In addition, in the *2015 Open Internet Order*, the Commission built on the foundation of its explanations in the *2010 Open Internet Order*, rejecting various objections to the interpretation of sections 706(a) and (b) as grants of regulatory authority and elaborating on the Commission's authority to adopt rules implementing that provision, and to enforce those rules. We seek comment on that reasoning and conclusions regarding the interpretation and implementation of section 706, and on the extent to which we should rely on that today. We also seek comment on whether and to what extent we also should draw upon the reasoning of court decisions affirming the Commission's interpretation of section 706 of the 1996 Act as granting regulatory authority—in particular, the D.C. Circuit's 2014 decision in *Verizon* and its 2016 decision in *USTA*, as well as the Tenth Circuit's 2014 decision in *In re FCC 11-161*.

183. Third, to the extent that we interpret sections 706(a) and (b) of the 1996 Act as grants of regulatory authority, we propose to use that authority to adopt open internet rules here. The Commission previously concluded in the *2015 Open Internet Order* and *2010 Open Internet Order* that open internet rules were a reasonable way to implement Commission authority under sections 706(a) and (b), and the nexus between open internet rules and the directives in sections 706(a) and (b) was affirmed by the D.C. Circuit in *Verizon*. For those same reasons, we believe the open internet rules we seek comment on here would be a reasonable exercise of

section 706(a) authority. We likewise believe that, in the event that the Commission concludes that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion under section 706(b), the open internet rules we seek comment on here would be a reasonable exercise of authority under that provision as well.

184. Finally, we seek comment on any other issues bearing on our interpretation and implementation of section 706 of the 1996 Act here, including possible objections to the interpretation of sections 706(a) and (b) as grants of regulatory authority. For example, when the D.C. Circuit concluded that the *RIF Order* permissibly reinterpreted section 706 as hortatory, rather than as a grant of regulatory authority, the court focused on the recognized ambiguity of the statutory language and the Commission's justification "that Section 706 lacks details 'identify[ing] the providers or entities whose conduct could be regulated,' whereas other provisions of the Act that unambiguously grant regulatory authority do specify such details." We seek comment on that rationale. How is section 706 of the 1996 Act distinct in this regard from other provisions understood as grants of authority in the Telecommunications Act of 1996, the Communications Act of 1934, or other federal statutes? The *RIF Order* itself recognized that, in relying on section 257 of the Act as authority for the transparency rule, it was interpreting that provision as a grant of authority notwithstanding its lack of any identified universe of entities from which information could be obtained, explaining that "other aspects of section 257 persuade us that our interpretation of that provision as a grant of authority." To what extent do other aspects of section 706 bear on the reasonableness of interpreting sections 706(a) and (b) as grants of authority?

185. We also seek comment on other theories discussed in the *RIF Order* as a basis for why section 706 of the 1996 Act not just permissibly could, but affirmatively should, be interpreted as merely hortatory, rather than a grant of regulatory authority to the Commission. For example, the *RIF Order* contended that interpreting sections 706(a) and (b) as grants of regulatory authority would allow the Commission "to impose duties or adopt regulations equivalent to those directly addressed by the provisions of the Communications Act focused on promoting competition and/or deployment that go beyond the entities, contexts, and circumstances

that bounded the Communications Act provisions." The *RIF Order* also argued that if sections 706(a) and (b) were interpreted as grants of regulatory authority that would enable the internet and information services to be heavily regulated in a manner inconsistent with policy goals reflected in the Act. We seek comment on those theories. The *RIF Order* acknowledged that the Commission's prior interpretation of section 706 was, by its own terms, constrained to be consistent with the Act, but claimed that such constraints did not adequately address the *Order's* statutory concerns. In the view of the *RIF Order*, seemingly the only outcomes of interpreting section 706 as granting regulatory authority would be extreme results where those constraints had little meaning and left the Commission with essentially unbounded authority or were such severe limitations as to render section 706 of little possible use. We tentatively conclude that this view is unfounded and invite more robust analysis of these issues in the record here, along with any related arguments.

186. The *RIF Order* also cited concerns about the Commission's ability to enforce rules implementing section 706 of the 1996 Act as further grounds for interpreting it as merely hortatory. The *Order* did not reject the theory that section 706 could be read to include implicit enforcement authority, but contended that such implicit authority "might enable actions like declaratory rulings or cease-and-desist orders, but would not appear to encompass authority to impose penalties given the absence of statutory language clearly granting that authority." We seek comment on this understanding of the scope of potential enforcement authority that could be implicit in section 706. Even assuming *arguendo* that scope of enforcement authority were accurate, why should we conclude that the resulting scope of our enforcement authority is so insignificant as to counsel against interpreting sections 706(a) and (b) as grants of regulatory authority? Further, the *RIF Order* rejected the view that the use of section 4(i) of the Act to adopt rules implementing section 706 of the 1996 Act would be sufficient to bring those rules within the purview of the Commission's enforcement authority under section 503 of the Act. The *RIF Order* reasoned that enforcement authority under section 503 is limited to rules based on substantive regulatory authority under the Act itself, rather than the rulemaking authority in section 4(i). We seek comment on the merits of this interpretation.

2. Title II of the Act With Forbearance

187. As in the *2015 Open Internet Order*, we propose again to rely on sections 201, 202, and 208 of the Act, along with the related enforcement authorities of sections 206, 207, 209, 216, and 217, as additional legal authority for the proposed open internet rules. And consistent with the *2010 Open Internet Order* and the *RIF Order*, and as affirmed by the D.C. Circuit in *Mozilla*, we propose also to rely on section 257 of the Act (now in conjunction with section 13 of the Act) as additional legal authority for the transparency rule, as we may modify it. We seek comment on these proposals.

188. We also seek comment on any additional sources of authority under Title II of the Act that could serve as authority for open internet rules. For example, the *RIF Order* cataloged arguments about other possible sources of Title II authority for open internet rules in sections 251(a), 256, and 275 of the Act identified in the record there. The Commission at the time ultimately declined to rely on those sources of authority due to perceived shortcomings in the record regarding the justification for their use, and also took the view that they would not, even in the aggregate, provide authority for the Commission to adopt open internet rules addressing the full array of ISPs. We seek comment on those possible sources of authority, including both more-developed explanations for how and when they could serve as regulatory authority for open internet rules and whether there would be grounds for exercising that authority under the regulatory approach we propose here.

3. Title III of the Act for Mobile Providers

189. As in the *2015 Open Internet Order*, we propose to rely on our broad legal authority under Title III of the Act to protect the public interest through spectrum licensing and regulations—including sections 303 and 316 of the Act—as additional legal authority for the proposed open internet rules in the case of mobile BIAS. The *RIF Order* conceded the viability of Title III authority in this regard, but declined to exercise that authority because it would be limited to rules for mobile ISPs, rather than providing authority for rules governing all ISPs. We do not believe that concern of the *RIF Order* is likely to arise under our proposed regulatory approach here, and we seek comment on that understanding. We recognize that the D.C. Circuit's *Mozilla* decision includes a brief statement as part of its review of the *RIF Order*'s preemption

decision stating that BIAS is not “radio transmission,” so Title III does not apply. But the *RIF Order* did not attempt to apply (or justify applying) Title III, and the *Mozilla* decision did not develop any reasoning in support of that assertion. Particularly given that backdrop, we do not believe the court's statement should be read to call into question the Commission's prior recognition that mobile BIAS falls within the scope of Title III. We seek comment on these views and on any additional provisions in Title III of the Act that could serve as authority for open internet rules in the case of mobile BIAS or otherwise.

4. Other Possible Sources of Legal Authority

190. We seek comment on any other possible sources of legal authority for open internet rules. For example, the *2010 Open Internet Order* relied on additional sources of authority apart from section 706 of the 1996 Act and Titles II and III of the Act—in particular, sources under Title VI of the Act. The *RIF Order* expressly declined to rely on those sources of authority given what that *Order* identified as limitations regarding the justification for the use of those authorities, as well as the *RIF Order*'s view that they would not, even in the aggregate, provide authority for the Commission to adopt open internet rules addressing the full array of ISPs. We seek more developed comment on that possible Title VI authority and on any other possible sources of authority under the Act.

191. In addition, we seek comment on additional sources of authority outside the Act. For example, the recent bipartisan Infrastructure Act built upon the foundation of the transparency rule and broadband label requirements from the *2015 Open Internet Order* to require the Commission to adopt new broadband label rules. Does that law provide additional authority for rules here, particularly as it relates to possible modifications of the transparency rule?

192. We also seek comment on whether the Commission should rely on ancillary authority in conjunction with other primary sources of legal authority in adopting open internet rules in any respects. To the extent that commenters advocate such an approach, they should explain how the prerequisites for ancillary authority would be met, particularly by explaining why the action would help effectuate regulatory authority granted to the Commission under other statutory provisions. To exercise ancillary authority “two conditions [must be] satisfied: (1) the Commission's general jurisdictional

grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.”

H. Other Laws and Considerations

193. The *2015 Open Internet Order* discussed the relationship between the open internet rules adopted there and ISPs' rights or obligations with respect to other laws, safety and security considerations, or the ability of ISPs to make reasonable efforts to address transfers of unlawful content and unlawful transfers of content. We propose continuing that approach in the case of the rules upon which we seek comment here, and seek comment on that proposal, along with specific language for open internet rules intended to achieve the objectives discussed below, and any additional ways in which we should account for similar interests in the codified rules.

194. Consistent with the *2015 Open Internet Order*, we propose that the open internet rules upon which we seek comment here would not expand or contract ISPs' rights or obligations with respect to other laws or preclude them from responding to safety and security considerations—including the needs of emergency communications and law enforcement, public safety, and national security authorities. The *2015 Open Internet Order* specifically highlighted examples of other laws imposing requirements in these respects, such as the Communications Assistance for Law Enforcement Act, the Foreign Intelligence Surveillance Act, and the Electronic Communications Privacy Act, and we again seek comment as to those specific laws along with any others that should inform our analysis. We propose to adopt the same rule language in this regard as was adopted in the *2015 Open Internet Order*:

Nothing in this part supersedes any obligation or authorization a provider of broadband internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.

We seek comment on this approach and on alternative approaches to protecting these interests, including whether the rule should capture other possible emergency communications and safety and security scenarios. For example, the *2015 Open Internet Order* elected not to expand the application of its rule in this regard to public utilities and other critical infrastructure

operators, reasoning that those interests otherwise were protected under the approach it adopted. Is that same approach appropriate here, or should we address safety and security interests related to public utilities and other critical infrastructure operators in some other way in any rules we may adopt here? Should our rules go further to affirmatively require ISPs to take certain steps to address the needs of emergency communications or law enforcement, public safety, or national security authorities? For example, should the rules go further in addressing the categories of concerns raised before the Commission on remand of the RIF Order, such as the needs of public safety personnel; concerns about particular harms to public safety that could result from blocking, throttling, or paid prioritization; concerns about public safety needs for individuals with disabilities; or concerns related to critical infrastructure?

195. Also consistent with the *2015 Open Internet Order*, we propose that the open internet rules upon which we seek comment here would protect only lawful content, and would not be intended to inhibit efforts by ISPs to address unlawful transfers of content or transfers of unlawful content. We propose to adopt the same rule language in this regard as was adopted in the *2015 Open Internet Order*:

Nothing in this part prohibits reasonable efforts by a provider of broadband internet access service to address copyright infringement or other unlawful activity.

We seek comment on that approach and on alternative approaches to protecting these interests, including whether the rule should capture other possible scenarios where ISPs might seek to address unlawful transfers of content or transfers of unlawful content.

196. We also seek comment on whether there are other categories of otherwise-applicable laws or legal requirements that should be addressed through comparable rules as those we propose to address emergency communications and safety and security scenarios and efforts by ISPs to address unlawful transfers of content or transfers of unlawful content. For example, the *RIF Remand Order* noted comments expressing concern about the possible interplay between ISPs' practices and laws protecting individuals with disabilities. Given that the regulatory approach proposed here differs significantly from the one at issue in the *RIF Remand Order*, would such concerns still be relevant here? If so, would it be appropriate to address them through a rule specifically focused

on those categories of laws? Are there additional otherwise-existing legal requirements imposed on ISPs that we should expressly accommodate in any rules we adopt?

IV. Constitutional Considerations

197. Consistent with the constitutional considerations the Commission has evaluated in connection with its regulatory approach to BIAS in the past, we seek comment on First Amendment speech issues and Fifth Amendment takings issues. In addition, we also seek comment on any other constitutional considerations that should inform our evaluation of the issues raised in this proceeding.

A. First Amendment

198. We seek comment on any First Amendment implications of the issues raised in this proceeding, both as a general matter and in the specific respects discussed below. Consistent with prior Commission analyses, we believe our open internet conduct rule proposals and any modifications to the transparency rule are permissible exercises of authority under the First Amendment.

1. Free Speech Rights

199. We anticipate that our proposals would withstand any review under the First Amendment for the same reasons explained by the Commission in the *2015 Open Internet Order*. In particular, as explained in that *Order*, and ultimately affirmed by the D.C. Circuit in *USTA*, under traditional First Amendment doctrine there are no First Amendment concerns raised by the conduct regulation of common carriers. We think the same reasoning is likely to apply here, and seek comment on that view.

200. Even if a court departed from the traditional common carrier First Amendment precedent, we believe that our proposed conduct rules are likely to satisfy First Amendment scrutiny for the same reasons further identified in the *2015 Open Internet Order*. Consistent with the explanation there, we believe the conduct rules are likely to be seen as content-neutral and thus subject to intermediate First Amendment scrutiny in this scenario. We also find it likely that the proposed rules readily could survive that level of scrutiny—advancing an important or substantial government interest unrelated to limiting speech without burdening more speech than necessary—based on the same governmental interests and nexus to the conduct rules identified by the Commission in the *2015 Open Internet Order*. We seek comment on that view

and on any additional evidence and arguments bearing on the potential application of the First Amendment in the case of the conduct rules proposed here.

201. Because the *2015 Open Internet Order* was limited to offers of “mass-market” broadband access to “all or substantially all internet endpoints,” it would not have applied to offerings that were clearly as advertised as providing only “filtered” internet access catering to a particular audience or as providing access only to curated content. We propose to adopt the same approach here and we seek comment on this proposal. We also seek comment on whether or to what extent ISPs engage in content moderation, curation, or otherwise limit or exercise control over what third-party content their users are able to access on the internet. We are aware that some social media platforms and other edge providers purport to engage in various forms of content moderation or editorial control over content they host or transmit, and typically announce that they engage in such practices in their terms of service or user agreements; is there any record of ISPs announcing and engaging in comparable activity?

202. We also seek comment on the competing First Amendment views expressed by judges in separate opinions accompanying the D.C. Circuit's denial of requests to rehear the *USTA* case *en banc*. On one hand, then-Judge Kavanaugh's dissent expressed First Amendment concerns with the *2015 Open Internet Order* on the theory that “the First Amendment bars the Government from restricting the editorial discretion of internet service providers, absent a showing that an internet service provider possesses market power in a relevant geographic market”—a showing that the Commission had not made there. On the other hand, Judges Srinivasan and Tatel, concurring in the denial of rehearing *en banc*, responded to the dissent by arguing that “no Supreme Court decision supports the counterintuitive notion that the First Amendment entitles an ISP to engage in the kind of conduct barred by the net neutrality rule—*i.e.*, to hold itself out to potential customers as offering them an unfiltered pathway to any web content of *their* own choosing, but then, once they have subscribed, to turn around and limit their access to certain web content based on the *ISP's* own commercial preferences.” We seek comment on those views.

203. Referencing statements in the First Amendment analysis in Judges Srinivasan's and Tatel's concurrence,

the *RIF Order* contended that the *2015 Open Internet Order* “allows ISPs to offer curated services, which would allow ISPs to escape the reach of the [2015 Open Internet Order] and to filter content on viewpoint grounds.” We seek comment on the accuracy of that characterization and how it should inform our analysis and approach here.

2. Compelled Disclosure

204. We also believe that any modifications to the transparency rule are likely to satisfy the First Amendment for the same reasons relied on by the Commission in its justification of the transparency rules at issue in the *2015 Open Internet Order* and the *RIF Order*. As a threshold matter, as explained in the *RIF Order*, we believe the speech addressed by our transparency rule is likely to be limited to commercial speech. We seek comment on that view.

205. We also believe that our transparency rule, as we may modify it, is likely to be understood by a court as limited to compelling the disclosure of factual, noncontroversial information under circumstances that fall within the *Zauderer* First Amendment framework, consistent with the Commission’s analysis in the *2015 Open Internet Order*. Also consistent with the analysis in the *2015 Open Internet Order*, we believe any modifications to the transparency rule are likely to be a reasonable way of advancing government interests in preventing consumer deception, among other things, and thus would satisfy the *Zauderer* standard. We believe any modifications to the disclosures in our transparency rule would be the sort of “purely factual and uncontroversial information about the terms under which . . . services will be available” to which *Zauderer* applies. We seek comment on the continued applicability of that analysis from the *2015 Open Internet Order*.

206. Alternatively, to the extent that a court evaluated any modifications to the transparency rule under the *Central Hudson* framework, which applies generally to commercial speech, we believe it also likely would satisfy First Amendment scrutiny under that standard for the same reasons given in that regard in the *RIF Order*. We believe any modifications to the transparency rule are likely to directly advance substantial government interests and be no more extensive than necessary, for reasons such as those identified in the *RIF Order*. We seek comment on these views and any other First Amendment considerations.

B. Fifth Amendment Takings

207. Consistent with the conclusions in the *2015 Open Internet Order*, we do not believe the proposals in this Notice—either the proposed classification decisions or the proposed rules—are likely to result in *per se* takings because we do not anticipate that they would grant third parties a right to physical occupation of the ISPs’ property. And as the *2015 Open Internet Order* recognized, where private parties voluntarily open their networks to end users and edge providers, reasonable regulation of the use of their property poses no takings issue. We seek comment on the continued applicability of those analyses here and any other considerations relevant to possible *per se* takings arguments.

208. Also consistent with the conclusions in the *2015 Open Internet Order*, we do not believe the proposals in this Notice—either the proposed classification decisions or the proposed rules—are likely to result in regulatory takings. Outside of *per se* takings cases, courts analyze putative government takings through “essentially ad hoc, factual inquiries” into a variety of unweighted factors such as the “economic impact of the regulation,” the degree of interference with “investment-backed expectations,” and “the character of the government action.” The *2015 Open Internet Order* weighed these factors and concluded that the actions taken there did not constitute regulatory takings, and we believe the same is likely to be true of our proposals here. We seek comment on these views.

V. Procedural Matters

209. *Ex Parte Rules*. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. 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.

210. *Initial Regulatory Flexibility Analysis*. Pursuant to the Regulatory Flexibility Act (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in this *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 on the *NPRM*. The Commission’s Office of the Secretary, Reference Information Center, will send a copy of the *NPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

211. *Paperwork Reduction Act of 1995 Analysis*. This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

VI. Initial Regulatory Flexibility Analysis

212. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities from the policies and rules proposed in the *Notice of Proposed Rulemaking (Notice)*. 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 *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Notice* and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

213. In the *Notice*, we propose to reestablish the Commission's authority over broadband internet access service (BIAS) by classifying BIAS as a telecommunications service under Title II of the Communications Act of 1934, as amended (Act). We further propose to reclassify mobile BIAS as a commercial mobile service. The COVID-19 pandemic showed how essential BIAS connections are for consumers' participation in today's society and economy, for work, health, education, community, and everyday life. In light of this reality, we believe that looking anew at the classification of BIAS is necessary and timely given the critical importance of ensuring the Commission's authority to fulfill policy objectives and responsibilities to protect this vital service. Notable among these is enabling the Commission to safeguard the fair and open internet through a national regulatory approach. The Commission also has an important statutory mandate to protect "life and property" by supporting national security and public safety.

214. Restoring Title II authority will allow the Commission to safeguard and secure the open internet in three significant ways. First, this authority will allow the Commission to protect consumers, including by issuing straightforward, clear rules to prevent internet service providers from engaging in practices harmful to consumers, competition, and public safety, and by establishing a national regulatory approach rather than disparate requirements that vary state-by-state. Second, reclassification will strengthen

the Commission's ability to secure communications networks and critical infrastructure against national security threats. Third, the reclassification will enable the Commission to protect public safety during natural disasters and other emergencies. We also anticipate that the proper classification of BIAS as a telecommunications service will enhance the Commission's ability to advance other important interests, including protection of consumers' privacy and data security interests and consumers' ability to access BIAS. Beyond these areas, we believe that classification of BIAS as a telecommunications service represents the best reading of the text of the Act in light of the marketplace reality of how the service is offered and perceived today.

215. To protect the openness of the internet, we propose to return to the basic framework the Commission adopted in 2015 by reinstating straightforward, clear rules that are designed to prevent internet service providers (ISPs) from engaging in practices harmful to consumers, competition, and public safety, and that would provide the basis for a national regulatory approach toward BIAS, consistent with the Commission's longstanding policy approach to protect internet openness prior to the *RIF Order*. We first propose to reinstate the rules adopted in the *2015 Open Internet Order* that prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. We similarly propose to reinstate the general conduct standard adopted in the *2015 Open Internet Order*, which would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Finally, with regard to transparency, we propose to retain the current disclosures, and we seek comment on the means of disclosure, the interplay between the transparency rule and the broadband label requirements, and any additional enhancements or changes we should consider. We believe that the rules we propose today will establish a baseline that the Commission can use to prevent and address conduct that harms consumers and competition when it occurs.

B. Legal Basis

216. The proposed action is authorized pursuant to sections 1, 2, 4(i)–(j), 13, 201, 202, 208, 257, 303, and 316, of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 152, 154(i)–(j),

163, 201, 202, 208, 257, 303, 316, and 1302.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Would Apply

217. 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 Small Business Administration (SBA).

1. Total Small Entities

218. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 33.2 million businesses.

219. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

220. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." U.S. Census

Bureau data from the 2017 Census of Governments indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 36,931 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 12,040 special purpose governments— independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of “small governmental jurisdictions.”

2. Wired Broadband Internet Access Service Providers

221. *Wired Broadband Internet Access Service Providers (Wired ISPs).* Providers of wired broadband internet access service include various types of providers except dial-up internet access providers. Wireline service that terminates at an end user location or mobile device and enables the end user to receive information from and/or send information to the internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction is classified as a broadband connection under the Commission’s rules. Wired broadband internet services fall in the Wired Telecommunications Carriers industry. The SBA small business size standard for this industry classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees.

222. Additionally, according to Commission data on internet access services as of June 30, 2019, nationwide there were approximately 2,747 providers of connections over 200 kbps in at least one direction using various wireline technologies. The Commission does not collect data on the number of employees for providers of these services, therefore, at this time we are not able to estimate the number of providers that would qualify as small under the SBA’s small business size standard. However, in light of the general data on fixed technology service providers in the Commission’s 2022 *Communications Marketplace Report*, we believe that the majority of wireline internet access service providers can be considered small entities.

3. Wireline Providers

223. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including Voice-over Internet Protocol (VoIP) services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry. Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.

224. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 4,590 providers that reported they were engaged in the provision of fixed local services. Of these providers, the Commission estimates that 4,146 providers have 1,500 or fewer employees. Consequently, using the SBA’s small business size standard, most of these providers can be considered small entities.

225. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250

employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 1,212 providers that reported they were incumbent local exchange service providers. Of these providers, the Commission estimates that 916 providers have 1,500 or fewer employees. Consequently, using the SBA’s small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

226. *Competitive Local Exchange Carriers (Competitive LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 3,378 providers that reported they were competitive local exchange service providers. Of these providers, the Commission estimates that 3,230 providers have 1,500 or fewer employees. Consequently, using the SBA’s small business size standard, most of these providers can be considered small entities.

227. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA have developed a small business size standard specifically for Interexchange Carriers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 127 providers that reported they were engaged in the provision of interexchange services. Of these providers, the Commission estimates

that 109 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, the Commission estimates that the majority of providers in this industry can be considered small entities.

228. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The closest applicable industry with an SBA small business size standard is Wired Telecommunications Carriers. The SBA small business size standard classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 20 providers that reported they were engaged in the provision of operator services. Of these providers, the Commission estimates that all 20 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, all of these providers can be considered small entities.

229. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 90 providers that reported they were engaged in the provision of other toll services. Of these providers, the Commission estimates that 87 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

4. Wireless Providers—Fixed and Mobile

230. The broadband internet access service provider category covered by this *Notice* may cover multiple wireless firms and categories of regulated wireless services. Thus, to the extent the wireless services listed below are used by wireless firms for broadband internet access services, the proposed actions may have an impact on those small businesses as set forth above and further below. In addition, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments and transfers or reportable eligibility events, unjust enrichment issues are implicated.

231. *Wireless Broadband internet Access Service Providers (Wireless ISPs or WISPs)*. Providers of wireless broadband internet access service include fixed and mobile wireless providers. The Commission defines a WISP as “[a] company that provides end-users with wireless access to the internet[.]” Wireless service that terminates at an end user location or mobile device and enables the end user to receive information from and/or send information to the internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction is classified as a broadband connection under the Commission's rules. Neither the SBA nor the Commission have developed a size standard specifically applicable to Wireless Broadband internet Access Service Providers. The closest applicable industry with an SBA small business size standard is Wireless Telecommunications Carriers (except Satellite). The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees.

232. Additionally, according to Commission data on internet access services as of June 30, 2019, nationwide there were approximately 1,237 fixed wireless and 70 mobile wireless providers of connections over 200 kbps in at least one direction. The Commission does not collect data on the number of employees for providers of these services, therefore, at this time we

are not able to estimate the number of providers that would qualify as small under the SBA's small business size standard. However, based on data in the Commission's 2022 *Communications Marketplace Report* on the small number of large mobile wireless nationwide and regional facilities-based providers, the dozens of small regional facilities-based providers and the number of wireless mobile virtual network providers in general, as well as on terrestrial fixed wireless broadband providers in general, we believe that the majority of wireless internet access service providers can be considered small entities.

233. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 594 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 511 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

234. *Wireless Communications Services*. Wireless Communications Services (WCS) can be used for a variety of fixed, mobile, radiolocation, and digital audio broadcasting satellite services. Wireless spectrum is made available and licensed for the provision of wireless communications services in several frequency bands subject to part 27 of the Commission's rules. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer

than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

235. The Commission's small business size standards with respect to WCS involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in WCS. When bidding credits are adopted for the auction of licenses in WCS frequency bands, such credits may be available to several types of small businesses based on average gross revenues (small, very small, and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in the designated entities section in part 27 of the Commission's rules for the specific WCS frequency bands.

236. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

237. *Wireless Resellers.* Neither the Commission nor the SBA have developed a small business size standard specifically for Wireless Resellers. The closest industry with an SBA small business size standard is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications and they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under the SBA size standard for this industry, a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services during that year. Of that

number, 1,375 firms operated with fewer than 250 employees. Thus, for this industry under the SBA small business size standard, the majority of providers can be considered small entities.

238. *1670–1675 MHz Services.* These wireless communications services can be used for fixed and mobile uses, except aeronautical mobile. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

239. According to Commission data as of November 2021, there were three active licenses in this service. The Commission's small business size standards with respect to 1670–1675 MHz Services involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For licenses in the 1670–1675 MHz service band, a "small business" is defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$40 million for the preceding three years, and a "very small business" is defined as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding \$15 million for the preceding three years. The 1670–1675 MHz service band auction's winning bidder did not claim small business status.

240. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

241. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable industry with an SBA small business size standard is Wireless Telecommunications Carriers (except Satellite). The size standard for this industry under SBA rules is that a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 331 providers that reported they were engaged in the provision of cellular, personal communications services, and specialized mobile radio services. Of these providers, the Commission estimates that 255 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

242. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum encompasses services in the 1850–1910 and 1930–1990 MHz bands. The closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (except Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

243. Based on Commission data as of November 2021, there were approximately 5,060 active licenses in the Broadband PCS service. The Commission's small business size standards with respect to Broadband PCS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. In auctions for these licenses, the Commission defined "small business" as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$40 million for the preceding three years, and a "very small business" as an entity that, together with its affiliates and controlling interests, has had

average annual gross revenues not exceeding \$15 million for the preceding three years. Winning bidders claiming small business credits won Broadband PCS licenses in C, D, E, and F Blocks.

244. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

245. *Specialized Mobile Radio Licenses.* Special Mobile Radio (SMR) licenses allow licensees to provide land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz spectrum bands on a commercial basis including but not limited to services used for voice and data communications, paging, and facsimile services, to individuals, Federal Government entities, and other entities licensed under Part 90 of the Commission's rules. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 95 providers that reported they were of SMR (dispatch) providers. Of this number, the Commission estimates that all 95 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, these 119 SMR licensees can be considered small entities.

246. Based on Commission data as of December 2021, there were 3,924 active SMR licenses. However, since the Commission does not collect data on the number of employees for licensees providing SMR services, at this time we are not able to estimate the number of licensees with active licenses that

would qualify as small under the SBA's small business size standard. Nevertheless, for purposes of this analysis the Commission estimates that the majority of SMR licensees can be considered small entities using the SBA's small business size standard.

247. *Lower 700 MHz Band Licenses.* The lower 700 MHz band encompasses spectrum in the 698–746 MHz frequency bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

248. According to Commission data as of December 2021, there were approximately 2,824 active Lower 700 MHz Band licenses. The Commission's small business size standards with respect to Lower 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For auctions of Lower 700 MHz Band licenses the Commission adopted criteria for three groups of small businesses. A very small business was defined as an entity that, together with its affiliates and controlling interests, has average annual gross revenues not exceeding \$15 million for the preceding three years, a small business was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$40 million for the preceding three years, and an entrepreneur was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$3 million for the preceding three years. In auctions for Lower 700 MHz Band licenses seventy-two winning bidders claiming a small business classification won 329 licenses, twenty-six winning bidders claiming a small business classification

won 214 licenses, and three winning bidders claiming a small business classification won all five auctioned licenses.

249. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

250. *Upper 700 MHz Band Licenses.* The upper 700 MHz band encompasses spectrum in the 746–806 MHz bands. Upper 700 MHz D Block licenses are nationwide licenses associated with the 758–763 MHz and 788–793 MHz bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

251. According to Commission data as of December 2021, there were approximately 152 active Upper 700 MHz Band licenses. The Commission's small business size standards with respect to Upper 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a "small business" as an entity that, together with its affiliates and

controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years, and a “very small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. Pursuant to these definitions, three winning bidders claiming very small business status won five of the twelve available licenses.

252. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA’s small business size standard.

253. *700 MHz Guard Band Licensees.* The 700 MHz Guard Band encompasses spectrum in 746–747/776–777 MHz and 762–764/792–794 MHz frequency bands. Wireless Telecommunications Carriers (*except Satellite*) is the closest industry with an SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

254. According to Commission data as of December 2021, there were approximately 224 active 700 MHz Guard Band licenses. The Commission’s small business size standards with respect to 700 MHz Guard Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years, and a “very small business” as an entity that, together with its affiliates and

controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. Pursuant to these definitions, five winning bidders claiming one of the small business status classifications won 26 licenses, and one winning bidder claiming small business won two licenses. None of the winning bidders claiming a small business status classification in these 700 MHz Guard Band license auctions had an active license as of December 2021.

255. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA’s small business size standard.

256. *Air-Ground Radiotelephone Service.* Air-Ground Radiotelephone Service is a wireless service in which licensees are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft. A licensee may provide any type of air-ground service (*i.e.*, voice telephony, broadband internet, data, etc.) to aircraft of any type, and serve any or all aviation markets (commercial, government, and general). A licensee must provide service to aircraft and may not provide ancillary land mobile or fixed services in the 800 MHz air-ground spectrum.

257. The closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except Satellite*). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

258. Based on Commission data as of December 2021, there were approximately four licensees with 110 active licenses in the Air-Ground Radiotelephone Service. The

Commission’s small business size standards with respect to Air-Ground Radiotelephone Service involve eligibility for bidding credits and installment payments in the auction of licenses. For purposes of auctions, the Commission defined “small business” as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$40 million for the preceding three years, and a “very small business” as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding \$15 million for the preceding three years. In the auction of Air-Ground Radiotelephone Service licenses in the 800 MHz band, neither of the two winning bidders claimed small business status.

259. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, the Commission does not collect data on the number of employees for licensees providing these services therefore, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA’s small business size standard.

260. *Advanced Wireless Services (AWS)*—(1710–1755 MHz and 2110–2155 MHz bands (AWS–1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS–2); 2155–2175 MHz band (AWS–3); 2000–2020 MHz and 2180–2200 MHz (AWS–4). Spectrum is made available and licensed in these bands for the provision of various wireless communications services. Wireless Telecommunications Carriers (*except Satellite*) is the closest industry with an SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

261. According to Commission data as of December 2021, there were

approximately 4,472 active AWS licenses. The Commission's small business size standards with respect to AWS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of AWS licenses, the Commission defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a "very small business" as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million. Pursuant to these definitions, 57 winning bidders claiming status as small or very small businesses won licenses.

262. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

263. *3650–3700 MHz band.* Wireless broadband service licensing in the 3650–3700 MHz band provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (*i.e.*, 3650–3700 MHz). Licensees are permitted to provide services on a non-common carrier and/or on a common carrier basis. Wireless broadband services in the 3650–3700 MHz band fall in the Wireless Telecommunications Carriers (*except* Satellite) industry with an SBA small business size standard that classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

264. The Commission has not developed a small business size standard applicable to 3650–3700 MHz

band licensees. Based on the licenses that have been granted, however, we estimate that the majority of licensees in this service are small internet access service providers. As of November 2021, Commission data shows that there were 902 active licenses in the 3650–3700 MHz band. However, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

265. *Fixed Microwave Services.* Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Upper Microwave Flexible Use Service (UMFUS), Millimeter Wave Service (70/80/90 GHz), Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), 24 GHz Service, Multiple Address Systems (MAS), and Multichannel Video Distribution and Data Service (MVDDS), where in some bands licensees can choose between common carrier and non-common carrier status. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA small size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

266. The Commission's small business size standards with respect to fixed microwave services involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in fixed microwave services. When bidding credits are adopted for the auction of licenses in fixed microwave services frequency bands, such credits may be available to several types of small businesses based on average gross revenues (small, very small, and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in Part 101 of the Commission's rules for the specific fixed microwave services frequency bands.

267. In frequency bands where licenses were subject to auction, the

Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

268. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). Wireless cable operators that use spectrum in the BRS often supplemented with leased channels from the EBS, provide a competitive alternative to wired cable and other multichannel video programming distributors. Wireless cable programming to subscribers resembles cable television, but instead of coaxial cable, wireless cable uses microwave channels.

269. In light of the use of wireless frequencies by BRS and EBS services, the closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

270. According to Commission data as of December 2021, there were approximately 5,869 active BRS and EBS licenses. The Commission's small business size standards with respect to BRS involves eligibility for bidding credits and installment payments in the

auction of licenses for these services. For the auction of BRS licenses, the Commission adopted criteria for three groups of small businesses. A very small business is an entity that, together with its affiliates and controlling interests, has average annual gross revenues that exceed \$3 million and did not exceed \$15 million for the preceding three years, a small business is an entity that, together with its affiliates and controlling interests, has average gross revenues that exceed \$15 million and did not exceed \$40 million for the preceding three years, and an entrepreneur is an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$3 million for the preceding three years. Of the ten winning bidders for BRS licenses, two bidders claiming the small business status won four licenses, one bidder claiming the very small business status won three licenses, and two bidders claiming entrepreneur status won six licenses. One of the winning bidders claiming a small business status classification in the BRS license auction has an active license as of December 2021.

271. The Commission's small business size standards for EBS define a small business as an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues that are not more than \$55 million for the preceding five (5) years, and a very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues that are not more than \$20 million for the preceding five (5) years. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

5. Satellite Service Providers

272. *Satellite Telecommunications.* This industry comprises firms "primarily engaged in providing

telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with \$38.5 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than \$25 million. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 65 providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 42 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, a little more than half of these providers can be considered small entities.

273. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of internet services (e.g. dial-up ISPs) or VoIP services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of \$35 million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than \$25 million. Based on this data, the Commission estimates that the majority of "All Other Telecommunications" firms can be considered small.

6. Cable Service Providers

274. *Cable and Other Subscription Programming.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of

programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (e.g., limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA small business size standard for this industry classifies firms with annual receipts less than \$41.5 million as small. Based on U.S. Census Bureau data for 2017, 378 firms operated in this industry during that year. Of that number, 149 firms operated with revenue of less than \$25 million a year and 44 firms operated with revenue of \$25 million or more. Based on this data, the Commission estimates that a majority of firms in this industry are small.

275. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standard for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide. Based on industry data, there are about 420 cable companies in the U.S. Of these, only seven have more than 400,000 subscribers. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Based on industry data, there are about 4,139 cable systems (headends) in the U.S. Of these, about 639 have more than 15,000 subscribers. Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

276. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 677,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator based on the cable subscriber count established in a 2001 Public Notice. Based on industry data, only six cable system operators have more than 677,000 subscribers. Accordingly, the Commission estimates that the majority of cable system

operators are small under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million. Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

7. Other

277. Electric Power Generators, Transmitters, and Distributors. The U.S. Census Bureau defines the utilities sector industry as comprised of “establishments, primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.” This industry group is categorized based on fuel source and includes Hydroelectric Power Generation, Fossil Fuel Electric Power Generation, Nuclear Electric Power Generation, Solar Electric Power Generation, Wind Electric Power Generation, Geothermal Electric Power Generation, Biomass Electric Power Generation, Other Electric Power Generation, Electric Bulk Power Transmission and Control, and Electric Power Distribution.

278. The SBA has established a small business size standard for each of these groups based on the number of employees which ranges from having fewer than 250 employees to having fewer than 1,000 employees. U.S. Census Bureau data for 2017 indicate that for the Electric Power Generation, Transmission and Distribution industry there were 1,693 firms that operated in this industry for the entire year. Of this number, 1,552 firms had less than 250 employees. Based on this data and the associated SBA size standards, the majority of firms in this industry can be considered small entities.

279. All Other Information Services. This industry comprises establishments primarily engaged in providing other information services (except news syndicates, libraries, archives, internet publishing and broadcasting, and Web search portals). The SBA small business size standard for this industry classifies

firms with annual receipts of \$30 million or less as small. U.S. Census Bureau data for 2017 show that there were 704 firms in this industry that operated for the entire year. Of those firms, 556 had revenue of less than \$25 million. Consequently, we estimate that the majority of firms in this industry are small entities.

280. Internet Service Providers (Non-Broadband). Internet access service providers using client-supplied telecommunications connections (e.g., dial-up ISPs) as well as VoIP service providers using client-supplied telecommunications connections fall in the industry classification of All Other Telecommunications. The SBA small business size standard for this industry classifies firms with annual receipts of \$35 million or less as small. For this industry, U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than \$25 million. Consequently, under the SBA size standard a majority of firms in this industry can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

281. In the *Notice*, we largely seek to reestablish the framework the Commission previously adopted in the 2015 *Open Internet Order*. We first propose to reclassify BIAS as a telecommunications service under Title II of the Act and to reclassify mobile BIAS as a commercial mobile service. We also propose to reestablish rules to prevent ISPs from engaging in practices harmful to consumers, competition, and public safety and that provide the foundation for a national regulatory approach toward BIAS. Specifically, we propose to adopt rules to prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. We further propose to reinstate the general conduct standard adopted in the 2015 *Open Internet Order*, which would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Additionally, we propose to retain current disclosure obligations for ISPs, and seek comment on the means of disclosure, the interplay between the transparency rule and current broadband label requirements, as well as any additional enhancements or changes the Commission should consider. While we expect the proposals in the *Notice* will impose new or additional reporting, recordkeeping and/or other compliance obligations on

small and other entities, we also anticipate that the burden for small and other entities to comply with the reclassification and rules will be minimal, as they will be entering a regulatory framework with which they are already and recently familiar. At this time however, the Commission is not in a position to determine whether, if adopted, our proposals and the matters upon which we seek comment will require small entities to hire professionals to comply with the proposed rules in the *Notice*, and cannot quantify the cost of compliance with the potential rule changes discussed herein. We seek comment from small entities that have concerns about potential hardships or other matters related to our proposed rules, and with compliance, should they be adopted.

282. Certain compliance obligations regarding the content of transparency disclosures that we discuss in the *Notice* and seek comment on are beyond those that currently exists. For instance, we seek comment on additional disclosure specifications that were established in the 2015 *Open Internet Order* and repealed by the *RIF Order*, including commercial terms about price and related terms and their relationship with disclosures regarding privacy and redress options, and about performance characteristics related to network performance and network practices. We also seek comment on whether ISPs should disclose additional information regarding their performance measurement methodologies and practices. We discuss additional disclosure requirements that were not adopted in the 2015 *Open Internet Order*, such as those regarding the source, location, timing, or duration of network congestion, packet corruption and jitter, or disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage. We also ask if ISPs should be required to make more detailed disclosures regarding the requirements, restrictions, or standards for enforcement of data caps. Further, we seek comment on whether to incorporate into the transparency rule the Commission’s clarifications and guidance regarding prior versions of the transparency rule, such as point-of-sale disclosures, service descriptions, disclosures for the benefit of edge providers, disclosures regarding security measures, and consistency between ISPs’ disclosures under the transparency rule and their advertising claims or other public statements. We also discuss how providers would make the required

disclosures, such as via a publicly available website, by transmitting disclosures directly to the Commission, and by additional locations or means. Additionally, we seek comment on whether such disclosures should be in a machine-readable format and regarding the accessibility of such disclosures to individuals with disabilities. Lastly, we explore what, if any, recordkeeping requirements we should implement as a means for ISPs to provide the types of information or records needed to support the content of their disclosures.

283. The Commission seeks comment on all of the above proposals to evaluate whether compliance with these requirements would cause an undue burden on small or other entities, if adopted. We therefore expect the information we receive in comments, including cost and benefit data, to help the Commission further identify and evaluate relevant matters for small entities, such as compliance costs, and other burdens that may result from the proposals and inquiries we make in the *Notice*.

E. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

284. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (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 or 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.

285. At the outset of the reclassification discussion, we request information on the benefits and burdens of the proposed reclassification, and specifically request feedback on the impact on small businesses and small ISPs. We also request feedback on the proposed conduct rules prohibiting ISPs from blocking or throttling the information transmitted over their networks, or engaging in paid or affiliated prioritization arrangements, and the general conduct rule, all of which, as we discuss in the *Notice*, track the specific language from the *2015 Open Internet Order*. We believe our proposal to reestablish the framework from the Commission's 2015 decision

could minimize the economic impact for small entities that already have experience operating under, and complying with, the *2015 Open Internet Order*.

286. We also believe and tentatively conclude that the proposed reclassification of BIAS as a telecommunications service will enhance the Commission's ability to continue to advance national security and preserve public safety by protecting the nation's communications networks from potential entities, equipment, and services that pose threats to national security and law enforcement. However, in the alternative to reclassification, we consider, inquire, and seek comment on whether there is other authority that can be used by the Commission that would allow it to protect the nation's communications networks against ISPs that pose threats national security and law enforcement. To the extent there is such an alternative available to the Commission, in the *Notice*, we request that commenters specify the statutory authority, and how this authority can be used by the Commission to address national security and law enforcement concerns. We believe reclassification also will protect the information of small and other telecommunications carriers, equipment manufacturers, and other entities that interact with ISPs that are potential national security threats, or are owned or controlled by, or subject to the jurisdiction or direction of foreign adversaries. Accordingly, we seek comment on how reclassification of BIAS will affect ISPs as well as telecommunications carriers and equipment manufacturers, and other entities that interact with ISPs, if adopted.

287. In the *Notice*, we indicate that as part of our proposal to reinstate the reclassification of BIAS as a telecommunications service, we will continue to define BIAS as defined in part 8 of the Commission's rules and "mass market" as defined in the *2015 Open Internet Order* and *RIF Order*. We consider whether there are reasons for the Commission to modify these definitions. Similarly, we consider whether there is any reason to depart from our tentative conclusion that BIAS is a telecommunications service and our supporting analysis. Further, while we propose to reinstate the classification of mobile BIAS as a commercial mobile service as adopted in the *2015 Open Internet Order*, alternatively, we propose to find that mobile BIAS is the functional equivalent of a commercial mobile service and, therefore, not private mobile service, even if mobile BIAS does not meet the definition of

"commercial mobile service." The *Notice* seeks comment on these matters.

288. The specific conduct rules we propose in the *Notice* would prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. In the alternative, we consider whether the need to prohibit any of these practices has been eliminated by any new technical advancements or market developments. We also consider whether our proposed no-blocking rule which tracks the language of the rule we adopted *2015 Open Internet Order*, and would apply to both fixed and mobile ISPs, continues to be the best no-blocking principle for ISPs. The no-blocking rule is a broadly accepted principle in the industry, including by ISPs, and many ISPs continue to advertise a commitment to open internet principles on their websites, which includes commitments not to block traffic except in certain circumstances, notwithstanding the 2017 repeal of the no-blocking rule. Similarly, after the repeal of the no-throttling rule, ISPs continue to advertise on their websites that they do not throttle traffic except in limited circumstances. As a result, we believe the economic impact on, and costs to comply with the proposed no-blocking rule, and the no throttling of lawful internet traffic rule, will be minimal for small ISPs. We however seek information on specific costs and burdens these rules would impose for small ISPs.

289. Regarding our proposed ban on paid prioritization practices, we take steps to minimize the economic impact for small ISPs by requesting information on the compliance costs small ISPs would incur as a result of such a ban, and by exploring whether there are alternatives we can take to protect consumers, and the open internet from the harms of paid prioritization practices that should be considered as an alternative to a flat ban. Similarly, we consider whether there is another standard we should adopt to establish a general conduct rule, as an alternative to the general conduct standard for ISPs we propose in the *Notice* that tracks the *2015 Open Internet Order*. We specifically inquire whether we should instead rely on the "just and reasonable" and "unreasonable discrimination" standards in sections 201 and 202 of the Act. The *Notice* seeks comment on these matters.

290. We further propose to build upon the foundation of our existing transparency requirement adopted in the *2010 Open Internet Order*, and the new broadband label requirements the Commission put in place to give

consumers a convenient tool to research and compare broadband offerings. We propose possible modifications or additions to the requirements pertaining to the content of required disclosure and the means of disclosure to update the transparency rule, to ensure that sufficient information is made available to end users, edge providers, the broader internet community, and the Commission, which allows for the timely and effective assessment of ISPs' terms and conditions for BIAS. Specific disclosure modification alternatives we consider, and seek comment on include whether to: (1) require disclosures regarding the source, location, timing, or duration of network congestion, packet corruption and jitter, or disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage, (2) require more detailed disclosures regarding the requirements, restrictions, or standards for enforcement of data caps; (3) require specific content of particular relevance to edge providers, the broader internet community, or the Commission, and (4) require different disclosures tailored to different audiences, and specifically, whether different content disclosures should be required for mobile ISPs than for fixed ISPs. Further, as an alternative to modifications that only add disclosure requirements, we inquire, and seek comment on whether under the current transparency rule there is certain content that is required to be disclosed that should no longer be required after weighing the relevant policy considerations at stake.

291. As we discuss in the *Notice*, our objectives for proposing modifications to the means of disclosure requirements for ISPs is to ensure that we are taking the appropriate steps to facilitate the availability of the content of the required disclosures in a timely and effective manner, without undue burdens on ISPs. Thus, while we consider and seek comment on alternatives to modify the means of disclosure requirements for ISPs such as, (1) whether any additional requirements are warranted regarding ISPs' website disclosures under the transparency rule, (2) whether disclosures under the transparency rule should be required in additional locations, and (3) possible direct notification requirements, we also consider whether there are existing means of disclosure requirements that should be eliminated because the burdens imposed by these requirements outweigh their benefits. We believe that to the extent that there are content and/

or means of disclosure requirements that can be removed, removal of these requirements could reduce the impact for small entities of any additional requirements that may be adopted.

292. Our assessment of how to implement any rules we may adopt relating to the transparency rule seeks to identify any implementation issues for small and other ISPs that may be associated with potential modifications. We specifically seek to understand the impacts for small ISPs, such as whether smaller ISPs need extra time to implement any modifications to the transparency rule.

293. More generally we consider implementation alternatives that include, (1) whether the Commission should adopt new safe harbors for compliance with the transparency rule, (2) whether there are safe harbors the Commission should adopt for compliance with the transparency rule as a whole, similar to the broadband label safe harbor adopted in the *2015 Open Internet Order*, and (3) whether the Commission should adopt recordkeeping requirements governing the types of information or records ISPs rely upon to support the content of their disclosures made under the transparency rule. With regard to any recordkeeping requirements, we seek information on specific ways information could be retained that could minimize the burden on small and other ISPs, and what recordkeeping timeframe would best balance the benefits to the Commission of having the required information available against the compliance burden for small and other ISPs. Overall, the Commission's objective is to determine the most cost-effective ways of ensuring that consumers, and edge providers receive the information they need in a timely and effective manner, while minimizing the implementation and compliance burdens for small and other ISPs, consistent with these goals.

294. In the *Notice* and summarized above, we discuss the potential effects our rule proposals and alternatives could have on small entities, and seek comment on these matters. We also discuss that the Commission envisions the proposed BIAS reclassification as a means to provide the basis for a national regulatory approach rather than a patchwork of state requirements, which could help streamline and minimize regulatory requirements for small entities. Further, we propose broad forbearance from statutory requirements and Commission regulations for ISPs, and note that the proposed forbearance could substantially lessen the economic impact of the proposed actions on small

entities. Accordingly, before reaching final conclusions, and taking action in this proceeding, the Commission expects to further consider the economic impact on small entities, and additional alternatives that are consistent with its goal of safeguarding and securing the open internet, while also imposing minimal burdens on small entities, based on comments filed in response to the *Notice* and this IRFA.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

295. None.

VII. Ordering Clauses

296. Accordingly, *it is ordered*, pursuant to the authority contained in sections 1, 2, 3, 4(i)–(j), 10, 13, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 501, 503, 522, 536, and 548 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 152, 153, 154(i)–(j), 160, 163, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 501, 503, 522, 536, 548, and 1302, that this Notice of Proposed Rulemaking *is adopted*.

297. *It is further ordered* that, pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on the Notice of Proposed Rulemaking on or before December 14, 2023, and reply comments on or before January 17, 2024.

298. *It is further ordered* that the Office of the Secretary, Reference Information Center *shall send* a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Parts 8 and 20

Communications, Common carriers, Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

Marlene Dortch,
Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 8 and 20 as follows:

PART 8—[AMENDED]

■ 1. The authority citation for part 8 is revised to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 160, 163, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 501, 503, 522, 536, 548, 1302, 1753.

■ 2. Amend part 8 by revising the part heading to read as follows:

PART 8—SAFEGUARDING AND SECURING THE OPEN INTERNET

■ 3. Add § 8.2 to read as follows:

§ 8.2 Conduct-based rules.

(a) *Definitions.* For purposes of this section:

(1) *Broadband internet access service* means a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.

(2) *Edge provider* means any individual or entity that provides any content, application, or service over the internet, and any individual or entity that provides a device used for accessing any content, application, or service over the internet.

(3) *End user* means any individual or entity that uses a broadband internet access service.

(4) *Reasonable network management* means a network management practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband internet access service.

(b) *No blocking.* A person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

(c) *No throttling.* A person engaged in the provision of broadband internet

access service, insofar as such person is so engaged, shall not impair or degrade lawful internet traffic on the basis of internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

(d) *No paid prioritization.* (1) A person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. “Paid prioritization” refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either:

(i) In exchange for consideration (monetary or otherwise) from a third party, or

(ii) To benefit an affiliated entity.

(2) The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the internet.

(e) *General conduct standard.* (1) Any person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage:

(i) End users’ ability to select, access, and use broadband internet access service or the lawful internet content, applications, services, or devices of their choice, or

(ii) Edge providers’ ability to make lawful content, applications, services, or devices available to end users.

(2) Reasonable network management shall not be considered a violation of this rule.

(f) *Effect on other obligations or authorizations.* Nothing in this part supersedes any obligation or authorization a provider of broadband internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider’s ability to do so. Nothing in this part prohibits reasonable efforts by a provider of broadband internet access service to address copyright infringement or other unlawful activity.

PART 20—COMMERCIAL MOBILE SERVICES

■ 4. The authority citation for part 20 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 155, 157, 160, 201, 214, 222, 251(e), 301, 302, 303, 303(b), 303(r), 307, 307(a), 309, 309(j)(3), 316, 316(a), 332, 610, 615, 615a, 615b, and 615c, unless otherwise noted.

■ 5. In § 20.3 amend paragraph (b) by revising the definitions of “*Commercial mobile radio service*” and “*Public Switched Network*” to read as follows:

§ 20.3 Definitions.

* * * * *

Commercial mobile radio service. A mobile service that is:

(1)(i) Provided for profit, *i.e.*, with the intent of receiving compensation or monetary gain;

(ii) An interconnected service; and

(iii) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or

(2) The functional equivalent of such a mobile service described in paragraph (1) of this definition, including a mobile broadband internet access service as defined in § 8.2 of this chapter.

(3) A variety of factors may be evaluated to make a determination whether the mobile service in question is the functional equivalent of a commercial mobile radio service, including: Consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service, would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review.

(4) Unlicensed radio frequency devices under part 15 of this chapter are excluded from this definition of Commercial mobile radio service.

* * * * *

Public Switched Network. The network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that uses the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services.

* * * * *

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